


1986

American Coastwise Trade Law

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AMERICAN COASTWISE TRADE LAW

BY

MARK DEAN ASPINWALL

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF
MASTER OF ARTS
IN
MARINE AFFAIRS

UNIVERSITY OF RHODE ISLAND

1986

MASTER OF ARTS THESIS
OF
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1986

ABSTRACT

Federal involvement in the shipping industry dates back to 1789. Since then, governmental efforts to promote the American merchant marine have taken a variety of forms, including the prohibition of foreign shipping from the coastwise trade. To this end, laws have been enacted which deal with specific activities considered to be coastwise trade in nature and which ban the use of foreign-flag and, in some cases, foreign-built ships from those activities.

However, the laws are narrowly worded and archaic, and have been unable to adequately address modern trends in coastal commerce. Maritime service industries have emerged in recent years which are associated with such coastal activities as passenger cruises and oil and gas exploration. Because federal law has not dealt with these specific coastal service activities, the coastwise trade laws have not been applied to them, and they may be undertaken by ships of any flag. Without a modern legal framework to govern cabotage activities, much of the recent coastwise trade policy of the United States has been formulated by federal courts and agencies.

At present, the U.S. coastwise trade laws are applied to the navigable waters of the United States and, with certain exceptions, its districts, territories and possessions. In addition, the cabotage principle extends to artificial islands on the outer continental shelf which are

in place for the purpose of oil and gas exploitation. Moreover, the requirements for participation in this trade stipulate that the vessel be domestically constructed, owned, and documented. Unfortunately, such ships are usually more expensive to operate than foreign ships, and consequently there is an inherent conflict between the users of coastal marine services, who seek them at the lowest possible cost, and the traditional public policy of the United States, which has been to encourage the growth of its own fleet.

It is proposed that two changes to the existing policy regarding the coastwise trade be pursued. The first is to include all coastal maritime commercial services within the purview of the U.S. coastwise trade. The second is to remove the U.S. construction requirement from some or all of the ships participating in that trade.

ACKNOWLEDGEMENTS

Grateful thanks are hereby extended to Professor Lawrence Juda for his efforts on my behalf. His sense of perspective on the subject of maritime policy and his generous donation of time helped me to clarify my thoughts and were essential to the completion of this study. In addition, Professors Bruce Marti and Norman Zucker, as thesis committee members, provided helpful guidance on the final draft.

I would also like to acknowledge the role played by Gerald Seifert and the staff of the Merchant Marine & Fisheries Committee in the United States House of Representatives in the conception and undertaking of this study. They provided, during my one year tenure with the Committee, a tremendous environment within which to learn the workings of the maritime industry from the federal perspective. This study would not have been possible without that experience. Countless other individuals in the federal government and private industry assisted me in one way or another, for which I am very grateful. Unfortunately, space does not permit me to mention them all, although special thanks are in order to Paul Hegland of the Carrier Rulings Branch, U.S. Customs Service for the voluminous amount of information he provided, both written and verbal.

Most of all, sincerest thanks are extended to Virginia C. Aspinwall, whose patience and support never waned during this project or during my entire graduate program, despite the frequent dislocations and disruptions to which her life was subjected.

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Chapter I

INTRODUCTION

This is a study of U.S. public policy relating to the American coastwise trade. The legal framework governing participation in the coastwise trade will be examined, with particular emphasis on the pertinent vessel documentation, construction, and ownership requirements. Other aspects of federal regulation of the coastwise trade, such as vessel inspection and rate regulation, will not be addressed.

Much of the existing body of literature focuses on shipping policy in the context of the foreign trades, and it is submitted that U.S. coastwise trade policy deserves closer attention.¹ The purpose of the study, therefore, is twofold. First, it will lay a foundation for further study devoted exclusively to U.S. coastwise trade policy. Second, it will point out shortcomings in the present policy toward the coastwise trade. These shortcomings include inconsistent and contradictory holdings by federal agencies and courts, and a failure by Congress to effectively regulate emerging developments in the coastwise trade.

U.S. federal maritime policy is essentially a balance between private interests which seek to procure shipping services at the best rate on the world market and the

interests of the nation as a whole in preserving the ability to construct, operate, and crew ships for national security reasons.² Accordingly, federal law has attempted to promote the American merchant marine while at the same time allowing cargo shippers at least some choice in what carrier they may use. An early example of this compromise between the interests of shippers and the promotion of the maritime industry is a 1789 law that imposed discriminatory tonnage duties on foreign carriers arriving at U.S. ports.³

Shippers were free to choose ships of any nationality to transport their cargo in both the foreign and coastwise trade, although the discriminatory tonnage duties made it cheaper to use U.S.-built and -owned ships, and thereby encouraged their use.

A variety of federal maritime promotional programs have emerged since the 1789 law that imposed discriminatory tonnage duties on foreign ships.⁴ Among the oldest is the exclusion of foreign shipping from the American coastwise trade, a policy that has been in effect without interruption since 1817.⁵ This policy was probably modelled after a British Navigation Act dating from the mid 17th century, the purpose of which was to "reserve to British ships the coasting trade of the British Isles, from ... one port or creek ... to another port or creek ..."⁶ The reservation of the coastwise trade to American ships played an important role in the development of the post-Revolutionary War merchant marine at a time when the nation depended heavily on the shipping industry for transportation, communication,

and economic and strategic development.⁷

For the purpose of this study, coastwise trade is defined as transportation, dredging, towing, and salvage services that are performed in the navigable waters of the United States, its territories, districts, and possessions, including the territorial sea and points established on the Outer Continental Shelf (OCS) for the purpose of developing, producing, or exploring for mineral resources. An attempt will be made to determine whether existing American cabotage law applies to these activities in the coastwise area outlined above and, if not, whether it should be applicable.⁸ No distinction is made in this study between coastwise trade, intercoastal trade, and noncontiguous trade, all of which relate to trade between points in the coastwise area.⁹

The term coastwise trade has never been defined by a statute or an agency regulation. There is no U.S. policy that clearly enumerates which activities undertaken in which specific geographic areas comprise the coastwise trade. The consequence is that the U.S. Customs Service, Department of the Treasury, which has the responsibility for day to day oversight of the coastwise trade laws, must judge whether an operation is coastwise trade in nature based on an evaluation of individual statutes. It is suggested that Customs' understanding of which activities constitute coastwise trade is too narrow and that foreign ships are able to perform services in the coastwise area that should be reserved to American ships. Examples of this include

cruises-to-nowhere and certain oil rig support activities, such as icebreaking and anchor handling. While such activities as the shipment of oil between U.S. ports clearly fall within the purview of the coastwise trade, other activities are less easily defined. For example, should dredging be part of the coastwise trade? Moreover, should such activities as the performance of specialized oil rig support services on the Outer Continental Shelf and cruises to nowhere be part of the coastwise trade?

Customs has looked for the answers to these questions in the antiquated statutes that form the existing body of coastwise trade law. These statutes include section 27 of the Merchant Marine Act of 1920 (the Jones Act),¹⁰ and the Act of June 19, 1886 (Passenger Ship Act),¹¹ respectively regulating the transport of merchandise and passengers. They are, for the most part, narrowly worded laws that leave little room for agency flexibility. On the one hand, such wording is indicative of the tenacity with which the coastwise trade has been reserved for U.S. vessels. On the other hand, the statutes do not allow Customs to respond to technological developments in coastwise services which early policymakers could not have foreseen.

The other federal agency concerned with administering the coastwise trade laws is the U.S. Coast Guard, Department of Transportation. The Coast Guard issues a coastwise license to any qualified vessel that engages in the coastwise trade, as determined by Customs. The qualifications a ship must possess in order to be issued a

license will be outlined in subsequent chapters, but essentially the ship must be constructed in the United States and its owners must be U.S. citizens.

There is an evolving maritime service industry in the coastwise area extending to the Outer Continental Shelf that includes icebreaking, rig inspection, dredging, passenger excursions and other activities of which transportation services are only a part. Understandably, the drafters of the Jones Act and other early coastwise trade laws could not have envisioned the changes in technology and consumer taste that have taken place in recent years. Would they have perceived these new maritime services as being within the purview of American coastwise trade law? One cannot be certain. However, unless the term coastwise trade is clearly defined, it is likely that the confusion surrounding its application will continue. Worse, it may allow foreign operators to gain a foothold in developing U.S. coastwise service markets that should be reserved to American ships.

NOTES

1. See for example John G. B. Hutchins, The American Maritime Industries and Public Policy, 1789-1914. New York: Russell & Russell, 1941, 641 pp., hereafter cited as Hutchins; A. C. Denison, America's Maritime History. New York: G. B. Putnam's Sons, 1944, 236 pp., hereafter cited as Denison; Samuel A. Lawrence, United States Merchant Shipping Policies and Politics. Washington, D.C.: Brookings Institution, 1966, 405 pp., hereafter cited as Lawrence.
2. In his second annual State of the Union address in 1790, George Washington urged Congress to consider the detrimental effect that a war could have on the United States, both economically and strategically, without a strong American merchant fleet. This policy has been maintained to the present time, and is embodied in the declaration of policy of the Merchant Marine Act of 1920 and the Merchant Marine Act of 1936. The text may be found in Fred L. Israel, ed., State of the Union Messages of the Presidents, 1790-1966, vol. 1, New York: Chelsea House - Robert Hector Publishers, 1966, pp. 4-7.
3. Act of July 20, 1789, ch. 3, 1 Stat. 27. A tonnage duty was

a tax assessed on a ship based on its tonnage. Under the law, a U.S.-built, U.S.-owned ship paid a duty of six cents per ton. A U.S.-built, foreign-owned ship paid a duty of thirty cents per ton. A foreign-built, foreign-owned ship paid a duty of fifty cents per ton. Moreover, U.S.-built, U.S.-owned ships in the coastwise trade paid the duty only once per year, whereas foreign-owned and -built ships paid it each time they entered port.

4. For example, several cargo preference statutes reserve part or all of certain cargoes transported in the U.S. foreign commerce to U.S. ships. In addition, the Merchant Marine Act of 1936 established direct operating and construction subsidies, as well as a loan guarantee program and a tax deferral program to spur shipbuilding.
5. The Act of March 1, 1817, ch. 31, sec. 4, 3 Stat. 351, hereafter cited as 1817 act.
6. Great Navigation Act, October 8, 1651. There was a subsequent increase in the growth of the British shipping industry which was attributed to this law. Denison, pp. 47,60. It is interesting to note that Britain is now one of the few maritime nations that does not reserve its coastwise trade to domestic ships.
7. Statistics show that the tonnage of the coastwise fleet more than tripled in the 12 year period 1789-1800, from 68,607

tons in 1789 to 245,295 tons in 1800. See also Lawrence, p. 32, and Hutchins, pp. 3-4.

8. Coastwise trade is sometimes differentiated from cabotage for at least two reasons. First, many writers refer to coastwise trade as the movement along the same coast, as opposed to intercoastal trade (for example, between the Atlantic and Pacific Coasts), and noncontiguous or domestic offshore trade (for example, between the mainland and Puerto Rico or Hawaii). On the other hand, cabotage is often considered to encompass all these trades. Second, cabotage may include other forms of transport, such as air movement, whereas coastwise trade is confined to maritime activity.

Cabotage is defined in Webster's Ninth New Collegiate Dictionary (Merriam-Webster, 1983) as deriving from the French word *caboter* -to sail along the coast (1831) -- and to trade or transport in coastal waters or airspace or between two points within a country. The word may have its origin in the Spanish *cabo* or *cape*. Oppenheim, Law Quarterly Review p. 329, Webster's New Twentieth Century Dictionary of the English Language, Unabridged, 2nd Edition, 1977. Black's Law Dictionary defines cabotage as "navigation from cape to cape along the coast without going out into the open sea." Black's Law Dictionary, 5th Ed. That volume further defines coasting trade as "commerce and navigation between different places along the coast of the United States." *Id.* It is maintained, moreover, that "in international law, cabotage is identified with coasting

trade so that it means navigating and trading along the coasts between the ports thereof." Id.

9. Noncontiguous trade has traditionally meant trade to U.S. offshore areas, such as Alaska and Hawaii, and intercoastal trade has implied shipping between different coasts, such as the Gulf to Pacific coast trade.

The "coasting trade," a term used in early statutes, has been equated with "coastwise trade" by the Federal courts. *Ravesies v. U.S.*, 37 Fed. Rep. 447, Circuit Court, S. D. Alabama, (1889). Further, the term "cabotage" will be used interchangeably with coastwise trade.

10. Merchant Marine Act of 1920, sec. 27, ch. 250, 41 Stat. 999. For the purposes of this study, the Jones Act will refer only to section 27 of this Act.
11. Act of June 19, 1886, sec. 8, ch. 421, 24 Stat. 81.

Chapter II

DOCUMENTATION LAW

Among the earliest forms of federal regulation of the shipping industry was the regulation of vessel documentation. Vessel documentation, among other things, indicates the nationality of a ship. In the U.S., vessel documentation indicates the trades in which the ship may be employed and is also an important method by which federal maritime policy is implemented.¹ The documentation of a U.S. vessel is essentially a classification procedure whereby the ship's tax status, and safety, trade, and pilotage requirements, among other things, can be determined.² Vessel documentation has been a function of the Coast Guard since it was transferred there from Customs in 1967.

For the purpose of this study, the role that documentation plays in regulating the participation of ships in the coastwise trade is the central issue. Under the present documentation procedures, essentially two questions are answered in the affirmative before a license may be issued for operation in the coastwise trade (see Appendix A, p. 190). The first is whether a ship is eligible for documentation. Provided that the vessel is at least five net tons in size and is owned by an American citizen, it is eligible for documentation.³ The second is whether the

vessel is eligible for a license. In order for this to be answered in the affirmative, the ship must be U.S.-built and must meet more stringent ownership requirements.⁴ Only ships for which a license has been issued are allowed to engage in the coastwise trade.⁵

History of Vessel Documentation

The policy of requiring ships of U.S. nationality to be documented as such extends back to the beginning of the federal government. For ships in the foreign trade, the policy had the benefit of extending "the rights, privileges, and immunities of that nation and the international comity attendant with international law and diplomacy ..." to that ship.⁶ For ships in the coastwise trade, documentation had the initial benefit of exempting them from the payment of high tonnage duties, as stated earlier.

The U.S. Department of Treasury, concerned with the collection of revenue from tonnage taxes assessed on ships and import duties assessed on foreign merchandise, employed "collectors" along the coast who were responsible for issuing ship documents, processing ships arriving in the local ports, and collecting revenues that might be due. These collectors were established by an Act of Congress in 1789, and they were responsible, in part, "for the due collection of duties imposed by law on the tonnage of ships and vessels ..."⁷

In 1789, the first law was adopted regarding vessel documentation, and it required that ships registered under

the U.S. flag be both U.S.-built and U.S.-owned.⁸ The requirement that vessels documented under this law be U.S.-built has been seen as an important concession to shipbuilding interests at the time and it represented the beginning of a shipbuilding-ship operating partnership that lasted until the early twentieth century.⁹ Although this early Act distinguished between documentation for the purposes of the foreign trade and the coastwise trade, it was not until three years later that the documentation procedures for the two trades were clearly defined.¹⁰

In 1792, Congress enacted a law that established documentation procedures for ships in the foreign trade and several months later enacted a separate law outlining documentation procedures for ships in the coastwise trade.¹¹ Specifically, U.S.-flag ships in the foreign trade were required to obtain a registry and ships in the coastwise trade were required to obtain an enrollment and license. These two statutes were extremely detailed, each specifying the exact wording of the appropriate document, and although the specificity was probably necessary at the time to effectively administer the laws, the inflexibility was to become a problem for the administering agency by the 1960s.¹² At any rate, a separate, clear system for the documentation of ships for the foreign and coastwise trades had been set up that became the basis for establishing the nationality of American ships and indicating the trades in which they might be employed. There was no difference in the requirements for the two types of documentation, so that

a ship that was eligible for the foreign trade would also be eligible for the coastwise trade. It was permissible for a shipowner to move vessels back and forth between the coastwise and foreign trades as long as he secured the appropriate document for that trade.¹³

U.S. policy toward the foreign and coastwise trades was beginning to develop separately by the late 1790s. Evidence of this is the fact that U.S. ships registered for the foreign trade were no longer accorded the lower tonnage fee status that ships in the coastwise trade were.¹⁴ This meant that registered ships had to pay a higher tonnage fee upon entering U.S. ports than did coastwise vessels.

Several issues began to emerge as a concern to early legislators considering the registry law of 1792. First, it was reported that foreigners had been evading the payment of the higher tonnage duties normally assessed on foreign ships by illegally maintaining that their ships were American.¹⁵ A specific measure was included in the law which required the master of a ship arriving from abroad to make an oath regarding the ownership of the vessel. It was felt that this would help ascertain the true nationality of the ship so that the proper tonnage duties could be applied.

A second issue was a section allowing the registry of ships captured as war prizes and forfeitures.¹⁶ Specifically, for the first time, it was permissible to register ships that had been captured as war prizes or forfeited under U.S. law, even if they were not U.S.-built. This measure was probably part of the effort to build up the

fleet and, although it met with some resistance in Congress, it was incorporated in the 1792 law and remains in effect today.¹⁷

A further issue was the transfer of tonnage to and from foreign-flags. The 1792 law made it illegal to register a ship unless it had been owned by an American since May 16, 1789.¹⁸ Therefore, even if a ship was built in the U.S., it could not be registered unless its entire period of ownership after May 16, 1789 was by an American citizen. Rather than discouraging the transfer of ships to the U.S. flag, the provision was probably intended to discourage the transfer of U.S.-flag ships to foreign countries for convenience purposes, since they would not be permitted to transfer back to the U.S. flag.

Panama Canal Act of 1912

Construction and ownership requirements for American ships in the coastwise and foreign trades remained identical until early in the 20th century, when two significant changes to U.S. maritime policy caused the requirements for foreign and coastwise trade documentation to diverge sharply. First, a 1920 law changed the ownership standard so that when an American corporation registered a ship for the foreign trade, a majority of the stock had to be U.S.-owned, whereas a corporation enrolling a ship for the coastwise trade had to be 75% U.S.-owned.¹⁹ This change will be addressed later in this chapter.

The second change was that under the Panama Canal Act

of 1912, U.S.-flag ships in the foreign trade no longer had to be U.S.-built.²⁰ This provision was known as the "free ship" bill because it allowed shipowners to purchase ships on the world market. It was the culmination of over forty years of efforts by shipowners to have such a measure enacted. The problem began during the Civil War, when some 750,000 tons of U.S. shipping were sold to foreign owners to avoid capture or sinking.²¹ The owners of these vessels were prohibited from repurchasing them or reflagging foreign-owned ships, and the effect was to wipe out one third of the U.S. fleet engaged in the foreign trade.²² This fact, combined with the emergence of Great Britain as a builder of iron-hulled steamships brought about an increasing pressure from ship-operating interests to allow the purchase of ships on the world market. The perception among these interests was that the traditional alliance of shipbuilders and ship-operators -- whereby U.S.-flag ships had to be U.S.-built -- was a useful alliance while U.S.-built ships were competitive in price and technology, but it had effectively stifled the redevelopment of the U.S. fleet after the Civil War.²³ Thus, by 1910, the coastwise fleet was estimated to comprise nearly 90% of the total U.S. merchant marine.

The events which led to the passage of the "free ship" bill for vessels in the foreign trade also had an impact on ships in the coastwise trade. The withdrawal of friendly shipping at the outbreak of World War I and the lack of available U.S.-flag tonnage to provide shipping services for

the U.S. foreign trades created a vacuum into which were drawn 300,000 tons of coastwise tonnage.²⁴ This, in turn, caused a shortage of ships providing coastwise service and paved the way for an emergency measure that allowed foreign-flag ships to operate in the coastwise trade during the War.²⁵

The Panama Canal Act also allowed the importation, free of duty, of all foreign materials used in the construction or repair of U.S.-built ships. These ships could be used in the coastwise trade and could apply for cargo contracts under the Ocean Mail Act of 1891, a cargo preference law for U.S. ships.²⁶ Other early laws had allowed limited importation of duty free materials for shipbuilding, and to some extent, these measures represented temporary accommodations to both the ship operating and shipbuilding industries, since U.S.-built ships were still required under U.S.-flag operation.²⁷ A Congressional Committee that investigated the problems of the Merchant Marine in 1870 argued that a "free ship" policy, among other things, would be detrimental to American labor, and that the ships would not be purchased abroad unless they had coastwise privileges anyway.²⁸ In siding with the shipbuilding interests, the Committee proposed admitting duty free materials for shipbuilding, as stated above, thereby benefitting the shipyards because of the lower cost of imported materials.²⁹

A major concern of those opposed to the "free ship" policy was the possibility that foreign-built ships might

find their way into the coastwise trade. In Congressional debate over the free-ship policy in 1886, Congressman Dingley stated that "if it were proposed to limit the free-ship policy to vessels for the foreign trade, some persons ... might fail to recognize the certainty that the granting of free ships for the foreign trade would assuredly soon result in free ships for the coastwise trade."³⁰ A letter was included in the Congressional Record during this debate from the Maritime Association of New York to the same effect, and it pointed out the concern of some sectors of the maritime industry that foreign-built ships would eventually find their way into the coastwise trade.³¹

A similar point was made by those who objected to the free-ship provisions of the Panama Canal Act inasmuch as foreign-built ships purchased under the authority of the Act might prove to be unprofitable in the foreign trades, increasing the pressure to allow such ships to enter the coastwise trade.³² Moreover, the legislative history of the law shows that an earlier bill dealing with the subject of foreign building stated that "foreign-built vessels registered pursuant to this act shall not engage in the coastwise trade or transport from one port of the United States to another port of the United States either direct or via foreign ports or for any part of the voyage, passengers or merchandise ..."(emphasis added)³³.

The language used in H.R. 8765 is a great deal stronger than that incorporated into the statute because it specifically prohibits the use of foreign-built vessels to

carry passengers and merchandise in the coastwise trade, and it points out clearly the concerns of maritime policymakers that only U.S.-built ships be used in coastwise service.

The "nose of the camel under the tent" fear has been one of the traditional arguments against allowing the use of foreign-built ships in any portion of trades normally reserved for qualified U.S. ships. This may be one of the primary reasons that it took over 40 years for a free-ship bill to become law, although it is significant that in the 74 years subsequent to the enactment of the free-ship law, the protection of the coastwise trade to U.S.-built ships has been maintained.

At any rate, the clear intent of the Panama Canal Act was to allow the registry of foreign-built ships for the foreign trades only. This policy is still valid, despite the concerns of opponents of a "free ship" policy. Therefore, the policy regarding documentation of U.S. ships engaged in the coastwise trade, as outlined in the Act of February 18, 1793, remained essentially intact until the Vessel Documentation Act of 1980.³⁴

The Vessel Documentation Act of 1980

The Vessel Documentation Act recodified the law pertaining to coastwise documentation, although it made no change to the policy objectives of the existing documentation laws.³⁵ In simple and straightforward language the law stipulates that in order to engage in the coastwise trade a ship must have a coastwise license.³⁶

Further, in order to get a coastwise license, a ship must be "eligible for documentation" and be U.S.-built.³⁷ In order to be eligible for documentation, the vessel must be at least five net tons and be U.S.-owned.³⁸

The stated purpose of the law, was to "improve procedures and increase efficiency" in laws that were nearly two hundred years old and viewed by many in the administration and Congress to be exceptionally archaic and complex.³⁹ Therefore, the Vessel Documentation Act sought to improve the administrative flexibility of ship documentation that previously was perceived as adversely affecting the efficiency of the maritime industry through unnecessary paperwork and reporting burdens.⁴⁰ The House Report was careful to point out that "the distinction between 'registered' vessels, those engaged in the foreign trade, and 'licensed' vessels, those engaged in the coasting trade, is carefully preserved in the bill."⁴¹ Further, it was made clear that the prohibition of foreign-built, U.S.-flag vessels engaging in the coastwise trade, a provision made necessary by the "free-ship" portion of the Panama Canal Act, was felt to be important enough to retain, even though it was somewhat redundant.⁴² As will be seen in the following Chapter, the individual coastwise trade laws also contain specific prohibitions against the operation of foreign-built and foreign-flag vessels in the coastwise trade and these individual prohibitions essentially repeat the ban on foreign coastwise participation that is set forth in the documentation law.

Based on the legislative history of the Vessel Documentation Act, therefore, it is clear that no change in the documentation policy of the U.S. -- one nearly as old as the country itself -- was intended. The major thrust of this policy is that in order for a ship to be documented to engage in the coastwise trade, she must be U.S.-built and U.S.-owned. It is perhaps indicative of the strong feelings of protection toward this trade that U.S. policy-makers would intentionally recodify redundant statutes.

The Act created certain classes of documentation for vessels, depending on the trade in which they are used. The classes of documentation include fishery license, Great Lakes license, limited coastwise license, pleasure vessel license, and temporary documentation for vessels procured outside the United States. A registry may be issued to a vessel engaged in the foreign trade, in trade with certain U.S. possessions, and "in other employments for which a coastwise license or Great Lakes license or fishery license is not required."⁴³ A registry, as stated, is issued for employment in the foreign trades, although it is not required for that employment. A registered vessel may also be endorsed to engage in the coastwise trade, the Great Lakes trade, or the fisheries, provided that the vessel meets the requirements for these trades.⁴⁴ A U.S.-registered, non U.S.-built vessel may not be endorsed for the coastwise trade.

Since it is beyond the scope of this study, the specific requirements for documents other than the coastwise

license will not be addressed, although it should be mentioned that because of peculiar geographic circumstances associated with trade on the Great Lakes, a separate licensing system evolved for that trade. An 1864 statute provided a separate classification system for ships "navigating the waters on the northern, northeastern, and northwestern frontiers, otherwise than by sea ...", such that these ships could simultaneously engage in the coastwise and foreign trades, provided they were confined to the Great Lakes and met other requirements for U.S. ships.⁴⁵ This law was incorporated in the Vessel Documentation Act with a notable change in that vessels obtaining a Great Lakes license must now meet the same requirements as a ship obtaining a coastwise license.⁴⁶

Eligibility for Documentation

Ownership

U.S. citizen ownership of a vessel has been a prerequisite to American documentation since September 1, 1789. In addition, corporate "citizens" have been allowed to enroll and license ships for the coastwise trade since the 1800s and, in fact, the sale of the company's shares to foreigners did not affect the coastwise eligibility of the ship.⁴⁷ This eventually provided an access for foreign interests to U.S. protected trades and was to become a contentious issue by the end of World War I.

The eligibility requirement of the Vessel Documentation

Act of 1980 is set forth in section 12102 of title 46. In order for a vessel to be eligible for documentation, it must be at least five net tons and it must be owned by a U.S. citizen, corporation, or a state or federal government.⁴⁸ Assuming one of the ownership requirements is met, the Secretary of Transportation is required to issue a certificate of documentation upon application by the owner⁴⁹ (see Appendix B, p. 192). In the case of vessel ownership by a corporation or partnership, U.S. law distinguishes between the minimum required amount of U.S. citizen involvement in coastwise operations versus foreign trade operations. Specifically, a corporation owning a registered ship must have at least a majority of U.S. citizens on its board of directors. Likewise, a majority of the controlling interest of a partnership must be owned by U.S. citizens. However, the Coast Guard regulations indicate that a simple majority ownership of vessels in the coastwise trade is not sufficient. Rather, American individuals must hold 75% of the controlling interest or directorships, as the case may be.⁵⁰ Authority for this regulation may be found in the Shipping Act of 1916, as amended in 1920, which mandates that 75% of the stock, voting power whether direct or indirect, or any other means of control had to be owned by or vested in U.S. citizens⁵¹ (see Appendix C, p. 193).

Such language suggests a relatively protective attitude toward the coastwise trade. The Shipping Act of 1916 had stipulated that a controlling interest of shipowning

corporations be owned by U.S. citizens. During the formulation of the Merchant Marine Act of 1920, which amended the 1916 ownership requirements so that 75% of the corporation had to be U.S.-owned, the U.S. Shipping Board held that "it is through the corporation or association holding American tonnage that the door is opened to foreigners."⁵² Moreover, the Shipping Board was of the opinion that "unless our coasting fleet be wholly and unequivocally owned by loyal American citizens, it can not be rated a dependable unit in time of national emergency."⁵³

Whereas the 1916 Act had classified corporations and associations as U.S. citizens and mandated that the "controlling interest" be U.S.-owned, certain groups, such as the U.S. Shipping Board, sought to strengthen the ownership requirements by mandating that 100% of the stock and voting power be owned by or vested in U.S. citizens and that the president and directors of the companies be U.S. citizens as well. In fact, this language was made part of the House bill, although through the political process it was diluted to allow 25% foreign investment in coastwise operations.

Clearly, the concern had developed during this period that foreign investment in U.S. protected trades was growing through the use of dummy corporations and that this investment might be detrimental to U.S. interests should an emergency arise. Further, emergency war legislation allowing foreign-flag ships to operate in the coastwise

trade contributed to the presence of foreign interests.

It is likely that foreign interests are still able to become involved in U.S. coastwise operations through sophisticated time charter arrangements with U.S.-based companies that hold the title to coastwise-qualified vessels.⁵⁴ Moreover, when the stocks of major banks are traded publicly, it is unclear what would prevent foreign citizens from owning more than 25% of a bank -- and of any vessel to which it holds the title -- on any given day and whether, in fact, that contingency would disqualify ships owned by that company from engaging in the coastwise trade.

Perhaps a relevant question at this point is whether and to what extent foreign investment in the U.S. coastwise trade is detrimental. Are the concerns of 1920 over compromising national security by allowing foreign investment in the coastwise trade still valid? Given the fact that these vessels are rarely, if ever, in foreign waters, and under no circumstances employ foreign crews, it may be that national security is not compromised to the extent previously thought by allowing foreign investment in the coastwise trade. Further, the economic benefits in terms of employment to seafarers and shipbuilders have been viewed by some as worth the potential security risk.⁵⁵ Moreover, if the rationale for domestic ownership is national security, there may be little need for domestic ownership of coastwise vessels, since an American crew in U.S. waters is far more likely to obey the requisition orders of the U.S. in the time of an emergency than those of

a distant foreign owner.⁵⁶

Title Requirements

In addition to the stipulation that the present owner of a ship in the coastwise trade be an American citizen, the Coast Guard requires that all the previous owners of that ship be U.S. citizens, in order to qualify for coastwise documentation.⁵⁷ Any ship that has at some point in its history been owned by a foreign national or has sailed under a foreign flag is permanently barred from re-entering coastwise service. This continuous "chain of title" policy dates back to 1935 and is attributable to a concern that the U.S. shipbuilding industry would suffer from a lack of orders if existing U.S.-built, foreign-owned or -flag ships were renationalized for coastwise service.⁵⁸ This issue will be addressed in greater detail in Chapter Five.

Build Requirement

September 1, 1789 marked the beginning of the federal policy that required U.S.-flag ships to be domestically built. That has been carried forward to the present, although the statutes have never gone further in describing exactly what constitutes "U.S.-built." While it is not the intention to document the interpretive history of this provision, a few words might be said about its present status. Prior to the Vessel Documentation Act, Coast Guard regulations did not specify exactly what constituted U.S.-built, and this caused some confusion as to the degree

to which foreign-origin materials could legally be used in a U.S.-built ship. In addition, there was some ambiguity regarding the geographic area within which a "U.S.-built" ship had to be assembled.⁵⁹

The Coast Guard, in interpreting the statutory wording of the 1980 Act regarding U.S.-built, has ruled that all major components of a vessel's hull and superstructure must be fabricated in the U.S. and it must be entirely assembled in the U.S. as well.⁶⁰ The agency had originally ruled, however, that at least 50% of a ship's non-integral machinery and components had to have been procured in the U.S., although this standard was eliminated because it was held to be "not necessary to determine the source of machinery and other components which are not an integral part of the hull or superstructure in order to determine whether a vessel is considered 'built in the United States'."⁶¹

It is clear, therefore, that U.S. coastwise trade policy was intended to protect the interests of shipbuilders as well as ship operators. For nearly two hundred years, U.S.-flag ships in the coastwise trade have been U.S.-built, as required by law. Despite the perception that the use of foreign-built ships in the foreign trade would carry over to the coastwise trade, that has not happened.

NOTES

1. See Michael P. Drzal and Phyllis D. Carnilla, "Documentation of Vessels: The Fog Lifts," Journal of Maritime Law and Commerce, 13:3, April, 1982, pp. 261-279, hereafter cited as Drzal. See also Shannon v. Streckfus Steamers, 131 S.W. Rep. 2d 836 (1939), and Conway v. Taylor, 66 U.S. 603.
2. U.S. Congress, House, Vessel Documentation Act, House Report 96-428, to accompany H.R. 1196, 96th Cong., 2nd sess., 1980, Printed in 6 U.S. Code Congressional and Administrative News, 1980, p. 7165. Hereafter cited as Documentation Act Report.
3. 46 U.S.C. 12102.
4. 46 U.S.C. 12106.
5. A vessel with an appropriately endorsed registry may also engage in the coastwise trade, as long as the ship meets the qualifications of a ship in the coastwise trade, and the endorsement is a coastwise trade endorsement.
6. Documentation Act Report, p. 2.

7. Act of July 31, 1789, ch. 5, 1 Stat. 29.

8. Act of September 1, 1789, ch. 11, 1 Stat. 55.

9. See Paul M. Zeis, American Shipping Policy. Princeton, N.J.: Princeton Univ. Press, 1938, p. 3. Hereafter cited as Zeis.

10. The Act of September 1, 1789 stated that only U.S.-built, U.S.-owned vessels (or, if not U.S.-built, then owned by U.S. citizens before May 16, 1789) could be registered as U.S. ships. Vessels that fit these qualifications but were engaged in the coastwise trade or fisheries, and were not registered, had to be enrolled in the state where the owner resided, if they were greater than 20 tons burden. Licenses for coastwise trading or fishing privileges were awarded for one year although, if the vessel was used for a foreign voyage during that year, the coastwise or fishing license was cancelled. At any rate, a ship could be either enrolled or registered under this act and engage in the coastwise trade, as long as the ship received a license for that trade. Vessels that were between five and 20 tons burthen could be granted an annual license that exempted them from entry and clearance procedures -- a function performed by the Customs Service to regulate and monitor ship traffic -- for that year.

Section 23 of the act stated that if a U.S.-built and

owned vessel was found trading between ports of the United States without the necessary enrollment, it would be subject to the same tonnage duties as a foreign vessel.

The Act of September 29, 1789 extended the entry and clearance exemption of the Act of September 1, 1789 (chapter 11, section 22) to vessels of up to 50 tons, provided that only domestic goods were being transported. Act of September 29, 1789. 1st Cong., 1st Sess., ch. 22, 1 Stat. 94.

11. Act of December 31, 1792, ch. 1, 1 Stat. 287; Act of February 18, 1793, ch. 8, 1 Stat. 305.
12. See Vessel Documentation Report, pp. 3-4.
13. See *The Mohawk*, 7 U.S. 153 (1865). *Gibbons v. Ogden*, 9 Wheat. 214 (1824).
14. 1793 Act. The benefits of the 1793 Act were essentially limited to the lower tonnage fees, since foreign-flag ships could still trade coastwise if they could afford the fifty cents per ton tax.
15. See History of Congress, debate in the House of Representatives, December 14, 1792, pp. 746-747. Hereafter cited as 1792 debate. There is no indication from the record what the nationality of these offending ships was.

16. 1792 Act, section 2.
17. Such a policy allowing the registry of war prizes captured at sea was felt by some to needlessly encourage hostile actions toward foreign ships. 1792 debate. See statements by Congressman Page, November 22, 1792, pp. 724-725. This and other exceptions to coastwise trade law will be addressed in chapter five.
18. 1792 Act, sec.2. According to a Coast Guard official, no application for a coastwise license has been made under this exception in at least ten years. The war prize must be captured from a belligerent during a declared war, and so ships captured during the Vietnam and Korean conflicts would be ineligible. Thomas L. Willis, U.S. Coast Guard, personal communication, April 7, 1986. In addition, yachts seized for drug forfeitures are auctioned off by federal marshalls periodically.
19. Merchant Marine Act of 1920, sec. 38.
20. Act of August 24, 1912, sec. 5, ch. 390, 37 Stat. 562. The measure was attached to the Panama Canal bill, and thus the name. Under the Panama Canal Act of 1912, vessels built overseas could be registered as U.S. ships, provided that they did not engage in the coastwise trade. Act of August 24, 1912. 62nd Cong., 2nd Sess., ch. 390. Section five of the Act stated, in part, that "... seagoing vessels,

whether steam or sail, ... not more than five years old at the time they apply for registry, wherever built, which are to engage only in trade with foreign countries ... may be registered as directed in this title. Foreign-built vessels registered pursuant to this Act shall not engage in the coastwise trade ..."

The Panama Canal Act of 1912, in addition to the free-ship provision, also made it illegal for a railroad to own, operate, lease, or have any interest in coastwise vessels with which the railroad might compete. Panama Canal Act, Act of August 24, 1912, ch. 390, sec. 11, 37 Stat. 566. This provision reflected the simultaneous influences of the emerging body of anti-trust law and the growing railroad system as a competitor of the coastwise fleet.

One earlier law allowing American owners of foreign tonnage to reflag was the Act of May 10, 1892 (52nd Cong., 1st sess., ch. 63). The ships could not be slower than 20 knots nor less than 8000 tons and could not enter the coastwise trade. The American owner who took advantage of this opportunity was required to have an equal amount of tonnage built in a U.S. yard, with each vessel being at least 7000 tons.

21. Zeis, p. 15.

22. Id.

23. Denison, p. 127.

24. Denison, p. 133.
25. This matter will be addressed in Chapter 5.
26. The Ocean Mail Act of March 3, 1891 (51st Cong., 2nd sess., ch. 519) authorized the Postmaster-General to enter into contracts of between five and ten years duration for the carriage of mails between U.S. and foreign ports. The vessels carrying the mail had to have been U.S.-built, -owned, and -officered. In addition, for the first two years of the contract, one-fourth of the crew had to be American, increasing to one-third for the next three years, and then one-half for the remainder of the contract.
27. For example, under the Act of June 6, 1872, lumber, timber, hemp, manila, iron and steel rods, spikes, nails, bolts, and copper for shipbuilding were admitted free of duty. The list was extended by the McKinley Tariff of 1890 and, under the Wilson Tariff of 1894, all materials of foreign production for shipbuilding use were admitted free of duty. Vessels that used duty free materials could only operate in the coastwise trade for two months per year, however. The Payne Tariff of 1909 extended the time limit to six months and all time limits were finally lifted by the Panama Canal Act. U.S. Congress, House, Committee on Merchant Marine & Fisheries, House Report 405, "American Registers for Seagoing Vessels," March 11, 1912, 62nd Cong., 2nd sess., p.

- 2, to accompany H.R. 16692. Hereafter cited as House Report 405.
28. United States Congress, House, Select Committee, "Causes of the Reduction of American Tonnage," House Report 28, 41st Cong., 2nd sess, 1870. Hereafter cited as the Lynch Report.
29. See Zeis, p. 19.
30. U.S. Congress, House, Congressional Record-House, Statement of Congressman Dingley, vol. 17, pt. 5, May 22, 1886, p. 4818.
31. Id., p. 4822.
32. House Report 405, part 2, 62nd, 2nd, March 26, 1912, p. 3, Views of the Minority.
33. H.R. 8765, introduced May 5, 1911. Id., p. 3. The language enacted in the Panama Canal Act is that which is not underlined.
34. Vessel Documentation Act, P.L. 96-594, 94 Stat. 3453.
35. See Vessel Documentation Report, p. 7166.
36. 46 U.S.C. 12106.

37. Id. Certain exceptions to the U.S. construction requirement exist which will be discussed in chapter five. Likewise, other factors may preclude a ship from the coastwise trade even if it meets the eligibility and documentation requirements, such as the receipt of subsidies. These factors will be examined in chapter five as well.
38. 46 U.S.C. 12102. If a ship is corporate-owned, varying degrees of domestic ownership apply, depending on the trade the ship will be used for. In the coastwise trade 75% of the corporation's stock must be in the hands of Americans. Ships obtaining a coastwise license must also meet other requirements. For example, the master of the ship must be a U.S. citizen as well as most of the crew, and the ship must have a name painted on it. It is not the intent of this study to address these requirements.
39. Id., p. 7162.
40. Drzal, p. 262.
41. Id., p. 7166.
42. Id.
43. 46 C.F.R. 67.17-3(a).
44. 46 U.S.C. 12105(b),(c).

45. Act of June 17, 1864, ch. 130, sec. 1, 13 Stat. 134.

46. 46 U.S.C. 12107. Therefore, a foreign-built ship that qualifies for a registry would not ordinarily also qualify for a Great Lakes license. An exception to this is embodied in section 12107(a)(2)(B), where a foreign-built ship is captured and condemned as a war prize, is forfeited for a breach of U.S. law, or is wrecked and repaired in a U.S. yard. These exceptions date from the 18th and 19th centuries and will be examined more closely in chapter 5.

47. See for example Revised Statutes 4313, title 47 (1880).

48. Specifically, a ship must be owned by:
 1. A U.S. citizen;
 2. An association, trust, joint venture, or other entity which is capable of holding title to a vessel and all of whose members are U.S. citizens;
 3. A partnership whose general partners are U.S. citizens, and the controlling interest of which is owned by U.S. citizens;
 4. A U.S. corporation, whose chief executive officer and chairman of the board are U.S. citizens, and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum;
 5. The U.S. government;
 6. A state government. See section 12102, chapter 121,

title 46.

49. 46 U.S.C. 12103.

50. 46 C.F.R. 67.03-5,9.

51. Act of September 7, 1916, ch. 451, sec. 2, 39 Stat. 729, as amended, hereafter cited as the 1916 act. Between 1792 and 1825, corporations were not allowed to document ships under U.S. law. From 1825 to 1858, by administration determination, a corporation could only document a ship if U.S. citizens owned 100% of the stock. After 1858, U.S. corporations could document ships in the foreign or domestic trade whether or not their stock was owned by aliens. This remained in effect until the 1916 act mandated that a "controlling interest" be owned by U.S. citizens. See U.S. Code Congressional & Administrative News, vol. 3, (1958), p. 5191.

52. U.S. Congress, Senate, Senate Report 573, 66th, 2nd, May 4, 1920, p. 7.

53. Id.

54. A 1981 letter from the San Francisco law firm of Derby, Cook, Quinby, and Tweedt, which represents Crowley Maritime -- a prominent coastwise operator -- detailed an example of how tugs and barges were built in this country for use in

the coastwise trade and essentially leased through a time charter arrangement to foreign interests. The foreign interests retained full control over the use of the vessels. Letter addressed to Arctic Marine Freighters, dated December 11, 1981.

55. See David Morris Phillips, "Restraints on Foreign Investment in the Merchant Marine -- An Asset or Liability to United States Interests?" Cornell International Law Journal, 11:1, Winter, 1978, p. 33. Hereafter cited as Phillips. He has also pointed out that it is difficult to determine the extent to which a stockowner may exert effective control over a company, and that furthermore, if 25% of a company's stock is concentrated in the hands of a single foreign investor, he may in reality exert more than 25% of the influence over the company. *Id.*, p. 36-37.

56. *Id.*, p. 40.

57. 46 C.F.R. 67.05-5.

58. U.S. Congress, Senate, Senate Report 870, 74th Cong., 1st sess., May 13, 1935, p. 2. Hereafter cited as Senate Report 870.

59. See 46 C.F.R. 67. See also Drzal, pp. 268-269.

60. 46 C.F.R. 67.09-3.

61. U.S. Coast Guard, C.G.D. 82-085, 49 Federal Register 4944.

Chapter III

COASTWISE TRADE LAW

The rules which govern participation in the coastwise trade have been discussed; attention now turns to the more difficult task of determining what, exactly, the coastwise trade is. This Chapter will examine the legal framework surrounding transportation, dredging, towing and salvage services in U.S. waters, and how that framework has evolved -- or remained static -- in the face of changing trends in coastal services.

Federal power to enact laws regulating shipping in the navigable waters stems from the commerce clause of the United States Constitution, which gives to Congress the power "... to regulate commerce with foreign nations, and among the several states ..."¹ The constitutional power to regulate commerce was used as early as the second act of the first Congress, when a law was enacted that laid a duty on imported goods, wares, and merchandise.² Congress began exercising its power to regulate the coastwise trade in the first Congress as well by enacting a law imposing

discriminating tonnage duties on ships that were not domestically constructed and owned. In fact, early maritime policy was an outgrowth of concerns over the economic and security well-being of the nation as a whole, and therefore was formulated on the national level.³ Efforts by state and local governments to regulate commerce in their navigable waters were rejected by the courts as being contrary to the federal authority granted by the Constitution to regulate commerce between states and with foreign nations.

In *Gibbons v. Ogden*, an early case challenging Congress' constitutional right to regulate commerce, an exclusive contract was awarded by the State of New York to an operator to navigate in New York state waters.⁴ It was maintained by the State of New York that the 1793 Act was unconstitutional, because the language of the Constitution allowing Congress to regulate commerce did not also apply to navigation. The Supreme Court held that the term commerce as used in the Constitution did include navigation, and that the U.S. government had the sole power to regulate the activity. Chief Justice Marshall stated that:

"if commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been

exercised from the commencement of the government, has been exercised with the consent of all ..."⁵

The opinion also stated that the wording of the Constitution might be construed by some to exclude federal power when the commerce is solely within the boundaries of a particular state, because the power extends to commerce "among the several states." However, it was noted that in foreign commerce, federal power must extend within the state jurisdictional line to the innermost reaches of that commerce; likewise, in interstate commerce, the federal power to regulate the activity would be meaningless if its jurisdiction did not extend inside the state boundary to the end-point of that commerce. Therefore, according to the court, the federal government must have the power to regulate commerce and navigation within the boundaries of any state if it is part of the interstate or foreign trade of the United States. Moreover, the court reasoned that the individual states are not entitled to regulate the commerce and navigation within their boundaries if there is any conflict with federal jurisdiction, and awarding an exclusive navigation contract to a single operator was deemed to be such a conflict.

The Supreme Court made a similar ruling in 1893, when it held unconstitutional a Chicago municipal tax levied on coastwise operators for the privilege of navigating the Chicago River.⁶ The court held, in agreeing with Gibbons

v. Ogden, that navigable waters that are within a state, and that connect "with other navigable waters so as to form a waterway to other states or foreign nations, cannot be obstructed or impeded so as to impair, defeat or place any burden upon a right to their navigation granted by Congress."⁷

Transportation

Merchandise

Two laws were in place by the end of the 18th century that served to encourage the growth of the coastal fleet, especially on the local level. The first was the previously mentioned 1789 discriminatory tonnage tax law under which the domestic fleet more than tripled from 1789 to 1800. The rationale for a discriminatory tax has been variously ascribed to a retaliation against the British for closing their trades to U.S. ships, and an early effort to promote the U.S. maritime industry.⁸

The second law was the 1793 Act, part of which imposed greater regulatory burdens on coastwise vessels operating on longer voyages -- that is, voyages which were not to or from ports in the same or adjacent states -- in that the masters of these ships had to submit manifests or reports to the local collector detailing the nature of the cargo, and additionally were required to obtain a permit for the voyage.⁹ Therefore, voyages between ports in the same or adjacent states were encouraged by virtue of the fact that lesser regulatory burdens were imposed upon these sailings.

Although the intent of the law is difficult to discern, a letter to the Senate from the Secretary of the Treasury in 1819 indicated that the distinction was probably created to encourage trade on the regional level and to safeguard against smuggling.¹⁰

Exclusion of Foreign Shipping

An 1817 act barred the participation of foreign ships in the coastwise trade, an exclusion that has remained in effect since. Ships "belonging wholly or in part to a subject of any foreign power" could not transport goods, wares, or merchandise between ports of the United States.¹¹ The act prohibited both foreign-owned and foreign-flag ships from the coastwise trade, although these ships could still sail between ports of the U.S. as long as they did not transport goods between one port and another.

The 1817 Act was the strongest statement to that point regarding the protection that was to be granted to the U.S. merchant fleet. Although it theoretically prohibited a foreign vessel from transporting any merchandise between U.S. ports, foreign carriers were able to find loopholes in the statute, and all further efforts in the 19th century devoted to regulating the carriage of merchandise were aimed at closing these loopholes.

The Act was interpreted by the Attorney General, in an 1843 opinion, to allow the coastwise transportation of domestic goods in foreign vessels, as long as the vessels were wholly owned by U.S. citizens and paid the appropriate

duties.¹² The Act may have been misinterpreted by the Attorney General, who assumed that only foreign-owned ships were prohibited from coastwise operation. However, the law specifically barred foreign vessels -- meaning foreign-flag vessels -- from domestic operation as well.

The 1817 Act was amended in 1893 by adding wording to the effect that carrying merchandise in a foreign ship "via any foreign port" was also illegal under the principle of cabotage.¹³ This language was in response to the practice of shipping cargo via a foreign port on foreign ships in order to save freight costs. In fact, impetus for the passage of the 1893 amendment was the shipment of a cargo of nails from New York to Antwerp on one foreign vessel and then reshipment on another vessel to California. In *U.S. v. 250 Kegs of Nails* (1894), a circuit court ruled that the 1817 cabotage law did not prohibit this type of activity, even though California was the intended destination of the cargo.¹⁴ Although the case was decided after the 1893 amendment became law, the actual shipment occurred prior to that time.

An 1898 provision further tightened existing cabotage law by adding language that prohibited the transport of merchandise between ports of the United States in a foreign vessel "for any part of the voyage."¹⁵ This again attempted to mitigate the practice of shipping cargo for part of a voyage to a foreign port and reshipping the cargo, using a foreign vessel for one leg of the journey, and an American vessel for the other part, so that "part of the

voyage" would be on a foreign ship.¹⁶ This creative method of avoiding the cabotage requirements was especially prevalent in the U.S. mainland to Alaska trade, where an American ship would make the 90 mile journey to Vancouver, drop off its cargo, and a less costly Canadian ship would carry the cargo the remaining 1000 miles to Alaska.¹⁷

The Jones Act

Most of the activities considered to be coastwise trade had come under federal regulation by the turn of the century. The laws essentially reserved the right to engage in specific types of commerce to ships of the United States and, since ships of the United States had to be built in the United States whether they were engaged in the coastwise trade or foreign trade, no distinction was made in the law between country of registry and country of build. In other words, prior to the Panama Canal Act of 1912, simply requiring a ship to be U.S.-flag ensured that it would be U.S.-built, so that no individual coastwise statute explicitly mandated domestic construction of ships to be used in the coastwise trade.¹⁸

The Jones Act, usually considered to be the cornerstone of the cabotage laws, did little other than restate the existing protective policy of the 1817 Act, as amended in 1893 and 1898.¹⁹ The Act did, however, make some important changes. First, it specifically mandated U.S. construction of ships transporting merchandise, probably as a reaction to the 1912 Panama Canal Act which had permitted

foreign construction for ships in the foreign trade. As stated in chapter 1, there was considerable nervousness that the foreign-build policy would find its way to the domestic trades, and so the language in the Jones Act was a reaction to that.

A second change from prior cabotage law was the requirement that merchandise transported "by land and water" had to be moved on American ships during the water portion. The purpose of this change was to preclude the "cargo diversion" practice of shipping cargo overland to a Canadian port and then by water to Alaska on foreign vessels.²⁰

In a broader context, the 1920 Merchant Marine Act for the first time explicitly set forth the role of the merchant marine as an auxiliary in wartime and emergencies. The Act stated that the U.S. "shall" have a merchant marine which is capable of serving as a naval and military auxiliary.²¹

In addition, an attempt was made to apply the same regime to passenger carriage as was applied to merchandise carriage, although that effort ran into resistance in the Senate. The House bill enacted as the Jones Act (H.R. 10378) was amended by the Senate Committee on Commerce such that it would have been illegal for any passenger to arrange through transportation between any two U.S. points when any part of the transportation was on a foreign ship, even if the passenger left the country to board the ship.²²

The passenger portion of the bill was aimed at stopping the practice of passenger travel to Alaska via Vancouver on

board Canadian ships, although nothing in the bill prohibited the purchase of a one way ticket from, for example, Houston to Vancouver, and another one way ticket from Vancouver to Alaska with Canadian ships providing all the water transportation. It was simply the through transportation that the bill affected. The specific objective was to stop Canadian passenger ship companies from selling both of these tickets in a U.S. port. Senator Wesley Jones, the chief proponent of the measure, realized that it was impossible to stop them from selling a ticket in Seattle for a voyage to Vancouver, and then another ticket in Vancouver for the remainder of the voyage to Alaska.²³

The Senate, however, clearly had concerns that such a provision would unduly restrict the choice of travelers, and so it was stricken from the bill.²⁴ Therefore, a balance of sorts had been struck between those interested in preserving the freedom of choice in passenger travel and those interested in increasing the protection accorded the U.S. merchant marine in the domestic carriage of passengers. Consequently, passage of the Jones Act did not affect the transport of passengers between American ports and the Passenger Ship Act of 1886, as amended, which outlawed the use of foreign ships for the coastwise carriage of passengers, continued to be the controlling law.

Passage of Senator Jones' provision would have had interesting consequences for the cruise ship fleet presently operating from Vancouver in that travel agents would be barred from some current operations. For example, purchase

of a through ticket for a flight from a U.S. point to Seattle followed by a bus trip to Vancouver and a one way voyage on a Canadian ship to Alaska would have been prohibited.

Although the Jones Act contains a ban on the transshipment of cargo by foreign vessels -- the shipment between U.S. points via a foreign point -- a problem with administering the law has emerged recently with respect to transshipped cargo. In *American Maritime Association v. Blumenthal*, an oil company shipped Alaskan oil to the Virgin Islands, where it was refined, and then on to east coast ports, with both legs of the voyage on foreign ships.²⁵ The courts traditionally have applied an "intent test" in determining whether a coastwise violation occurred, so that if a shipper's intended destination was the United States, a coastwise violation would occur when a foreign ship is used on any leg of the voyage.²⁶ However, in *American Maritime Association v. Blumenthal*, both the district and circuit courts found that a Jones Act violation had not taken place, because sufficient alteration had occurred in the refinery process. The "alteration test" used in this case ignores whether the U.S. was the intended destination of the shipment. The implication is that foreign ships could be used to transport raw materials from the U.S. to manufacturing or refining plants outside the scope of U.S. cabotage law. Likewise, the finished product could be reshipped to the U.S. on foreign vessels, all of which would work to the detriment of U.S. coastwise shipping.²⁷

Due to various pressures from shipbuilding and shipowning interests, the Jones Act has had a series of provisos attached to it since its enactment which have both strengthened and weakened the main body of the Act. These provisos will be outlined in Chapter Five.

Passengers

The carriage of passengers was not addressed in the 1817 Act, probably because they were usually carried on the same ships that carried cargo, rather than dedicated passenger ships. While the legal framework governing passenger carriage has remained essentially static since 1886, the changes in the industry have been dramatic. Passenger ships have evolved from being the only means of long distance transportation to being a destination in themselves, primarily for leisure purposes. Therefore, while the present law was created to assure U.S.-flag presence in the coastwise transportation market, the passenger ship industry is no longer concerned with transportation and in fact is able to sidestep the U.S.-flag requirement by providing a roundtrip service to and from the same port. This service is in line with the evolution of passenger vessels into cruise ships, which are essentially floating resorts, rather than liner ships, which shuttle passengers between ports. Because of the lower costs of using foreign-flag ships, the result has been the virtual extinction of the U.S.-flag passenger fleet.

It is commonly assumed that passenger transportation

was first reserved to American ships by the 1886 Passenger Ship Act, although this is not quite true. Somewhat by accident, perhaps, as early as 1838, steamships carrying passengers had to have been U.S.-built and -owned. By a law passed that year, all steam-propelled vessels had to take out a new enrollment and license.²⁸ It further provided that steamships could not transport goods, wares, merchandise or passengers in or upon the lakes, bays, rivers or other navigable waters of the United States without first obtaining a license.²⁹ Newspaper accounts of the time reveal that there were at least two serious accidents on steamboats in June of 1838 that resulted in heavy loss of life. The steamboat Washington caught fire on a passage from Cleveland to Detroit on June 16, 1838, with the loss of as many as 40 people.³⁰ Another accident occurred on June 14, 1838, when a boiler on the steamer Pulaski exploded off Wilmington, North Carolina, destroying the ship and resulting in about 140 deaths.³¹

It was clear therefore, that the 1838 law was essentially a passenger safety law that was enacted in response to an explosion on board a steamship, and that the measure was more of a reaction to the need for safe steamships than the need for domestically constructed and owned steamships in the coastwise trade. At any rate, perhaps inadvertently, the measure reserved the coastwise transport of passengers for U.S.-built and owned steam vessels until it was superceded by the Passenger Ship Act of June 19, 1886.

Another law enacted 10 years later seemed to suggest that Congress considered the carriage of passengers between U.S. ports to be coastwise trade, regardless of the type of ship. The 1848 law allowed vessels "... duly registered in pursuance of the laws of the United States ..." to carry merchandise, passengers and their baggage, letters, and mails between ports of the U.S. with intermediate stops at foreign ports.³² The only apparent analysis of the issue is a one sentence entry in the Congressional Globe at the time the bill was reported to the Senate which states that:

"This bill allows the steam packets between New York and New Orleans to stop at Havana and take in passengers, mails, etc., provided that no merchandise be landed or taken in."³³

However, the law as enacted does allow the transport of merchandise as well as passengers and it is unclear why the report includes a proviso excluding the carriage of merchandise. In any event, if the intent was to allow coastwise-qualified vessels (that is, vessels enrolled and licensed to engage in the coastwise trade) to make stops at foreign ports, then it must be assumed that the carriage of passengers was perceived by Congress to be an element of coastwise commerce, including those passengers carried on sailing ships.

Passenger Ship Act of 1886

The Passenger Ship Act of 1886 signalled the growing recognition of passenger-carrying ships as important transportation modes and indicated the perceived need to regulate them separately from ships carrying merchandise. The provision states that foreign vessels found transporting passengers between ports or places of the United States were subject to a fine of \$2 per passenger landed.³⁴ It was felt by certain members of Congress that a penalty for passenger carriage by foreign ships was a necessary component of coastwise law, in addition to the penalty provided for the illegal shipment of merchandise.³⁵

The \$2 penalty was increased in 1898 to \$200 per passenger.³⁶ The lower penalty was seen as inadequate to preserve to U.S. ships the Pacific Coast to Alaska passenger trade, since it could be added to the price of a ticket with little difficulty.³⁷ It also provided that a foreign vessel could not transport passengers "directly or by way of a foreign port" between two U.S. ports or places. This was done to avoid the practice of sailing from, for example, Seattle to Vancouver on an American vessel and from Vancouver to Alaska on a foreign vessel.

It is the feeling of many observers that the Passenger Ship Act, by explicitly stipulating what type of ship could carry passengers between U.S. ports, implicitly included passenger transportation within the purview of coastwise trade. On the other hand, the argument could be made that the Passenger Ship Act was passed merely to put teeth into

what was felt to be a pre-existing policy by creating the two dollar per passenger penalty. At any rate, the regime for participation in the passenger-carrying trades was clearly and unequivocally defined by the 1886 Passenger Ship Act.

Court and Administrative Policy

Passenger transportation, almost without exception, was seen by the courts and agencies to be part of the coastwise trade after enactment of the Passenger Ship Act. The thrust of these decisions has generally been twofold. First, they recognized that Congress has the right to regulate the coastwise trade, and second that passenger carriage is part of the coastwise trade. The lack of congressional action in the face of the changing nature of the passenger ship industry has meant that judicial and administrative decisions have been the primary means of policy formulation.

Early Judicial Policy Toward Passenger Carriage

While passenger carriage on steamships was statutorily included within the realm of coastwise law in 1838, the courts seemed to reach that conclusion as early as 1824, when it was held that:

"Commerce is not prevented because the object of it is to serve the pleasure of passengers. The business was that of earning money by transporting people on the navigable waters of the United States and, strictly speaking, it is

just as much a part of commerce ... as if these vessels were carrying cargoes of merchandise."³⁸

However, early court cases and executive decisions reached differing opinions on the applicability of the coastwise trade laws to vessels carrying passengers. In *Gibbons v. Ogden*, the Supreme Court held that the coasting trade applies equally to the transportation of passengers and merchandise.³⁹ In fact, it was noted that there was no provision in existing passenger-related law which governed what type of ship could carry passengers.⁴⁰ The court construed this to mean that Congress had felt that existing regulations covered passenger vessel movement in the coastwise trade and that no additional regulation was necessary.⁴¹

In a subsequent case before the Supreme Court (*City of New York v. Miln*), it was held to be improper to consider shipboard passengers as the subject of commerce and, therefore, the power given to Congress by the Constitution to regulate commerce did not override certain police powers possessed by states to regulate immigrant passengers.⁴² However, the opinion of the court did not question the power of Congress to regulate passengers while they were on their voyage and, in fact, reaffirmed that power. In short, the court seemed to reinforce the Congressional prerogative to regulate the coastwise carriage of passengers. On the other hand, the court did hold that the internal police power of a

state enabled it to regulate passengers once they had landed. ⁴³

The holding in *City of New York v. Miln* was misconstrued, however, in an Attorney General's opinion of November 2, 1843. The Attorney General ruled that foreign-built, foreign-owned vessels could transport passengers between ports of the United States. He construed the 1817 Act, which stated that "no goods, wares or merchandise shall be imported . . . from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power," as not applying to passengers.⁴⁴ In support, the Attorney General cited *City of New York v. Miln*, where the court held that persons or passengers were not the subject of commerce, and therefore did not fall within the realm of Congress's power to regulate commerce. He also cited (evidently unaware of the 1838 steamship law) the total lack of any federal legislation regarding the coastwise transport of passengers, except for the Act of March 12, 1812 regarding inland steamboats, and stated his opinion -- correctly, as far as sailing ships were concerned -- that foreign vessels could legally carry passengers between the ports of the United States.⁴⁵ Apparently, this was not perceived as a problem, for no legislation concerning the coastwise carriage of passengers -- aside from the steamship law of 1838 -- was enacted until 1886.⁴⁶

Court and Administrative Policy After the Passenger Ship Act of 1886

The Passenger Ship Act of 1886 set in concrete the notion that passenger carriage was coastwise commerce. No executive or judicial decision after enactment of that law questioned that premise. For example, in *Ravesies v. U.S.* (1888), it was held that interstate commerce includes the transportation of objects of trade and commerce as well as the transportation of passengers.⁴⁷ Moreover, a 1939 Kentucky State Court of Appeals case also upheld the inclusion of passenger transportation -- even if it was to and from the same port -- in the meaning of coastwise trade:

"Coasting trade embraces commercial intercourse between places in the same district or state on a navigable river ... That the object may be to serve the pleasure of passengers and the journey from and to the same port would seem to make no difference in the classification."⁴⁸

Despite this ruling, the Customs Service has not included trips to and from the same port within the protection of the coastwise laws.

A 1940 District Court case used the concept of the purpose of the voyage to determine whether a violation of coastwise law had occurred.⁴⁹ This concept had been used in earlier Customs rulings, upon which the courts have traditionally drawn heavily. The case involved a Honduran

ship employed in the banana trade between New York and Central America that regularly carried a limited number of passengers on a round trip voyage from New York to Mexico. In the particular instance, the ship put in at Philadelphia on the return voyage to get the bananas ashore in a saleable condition. The passengers were let off in Philadelphia and given railroad fare back to New York. Judge Bard examined the various Attorney General rulings and distinguished between the carriage of passengers locally (Boston to Philadelphia, for example), and on world cruises. The Attorney General opinion of February 26, 1910 (the Cleveland case) was cited as support that the test should be the object of the transportation:

"If one should take passage on a vessel at New York for Liverpool, and after transacting business in that city should again take passage on the same vessel on its return voyage and be landed in Boston, it certainly would not be insisted that the vessel would be subject to the penalty imposed by the statute."⁵⁰

Judge Bard ruled in the Granada case that the object of the transportation in question was a cruise to a foreign port and not coastwise commerce between U.S. ports. This ruling reinforced Customs' earlier Cleveland opinion which allowed the transport of passengers between U.S. ports on

foreign vessels as long as a "non-nearby" foreign port is visited.⁵¹ The notion of intent, or purpose of the voyage was thereby tied to the geographic distance the ship traveled between the two coastwise ports. This concept is still used by Customs in the setting of its regulations, as will be seen below.

Administrative Interpretations

Executive agencies have issued a number of rulings on the application of the Passenger Ship Act of 1886. In general, these have focused on the continuity of the voyage and whether the intended purpose or objective of the trip was coastwise transportation. In other words, the Act was held violated if the coastwise movement was continuous or if the purpose of the trip was a coastwise voyage.

Possibly the earliest interpretation of the Passenger Ship Act was an Attorney General opinion of September 4, 1886.⁵² This opinion concerned a foreign vessel which picked up passengers in Cleveland, took them to the port of Windsor in Canada, and then transported them to Chicago. The Attorney General ruled this a violation of the Passenger Ship Act since the voyage was "a substantially continuous one" aboard a foreign vessel between ports of the United States.⁵³ The Attorney General did not rule out the option of the passengers transferring to a different foreign ship at the foreign port in order to avoid the two dollar per passenger fine under the Passenger Ship Act.

The Attorney General ruled in a February 26, 1910

opinion that tourists who were taken aboard the German steamer Cleveland in New York for a world cruise and landed in San Francisco were not transported in violation of the Passenger Ship Act.⁵⁴ The rationale used by the Attorney General was that since several ports around the world were visited and the purpose of the trip was not strictly transportation between New York and San Francisco, the cruise did not violate the spirit of the Act.

This ruling is still used by the Customs Service in regulating the coastwise passenger trade. It is currently permissible according to Customs regulations to transport passengers from one port of the United States to another port of the United States on a foreign vessel if a far-away foreign port is visited enroute.⁵⁵ Customs has defined far-away foreign ports as all ports other than those in North and Central America (except for some ports in the Leeward Islands, which are considered far-away ports).

In response to Canadian vessels which were making trips to Canadian waters on the Great Lakes from an American port, and then returning to that port, the Attorney General ruled on February 12, 1912 that transporting passengers to and from the same U.S. port on a foreign vessel did not violate the Passenger Ship Act of 1886.⁵⁶ The Act states merely that a foreign vessel may not transport passengers between one port of the United States and another, and does not address the issue of "round-trips" from the same port.

This ruling is also used by the Customs Service in setting its current regulations. As stated earlier, there

are several foreign-flag cruise ships operating cruises to nowhere from U.S. ports, notably Miami, without objection, because Customs does not consider this activity to be coastwise trade. No doubt the authors of the original 1886 law dealing with passenger vessels would have shivered with fright at the spectre of spending vacation time aboard a ship, and so did not conceive that it would become a popular pastime. Whether they would have intended that this type of activity should be classified as "coastwise trade," and therefore the ships involved be subjected to the stringent U.S.-building and documentation requirement is an interesting question.⁵⁷

The Attorney General issued another ruling on February 1, 1913 in a case that was similar to the Cleveland case.⁵⁸ A foreign steamship line was found to be in violation of the Passenger Ship Act by transporting passengers between New York and Puerto Rico, where the primary object of the voyage was found to be the transport between ports of the U.S. and the secondary object of the voyage was sightseeing to various other islands. This case was distinguished from the Cleveland case because in the latter, the voyage to foreign ports for sightseeing purposes was found to be the sole purpose of the trip, and transport between New York and San Francisco was merely incidental.⁵⁹

A further ruling was handed down on December 24, 1924.⁶⁰ In this instance, the transport of a group from Philadelphia to Boston, where the group attended a

convention, and then a return voyage via two Canadian ports to Philadelphia, all on a foreign ship, was found to be a violation of the Passenger Ship Act. The central finding here was that the primary object of the voyage was the attendance at a convention in Boston. Without that convention, the voyage would not have been undertaken. The significance of these two rulings is apparent in that Customs deems there to be a violation of the Passenger Ship Act whenever the purpose of the voyage is seen to be coastwise transportation, regardless of the number of foreign ports visited enroute.

A 1930 ruling further defined the application of the Passenger Ship Act to an evolving ocean transportation industry.⁶¹ In this case, passengers purchased through tickets from San Francisco to Sydney, Australia from a Japanese steamship line. A Japanese ship carried the passengers from San Francisco to Honolulu, and a ship of the Canadian-Australasian Line transported them from Honolulu to Sydney. Attorney General Thacher in this case referred to the September 4, 1886 opinion where it was declared that any time a foreign vessel transports passengers, on a substantially continuous voyage, between ports of the United States, there is a violation of the Passenger Ship Act.⁶² The transportation of passengers between San Francisco and Honolulu was held to be such a violation, regardless of the intent or final destination of the passengers.

The Customs Service has used these rulings and court cases to fashion its policy toward the coastwise carriage of

passengers. Specifically, it considers a violation of the 1886 Passenger Ship Act to have taken place when passengers are carried between U.S. ports, whether directly or not, when that is the intended purpose of the voyage.

Recreational Vessels

As mentioned earlier, an important component of the modern cruise trade are "cruises to nowhere." In addition to the well known "Love Boat" type of cruise, there are several other varieties of what might be termed "passenger service" cruises which begin and end in the same port. For example, scuba diving trips and charter fishing trips are common in U.S. ports. Interestingly, the Customs Service regards these voyages differently for the purposes of the coastwise trade laws. If a scuba diving boat takes passengers outside the three mile territorial sea, to and from the same port, the voyage is not considered coastwise trade and could be performed by a foreign-flagged vessel. However, a charter fishing vessel performing the same voyage would be engaging in the coastwise trade, even if it went outside the territorial sea.⁶³ Once the fishing lines go over the side, Customs holds the voyage of a charter fishing boat to be coastwise trade in nature, despite the obvious similarities to other "passenger service" voyages.

Yachts

In a Court of Appeals case in 1970, the time chartering of a yacht for pleasure purposes was held to be a coastwise

trade activity.⁶⁴ A time charter occurs when a vessel owner charters, or leases, a ship to to another party for a specified period of time, usually with the owner retaining effective control over the ship through the master. The same arrangement made for a specified voyage would be a voyage charter. A bareboat or demise charter is one in which the charterer assumes full responsibility for the vessel's operation. In the case of a yacht, a time chartered vessel normally has a captain and crew provided by the owner and so the charterers are considered passengers. On the other hand, the charterers of a bareboat yacht are considered the owners pro hac vice, and therefore are not considered passengers.⁶⁵

The implications for the coastwise operation of yachts, which can be used for both transportation and recreation, are that time chartered yachts must be coastwise-qualified, since they carry passengers for hire. Conversely, bareboat chartered yachts need not be coastwise-qualified, as long as no control or management over the yacht is exercised by the owner.⁶⁶ At any rate, if the yacht is not used for transporting passengers between coastwise points, it need not be coastwise-qualified, regardless of the charter arrangement. That is, if the boat remains tied to the dock, it need not be U.S.-flag and U.S.-built.

Current Regulatory Arrangement

Combining the Passenger Ship Act of 1886 with its numerous rulings, the Customs Service has established a

three-tiered regulatory system governing the movement of foreign passenger ships between U.S. ports. In the first tier, a foreign vessel moving passengers between U.S. ports without any intervening stops is in violation of the Passenger Ship Act if a passenger steps ashore at the second port even temporarily.⁶⁷

In the second tier, if a foreign vessel touches a nearby foreign port between the U.S. ports, the passengers may go ashore while the vessel is in the second U.S. coastwise port. If the passenger does not reboard the ship before it leaves, there is a violation of the Passenger Ship Act.⁶⁸ Originally, this tier also provided that a foreign passenger ship that had visited a nearby foreign port between two U.S. ports could stay only 24 hours in the second U.S. port before passengers had to be back aboard and the ship underway. Citing the lack of a statutory time constraint in the Passenger Ship Act and the economic benefit to ports in Alaska, Florida, and Puerto Rico, The Customs Service amended its regulations on July 31, 1985 so that the 24 hour time constraint was abolished.⁶⁹ Understandably, there was a great deal of support for the change among political and private interests in Alaska, Puerto Rico, and the West Coast states. Eradicating the 24 hour rule was viewed as a tremendous boost to the local economies, since passengers would potentially be ashore for longer periods of time.

In the third tier, a foreign passenger vessel may discharge passengers permanently at a second U.S. port if a

non-nearby foreign port is visited first.⁷⁰ However, if coastwise transportation is the primary object, or purpose, of the voyage in any of these three cases, a violation of the Passenger Ship Act will have occurred. Customs deems the purpose of a voyage as coastwise if one of two situations occurs. If the number of U.S. ports visited exceeds the number of foreign ports visited or if the amount of time spent in U.S. ports exceeds the amount of time spent in foreign ports, then the purpose of the voyage is held to be coastwise transportation.⁷¹

Dredge Spoil and Waste

The transportation of dredge spoil and waste have only become an issue relatively recently.⁷² Customs considers the transportation of dredge spoil and waste to be coastwise trade when the material has any value whatsoever, and is thereby equivalent to merchandise. Material which "has no apparent value and will not be used commercially or in trade but is being dumped as worthless" is not considered to be merchandise by the agency.⁷³ Therefore, if the material is dumped at sea or otherwise disposed of as useless, the transportation would not be considered coastwise trade. On the other hand, if the same material was used as landfill, for example, it would have value, and the transportation of that material would be coastwise trade.⁷⁴ The significance of this is that vessels transporting valueless waste need not be coastwise-qualified, whereas vessels transporting waste that may be used as fill or for other

purposes must be documented for the coastwise trade.

A movement of valuable dredge spoil which had repercussions for oil and gas activities on the Outer Continental Shelf (OCS) was examined in a 1983 Customs ruling. A proposal to use four Canadian-built bottom dumping barges on the North Slope of Alaska for gravel transport prompted the ruling.⁷⁵ The Customs Service held that the transport of valuable spoil, such as gravel, is considered to be coastwise trade when the movement is between two coastwise points, and the material is merchandise for the purpose of the Jones Act.⁷⁶ Therefore, the vessels involved in the transportation had to be coastwise-qualified.

In *Great Lakes Dredge & Dock Co., v. Ludwig* (Great Lakes), the court held that the transport of valueless dredge spoil solely for the purpose of disposing of it was not considered as coastwise trade.⁷⁷ The case involved a U.S.-built dredge that had been sold foreign and was subsequently used to perform dredging activities on the Cuyahoga River. The argument that the activity of dredging valueless spoil was coastwise trade in nature was rejected by the court as inconsistent with prior Customs rulings, upon which the court relied heavily in its decision. The important point for this section was, as stated, that the transport of the valueless spoil did not violate the coastwise trade laws (specifically the Jones Act), since the spoil was of no use and therefore not a thing of value.

Had it come up, the court presumably would have held

that the transport of any type of waste is not considered coastwise trade. This, of course, has implications for the vessels transporting the waste, such as garbage scows, incinerator ships, and others. Barring any other federal law, may they be foreign-built or even foreign-flag? As outlined above, the Customs Service does not apply the coastwise laws to the transport of valueless waste, and so ships undertaking such operations need not be coastwise-qualified.

The shipment of hazardous waste between the U.S. and the open sea for incineration was covered by separate legislation in 1982 which deemed that activity to be coastwise trade.⁷⁸ Presumably, the waste being incinerated has no value, except as a means of earning money for the owner of the incinerator ship. Judging by agency and court holdings, the transport of this material should not be subject to the cabotage laws, since it is valueless. In enacting this specific legislation, however, which states that ocean incineration vessels operating between the U.S. and open water are operating in the coastwise trade, Congress may have perceived a need to exclude foreign ships because of the detrimental impact on the U.S. fleet.

Dredging

In 1906, the type of dredge that could be operated in the United States was addressed through specific legislation, largely as a result of the protest surrounding the use of four foreign dredges that assisted in the

rebuilding of Galveston after the hurricane of September 8, 1900.⁷⁹ In response to questions of the legality of the project, proponents for the use of foreign-built dredges at Galveston did not argue that the activity of dredging was not coastwise trade in nature, but that the existing cabotage law at the time (R.S. 4347, the Act of February 17, 1898) only prohibited the movement of merchandise between ports of the U.S., an activity which the dredges would not undertake.⁸⁰

It is important to remember that dredging is distinguished from the transport of the dredge spoil, and since the former operation was not off-limits to foreign equipment, Galveston was in fact rebuilt by the foreign dredges. Needless to say, certain maritime interests felt threatened by this turn of events, and they did not hesitate to let the Congress know. The 1906 dredging law that was enacted prohibited the use of foreign-built dredges unless they were documented as U.S. vessels and further directed the Commissioner of Navigation to document as U.S. vessels five foreign built dredges.⁸¹

While the second section mandating documentation of the five foreign dredges was deleted as obsolete, the wording of the first section, perhaps inadvertantly, was not reshaped to reflect this change. In other words, the language barring the use of a foreign-built dredge "unless documented as a vessel of the United States" remains intact, so that as it is worded, the law would seem to allow the use of:

1. A U.S.-built, U.S.-flag dredge;

2. A U.S.-built, foreign-flag dredge;
3. A foreign-built, U.S.-flag dredge.

Did the Congress intend that any foreign-built dredge that procures a U.S. document could engage in dredging in the U.S., or was this language intended to apply only to the five foreign dredges mentioned above?⁸² According to the Coast Guard, the proviso applied only to the five foreign dredges, so that a foreign-built dredge in existence today can not obtain a registry and begin dredging.⁸³ Clearly, there is a contradiction between the wording of the statute and the relevant Coast Guard regulations. Despite the fact that a foreign-built dredge can legally obtain a registry, and despite the 1906 dredging law, which purportedly allows a foreign-built, U.S.-documented dredge to undertake dredging in the U.S., the Coast Guard will not give such a dredge the authority to operate.⁸⁴

The contradiction is explained by the legislative history of the dredging law, according to the Coast Guard. The agency maintains that the intent of the Congress was to allow the documentation of only the five foreign-built dredges mentioned in section 2 of the original law.⁸⁵

The Customs Service, for its part, does not consider dredging to be a coastwise activity. Therefore, a dredge need not possess a coastwise license in order to operate in U.S. waters.⁸⁶ However, Customs does require the dredge to be U.S.-built in all cases. In a ruling issued August 6, 1984, the agency held that a foreign-built, U.S.-documented dredge could not engage in dredging in the United States,

citing section 2 above and legislative intent in enacting the 1906 law.⁸⁷ On the other hand, according to the ruling, a U.S.-built, foreign-flag dredge is entitled to dredge in the U.S., because the 1906 law forbids dredging only by foreign-built vessels.⁸⁸ As stated earlier, because of the fact that a dredge may be foreign-flag, a Coast Guard document is not required of a dredge working in the United States, so that domestic ownership, crewing, flag and other requirements do not apply. Therefore, both the Coast Guard and Customs Service exclude dredging from the activity of coastwise trade.

The same is not true of the Justice Department, however. An opinion of the Attorney General in 1963 held that dredging was a coastwise trade activity, and that the dredging statute was a coastwise act.⁸⁹ The implication is that under this interpretation, a dredge would have to be coastwise-qualified. In addition to being U.S. built, it would have to have a coastwise license and be U.S. owned and manned.

In Great Lakes, a 1980 case involving the use of a non coastwise-qualified dredge to do contract work in the Cuyahoga River, the district court held that the Customs Service had properly ruled that the dredging of valueless spoil does not constitute coastwise trade.⁹⁰ The dredge in this case was built in the U.S. and had at one point been sold foreign, although at the time of its employment on the Cuyahoga River, it was owned by a U.S. company. For the purposes of the documentation statutes, not all dredging

constitutes coastwise trade and, in fact, American-built dredges should be able to engage in dredging in the U.S. without being licensed and enrolled for the coastwise trade, as long as they are documented in some form, according to the court's opinion.⁹¹

Moreover, the court stated that foreign-built dredges would have to be registered rather than enrolled since there are prohibitions to the use of foreign-built equipment in the coastwise trade, although that was beyond the scope of the case. Clearly, the court took the wording of the dredging statute seriously to mean that if a foreign-built dredge is documented in the U.S., it may engage in dredging.⁹²

Dredging, therefore, in itself is not considered to be a coastwise trade activity, although participation in that activity is regulated by the federal government. The dredging industry is protected in a way, because only U.S.-built dredges may participate. Clearly this is less protection than is afforded to ships carrying merchandise, but it is an indication that U.S. policy-makers have viewed the dredging industry as worthy of protection in its own right.

Towing

This activity was first regulated by a federal statute in 1866 which barred foreign tugs from towing U.S. vessels between U.S. ports.⁹³ This law did not last long as it

was originally enacted, but was amended in February of the following year to include two provisos.⁹⁴ The first allows foreign tugs to tow U.S. documented ships between U.S. ports if any of the tow was through foreign waters. The term "foreign waters" was not further defined, although presumably this meant the territorial waters of a foreign country. The second exempted tugs owned by foreign railroads whose road entered the U.S. by means of a tug or ferry.

The legislative history of these laws is scarce, although barring foreign tugs from U.S. employment was undoubtedly conceived to assure some degree of employment for American tugs. The 1867 amendment was in response to pressure from owners of tugs and vessels located on the Great Lakes, because of the inflexibility of international boundaries, and the fact that navigating realities made it difficult to determine with certainty whether the vessel was located in U.S. or Canadian waters.⁹⁵ The logic of this argument is somewhat puzzling, since the original statute had no bearing on boundaries. It may be that Canadian tug owners were objecting to the situation where they could be held liable for towing an American vessel to a U.S. port from the territorial waters of the United States.

The second proviso, allowing foreign railroads to own tugs and operate them as if they were U.S. owned, was probably included to allow Canadian tugs to pull railroad ferries to more than one U.S. port from Canada.

The 1940 Towing Law

The towing statute of 1866, as amended, was felt by many to be inadequate by the 1930s for at least two reasons. First, it appeared that the penalties for its violation were insufficient to discourage foreign tugboats to take jobs in the U.S., especially the longer tows. Moreover, a foreign tug could pick up a tow in a U.S. port, proceed to a foreign port, drop anchor for a moment, then proceed to another U.S. port without violating the law. Although technically two foreign voyages, the result would be one coastwise transportation.⁹⁶

A bill (H.R. 8533) was introduced on November 25, 1937 that attempted to remedy some of these problems.⁹⁷ Among other things, the legislation specifically prohibited any foreign ship from towing between ports of the U.S. "... or to do any part of such towing."⁹⁸ The same section of the bill provided that both the owner and the master would be liable for a penalty of \$250 for any violation of the statute. However, both the administration and industry groups felt that a \$250 penalty was insufficient.⁹⁹ The Department of Commerce expressed the view that the \$250 penalty might not be enough and suggested it be changed to "not less than \$250 nor more than \$1000."¹⁰⁰ At the same time, two industry representatives recommended that the existing penalty of fifty cents per ton be changed to fifty dollars per ton.¹⁰¹ The perception among the American towing industry was that neither the fifty cents per ton nor the proposed \$250 penalties were sufficient to discourage

foreign companies from taking American towing jobs. An example was cited repeatedly of a tow made from New Orleans to Seattle for \$35,000 from which the proposed and existing penalties would not detract significantly.¹⁰²

Another effect of the bill was that it did not include the term "steam tug-boats" as in the 1866 statute. The bill further tightened the existing requirements by stipulating that a tug had to be U.S.-owned and had to have a certificate of registry, an enrollment, a license, or a motorboat number in order to engage in towing. These changes were eventually enacted and they served to put towing on the same playing field as ships involved in transportation, except that domestic vessel construction was stipulated. An exemption was provided for foreign tugboats that were towing foreign vessels between U.S. ports, although it is unclear why this was included. In particular, the Foss Company reacted strongly to this provision, and requested that it be deleted from the measure, stating that it doubted it was the actual intent to allow a foreign tug to tow a foreign vessel between, for example, Boston and New York.¹⁰³

One further issue raised with the bill as introduced was section (c), which prohibited foreign-owned tugs and ferries used in conjunction with a railroad entering the country by means of that tug or ferry from participating in the transport of merchandise between one U.S. point and another.¹⁰⁴ The problem with this provision was that an amendment to the Jones Act three years earlier allowed the

transport of merchandise on non Jones Act-qualified railroad ferries operating between the U.S. and Canada under some circumstances. Cargo movement from the U.S. to Canada and back to the U.S. by means of these ferries were affected by the legislation.¹⁰⁵ The proposed legislation would have taken away the exemption to the Jones Act conferred by the three year old amendment. The objectors succeeded in having language inserted in later bills that continued the exemption provided in the Jones Act.

The bill was reintroduced in the next Congress on January 3, 1939 as H.R. 200. Language regarding penalties and the above mentioned Jones Act exemption was added that addressed the concerns of industry groups. In addition, the bill exempted vessels in distress from the towing requirements and maintained the exemption for foreign tugs towing foreign vessels. The "vessels in distress" exemption was included because of the feeling on the part of the Maritime Commission that "in case of emergency, there should be no absolute prohibition against the use of any available facilities for salvage purposes, including towing, irrespective of its ownership or registry ..."¹⁰⁶ The towing portion of the bill had the support of most of the industry and executive agencies that commented on it.¹⁰⁷

H.R. 200 was reintroduced as H.R. 8283, with only one change to the towing portion. The change was in section (a) and it clarified the application of the term "citizen of the United States," for the purposes of tugboat ownership in the bill.¹⁰⁸ The bill was signed into law and superseded the

1866 towing law on June 11, 1940.

Section (a) of the new towing law allowed any U.S.-owned tug with a certificate of registry, an enrollment or a license to engage in towing. An early question that arose was whether a foreign-built tug with a registry could be used to tow a vessel. It should be recalled that foreign-built ships could be issued a registry under the Panama Canal Act, as long as they did not engage in the coastwise trade. The issue, therefore, was whether towing was part of the coastwise trade. Customs ruled in 1958 that such a vessel would be prohibited from towing between U.S. ports.¹⁰⁹ The link between coastwise trade and towing was strengthened in a further ruling in which Customs stated that they considered towing to be coastwise trade, and therefore a vessel needed a coastwise document, not just any document.¹¹⁰

Foreign Tugs in the Coastwise Trade

Despite the inclusion of towing within the purview of coastwise trade, Customs does allow foreign-flag tugs to tow U.S. barges if no merchandise is transported and the movement is part of an overall foreign voyage. In 1954, the agency held that a Canadian tug was allowed to tow an American barge from Seattle to Canada via Tacoma when cargo was laden at both U.S. ports.¹¹¹ However, in a conflicting ruling issued in 1967, Customs found a violation of the towing statute when the towing began and ended in U.S. ports, regardless of whether the voyage was part of a

continuous foreign voyage.¹¹² That policy was reversed in 1970 when it ruled that a foreign tug towing a U.S. barge between U.S. ports is permitted when the movement is part of a continuous foreign voyage.¹¹³ The policy was further clarified in a letter the same year that stated that the towing statute must be construed in pari materia with other coastwise trade laws, notably the Jones Act.¹¹⁴ The Jones Act allows the coastwise transport of merchandise in foreign vessels as long as it is not laden in one U.S. port and unladen in another. Customs' policy toward towing reflects this statutory wording so that a foreign tug may tow an American barge between U.S. ports if the transport is part of an overall foreign movement and no merchandise is transported coastwise.

Interestingly, in a 1966 internal memorandum from Customs' chief counsel to the Commissioner, it was maintained that the House Report on H.R. 8283 "points up with sufficient clarity that it was intended to bar foreign tugs from participating in any way in towing American vessels on an overall voyage from one United States port to another (emphasis added)."¹¹⁵ Notwithstanding this argument, the agency has continued to regard towing in a manner consistent with the September 24, 1970 letter.

A further issue in the application of the towing law is the ability of foreign tugs to provide docking services for foreign ships in U.S. harbors. This activity is technically legal, although surprisingly it has not surfaced as a potential problem for U.S. towing companies until recently.

Representatives of Foss Towing Company (ironically, the same company that originally complained about the provision in a letter in 1937 to the Chairman of the Merchant Marine & Fisheries Committee) succeeded in having language inserted in a miscellaneous Coast Guard bill in November, 1985, that would end the right of foreign tugs to tow foreign vessels between U.S. ports, so that a foreign tug could only tow a vessel in distress.¹¹⁶ The intent of this provision is to mitigate the possibility of a foreign towboat providing docking services in U.S. ports for foreign ships, and based on Customs' past rulings, the agency would still allow foreign tugs to tow foreign barges in continuous foreign voyages, assuming that no merchandise is transported coastwise. The language in the Coast Guard bill also stipulates that a qualified towing vessel must have a coastwise license, which alleviates some of the confusion surrounding the status of the vessel's document.¹¹⁷

Salvage

Canadian vessels were first given the right to undertake salvage operations in U.S. waters in 1878, although the right was limited to U.S. waters contiguous to Canada.¹¹⁸ This measure gave Canadian ships the right to engage in salvage work in U.S. waters "contiguous to the Dominion of Canada" as long as reciprocal privileges were extended to U.S. vessels. The area was not further defined in the statute nor is it clear what originally prohibited

Canadian ships from salvage operations in U.S. waters, unless it was the perception that salvage was an activity that required a license under the 1793 act, and therefore only U.S. ships were qualified for the activity.

The salvage law was amended in 1890 to its present form, without further elaborating on the area which was considered to be "contiguous to the Dominion of Canada."¹¹⁹ The only change made in 1890 was to apply the provisions of the law to certain canals and rivers between the U.S. and Canada.

The 1908 Treaty

For the purposes of salvage by Canadian vessels, the 1908 Treaty between the United States and Canada defined the contiguous area in which Canadian vessels could operate without penalty.¹²⁰ By 1908, therefore, Canadian salvage ships were permitted to operate in a specified area of U.S. waters: namely, along the Atlantic and Pacific coasts within 30 miles of the boundaries, and in commonly shared Great Lakes waters "contiguous to the Dominion of Canada." Ships of nations other than the United States and Canada were not permitted to operate in the U.S. by this Treaty.

The 1940 Salvage Law

Salvage and towing often involve similar operations, and consequently it was felt necessary to include language in the towing bills of 1937 through 1940 to the effect that the towing provisions were not intended to conflict with the

salvage law of 1878, as amended. Whereas the 1878 law and the Treaty of 1908 had outlined areas where foreign ships could undertake salvaging in the U.S., the bills which were introduced from 1937 to 1940 attempted to clarify the areas off-limits to foreign ships. H.R. 8533, the first of the bills, made it illegal for foreign ships to undertake salvaging operations in Great Lakes areas outside that portion covered by the 1908 Treaty.¹²¹

The Administration had two problems with H.R. 8533, one of which related to the area of applicability and the other to the lack of a "safety valve," in case U.S. ships were unavailable to assist a ship in distress. In the latter case, the Maritime Commission argued that, as a coinsurer of some vessels and owner of others, an absolute prohibition against the use of foreign salvage equipment was undesirable because U.S. equipment may not be available in some cases.¹²² It was noted that the Department of Commerce had allowed the use of Canadian salvage equipment in U.S. waters on several occasions for that reason, and the Commission suggested a change permitting the Secretary of Commerce to waive the salvage requirement if necessary.¹²³ The Commerce Department agreed that Canadian salvage vessels ought to be allowed to operate farther than 30 miles from the boundary, provided it was an emergency situation, no U.S. equipment was available, and cargo from wrecks was not transported to U.S. ports by foreign vessels.¹²⁴

The second administration concern related to the area within which foreign ships would be excluded under H.R.

8533. The bill barred foreign ships from any Great Lake or tributary area which was not covered by the 1908 Treaty. Since the Treaty applied to some portions of the Atlantic and Pacific coasts in addition to the Great Lakes, the Maritime Commission reasoned that H.R. 8533 ought to be extended to bar foreign ships from all U.S. territorial waters not covered by the Treaty.¹²⁵ This view was also shared by the Department of Commerce, which opposed the application of H.R. 8533 to just the Great Lakes.¹²⁶

H.R. 200, introduced in 1939, incorporated the change regarding the area of applicability by extending the foreign vessel prohibition to the Atlantic and Pacific coasts of the United States. While the Maritime Commission and the Department of Commerce were pleased with this, the State Department objected on the grounds that it interfered with our treaty obligations to Mexico under the Treaty of June 13, 1935, which provided a reciprocal arrangement whereby ships of either the U.S. or Mexico could undertake salvage efforts in the territorial waters of either nation within 200 miles of the Gulf of Mexico boundary and 720 miles of the Pacific coast boundary.¹²⁷ The State Department noted that H.R. 200 extended the foreign ship ban to the Atlantic and Pacific coasts without mentioning the Mexican Treaty, and it was suggested that the Treaty area be specifically excluded from the bill's provisions.¹²⁸ Further, H.R. 200 did not contain a waiver provision, as requested earlier, and both the Maritime Commission and the Department of Commerce objected to it on these grounds.

Steamship interests were allied with the administration in support of a waiver provision in the salvage law when no U.S. salvage company was available.¹²⁹ A case was cited at the 1940 hearing where an American ship had grounded more than 30 miles south of the Canadian border. Due to the unavailability of U.S. salvage equipment and the time delay in getting departmental permission for use of a Canadian vessel, the grounded ship was a total loss.¹³⁰

An amendment was suggested at the 1940 hearing which incorporated both the waiver provision and reference to the Mexican Treaty.¹³¹ The language of the amendment prohibited the use of foreign salvage vessels on the Atlantic and Pacific coasts, the Gulf of Mexico, and in the Great Lakes, except where our treaty obligations specified otherwise and when the Secretary of Commerce found that no suitable qualified U.S. vessel was available.¹³² One interesting change was made to the amendment language when H.R. 200 was reintroduced as H.R. 8283. The change included Alaska -- then a territory -- in the salvage portion of the bill, in addition to the geographic areas mentioned above.¹³³ However, the Alaska reference, for reasons that are unclear, was stricken from H.R. 8283 in Committee markup and that change was agreed to on the floor of the House on May 6, 1940.¹³⁴ The bill was subsequently signed into law with the Alaska exclusion, so that Alaska was implicitly not brought under the purview of the salvage law and presumably a ship of any flag could perform salvage services there.

Customs stated its position on the applicability of the

salvage statute in a March 8, 1985 letter.¹³⁵ Puerto Rico and the Virgin Islands were held not to come under the law, because they are not "places on the Atlantic coast within the meaning of section 316(d)."¹³⁶ Notwithstanding that Puerto Rico is considered to be a point embraced within the coastwise laws, and salvage is considered by Customs to be a coastwise activity, the lack of statutory wording specifically extending the salvage law to Puerto Rico was cited by the agency as evidence that foreign salvage ships may operate there.¹³⁷ The agency pointed out that the Jones Act had been expressly extended to Puerto Rico (and other U.S. territories, districts, and possessions) by two other laws.¹³⁸ This is somewhat misleading, however, since the laws referred to extend the coastwise laws to these areas, and not just the Jones Act. Since Customs considers salvage to be coastwise trade, there appears to be an inconsistency with respect to its application.

Alaska, on the other hand, must employ U.S. salvage ships in its waters. Despite the obvious Congressional intent to the contrary in enacting the salvage legislation, Customs does apply the salvage requirements to Alaska.¹³⁹ In fact, the law has applied to both Alaska and Hawaii since their admittance to the Union as states. Therefore, it may be said that the salvage portion of U.S. cabotage law applies only to the fifty states of the Union and to none of the territories, districts, or possessions.

A further inconsistency in the administering of the salvage law seems to exist with respect to where U.S.

salvage ships must be built. Although Customs considers salvage to be coastwise trade in nature, a U.S. salvage vessel need not be U.S.-built. The reason for this, according to the agency, is that the language of the salvage law bars participation in U.S. salvage unless the vessel is American. The language does not indicate whether the vessel has to be American-built, and Customs has interpreted this to mean that a foreign-built ship may participate in the salvage industry.¹⁴⁰

This logic could be applied to the towing industry as well, albeit with less success. A U.S.-built vessel is a requirement for participation in the towing industry. The language of the 1940 Towing Act seems to allow towing by vessels that have a U.S. registry or an enrollment and license. As stated in chapter II, a foreign-built vessel has been able to procure a U.S. registry since the Panama Canal Act, which had been in place 28 years before the towing law was enacted. Why, then, cannot a foreign-built, U.S.-registered towboat engage in towing in the United States while a foreign-built, U.S.-registered ship may engage in salvage? Both are activities considered to be coastwise trade. However, through an apparent administrative inconsistency, foreign-built, U.S.-registered towboats are prohibited from engaging in towing, whereas the same is not true for salvage.

We have established, then, that the transportation of anything of value, including passengers, is included in the regime of coastwise trade. Other services that are

provided are not deemed to be coastwise trade in nature, with the exception of towing and salvage. Moreover, the performance of towing and salvage services often carry with them easier participatory requirements, such that foreign-built and foreign-flag vessels may be eligible, in some cases.

NOTES

1. United States Constitution, article 1, section 8.
2. Act of July 4, 1789, ch. 2, 1 Stat. 24.
3. See, for example, the second annual State of the Union address given by President Washington to the Congress in 1790. The text may be found in Fred L. Israel, ed., State of the Union Messages of the Presidents, 1790-1966, vol. 1, New York: Chelsea House - Robert Hector Publishers, 1966, pp. 4-7.
4. Gibbons v. Ogden, 9 Wheat. 1, February, 1824.
5. Ibid., p. 189-190; Debate in the house before the passage of the 1817 cabotage law indicates that Congress fully intended to regulate navigation as well as commerce. Congressman Smith of Maryland held that "... in general, navigation and commerce were considered and used as synonymous terms ..." History of Congress, House of Representatives, January, 1817, p. 783.
6. Harmon v. Chicago 147 U.S. 396 (1893).

7. Id., p. 412.
8. Zeis, p. 4.
9. 1793 Act, sec. 16-17.
10. American State Papers. "Commerce and Navigation," number 220, p. 166. Letter dated December 24, 1818.
11. The 1817 act also provided, in response to British law mandating strict 100% cargo preference between that country and its colonies, a bilateral "cargo sharing" stipulation in that goods, wares and merchandise imported into the U.S. had to be on U.S. vessels or vessels of the nation from which the goods were originating. This law was intended only to extend to the vessels of countries which had similar regulations and, under section 2, it provided for a penalty of forfeiture of the vessel for violations of the importation law.

The further also required all vessels of the United States to pay a fifty cents per ton fee if they were trading between nonadjacent districts of the United States. Vessels licensed to carry on the coastwise trade did not have to pay this duty more than once per year. The provision did not apply to vessels trading between adjacent districts, on navigable rivers, or between Rhode Island and Long Island.

Moreover, the law provided an economic incentive to use American crew, because coastwise-licensed vessels paid a

duty of only six cents per ton on coastwise trips if three-fourths of the crew were American. In addition, U.S. vessels entering ports of the U.S. from foreign voyages paid a duty of fifty cents per ton unless all the officers and at least two-thirds of the crew were American. Act of March 1, 1817, ch. 31, sec. 1.

Other early laws imposing a duty on the tonnage of ships included:

March 2, 1799, chapter 22, section 63, 1 Stat. 627.

Provided that the tonnage duties payable on entry are to be paid before a permit to unload is issued.

May 1, 1802, chapter 45, 2 Stat. 181. Exempted vessels under 50 tons that were engaged in the coasting trade on the Mississippi River from duty.

April 27, 1816, chapter 107, 3 Stat. 310. Recodified existing tonnage duty amounts.

January 14, 1817, chapter 3, 3 Stat. 344. Continued the duty levels as per the Act of July 20, 1790, except for foreign vessels from countries with which U.S. vessels were not permitted to go and trade. The tonnage duty on these ships was set at two dollars per ton.

May 31, 1830, chapter 219, 4 Stat. 425. Abolished the duties for U.S. ships on which all the officers and

two-thirds of the crew were American. It also abolished all the duties for foreign vessels, provided that the vessel's flag country had a similar arrangement for U.S. ships.

August 30, 1842, chapter 270, 5 Stat. 548. Increased by 10% the duty on merchandise imported in foreign bottoms, although it did not change tonnage duties.

12. 4 Attorney General's opinion (O.A.G.) 188, July 20, 1843.
13. Act of February 15, 1893, 52nd Cong., 2nd sess., ch. 117, 27 Stat. 455.
14. U.S. v. 250 Kegs of Nails, 61 Fed. 410 (1894).
15. Act of February 17, 1898, sec. 1, 30 Stat. 248.
16. A letter from the Secretary of Treasury dated February 9, 1898 indicated that coastwise shipments from Seattle to Alaska were being transshipped in Vancouver, using foreign ships on both legs of the voyage. U.S. Congress, Senate, Congressional Record-Senate, February 15, 1898, vol. 31, p. 1729. While Treasury held this to be a violation of the coastwise laws, there was some concern that the courts might not concur. Id.
17. Id. This specific language was seen by Treasury as "a stronger and more explicit statement" of U.S. cabotage law.

18. Compare, for example, the relevant provisions of the Panama Canal Act, detailing documentation requirements, and the Act of February 17, 1898, which prohibited the coastwise shipment of goods and passengers.

19. The Jones Act provides that:

"No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States ... embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States ..."

Merchant Marine Act of 1920, Act of June 5, 1920, ch. 250, 41 Stat. 999.

20. Again, the Alaska trade was a major factor in the inclusion of this wording. Senator Wesley Jones, a strong proponent of the bill, was from the state of Washington, and he had concerns about cargo bound from the continental U.S. for Alaska being diverted to Vancouver for shipment on Canadian vessels. Jones held that "we have a direct competitor with our shipping in Canadian shipping. It seems to me whenever we can legitimately give an advantage to our shipping, we ought to do it." U.S. Congress, Senate, Congressional

Record-Senate, vol. 59, pt. 7, May 20, 1920, p. 7348.

21. Merchant Marine Act of 1920, section 1. See also Clinton H. Whitehurst, Jr., The U.S. Merchant Marine, Annapolis, Maryland: Naval Institute Press, 1983, p. 26.

22. H.R. 10378 stated:

Sec. 29. That no merchandise shall be transported water, or by land and water, on penalty of forfeiture thereof, between points in the United States ... embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and wholly owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 24 of this act. No agent or employee of a common carrier shall check baggage, issue bills of lading, or otherwise arrange for through carriage of property between ports or places in the United States ... embraced within the coastwise laws when all or any part of the carriage is in a foreign vessel, and no person in the capacity of agent or otherwise,

directly or indirectly, by means of a ticket, understanding, order, or any form of contract whatsoever, shall sell or contract to sell to any person the right to travel by water, or by land and water, either directly or via a foreign port, or for any part of the transportation, on a foreign ship between ports or places in the United States ...

U.S. Congress, Senate, Congressional Record-Senate, vol. 59, pt. 7, May 13, 1920, p. 6990.

Interestingly, the bill did not specifically require U.S.-built ships for the passenger-carrying trade, whereas it did for the carriage of merchandise. The reason for this is unclear, especially considering the general nervousness surrounding the penetration of foreign-built ships into the coastwise trade. The bill may have been modelled after the Passenger Ship Act which simply bars foreign vessels, without specifically addressing the construction issue.

23. Id., p. 7348.

24. The passenger section of H.R. 10378 was deleted by the Senate on May 20, 1920 after an amendment was offered by Senator McCumber of North Dakota to have the part stricken from the bill. U.S. Congress, Senate, Cong. Rec. May 20, 1920, vol. 59, pt. 7, p. 7347-7350. He cited the inconvenience to passengers who desired to travel from

Minnesota or other inland U.S. points to Alaska and had to travel through Canada for part of the voyage: " ... if a passenger desires to go by rail on an American railway or Canadian railway to Vancouver, he ought to have a right to buy a ticket through from the Canadian port of Vancouver to an Alaskan port or any other port in our possessions." *Id.*, pp. 7347-7348.

Jones offered to remove the language regarding land transportation to appease McCumber's concerns, but there were other objections to the language. Senator Nelson complained that the language placed an undue burden on travellers. He cited an example of a friend who waited for several weeks in Hawaii for an American ship to take him to the mainland. Since none came, he was forced to take a British ship and pay a \$200 penalty. *Id.*, p. 6810.

25. 590 F.2d 1156, D.C. Cir. (1978). See also Robert W. Gruendel, "The Weakening Grip of United States Cabotage Law," Fordham International Law Journal, vol. 4, 1981, pp. 399-403. Hereafter cited as Gruendel. The Virgin Islands, although part of the United States, do not come within the purview of U.S. cabotage law and are the equivalent of a foreign country. For a further discussion of this, see chapter four.
26. See Gruendel, p. 400.
27. *Id.*, p. 402.

28. Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam: July 7, 1838, 25th Cong., 2nd sess., ch. 191.
29. By the 1793 act, any ship obtaining a license had to be domestically constructed and owned.
30. Providence Daily Journal. June 21 and 22, 1838.
31. Providence Daily Journal. June 24, 25, 26, 27, 1838. It was learned from survivors that the Pulaski's engineer had boasted before the voyage that it would be the fastest trip ever between Charleston and Baltimore. It was believed that the boilers had been strained beyond their limits.
32. Act of May 27, 1848. 30th Cong., 1st Sess., ch. 48. The law was recodified in 1970 and is still in force. 19 U.S.C. 293.
33. Congressional Globe. vol. 17, 30th Cong., 1st sess., April 18, 1848, p. 642.
34. Act of June 19, 1886. 49th Cong., 1st sess., ch. 421 24 Stat. 81.
35. U.S. Congress, Congressional Record. February 3, 1886, vol. 17, part 2, p. 1108. Statement of the Chairman, House

Committee of Shipbuilding and Ship-owning Interests.

36. Act of February 17, 1898. 55th Cong., 2nd sess., ch. 26, 30 Stat. 248.
37. Letter from Secretary of the Treasury L. J. Gage to Senator William P. Frye, Chairman of the Senate Commerce Committee. Congressional Record, vol. 31, pp. 1729-1730, February 15, 1898.
38. London Guarantee & Accident Co. Ltd. v. Industrial Accident Commission of California, 279 U.S. 110, (1928), 124-125; quoted from Gibbons v. Ogden 9 Wheat. 1, 215, et seq.
39. Gibbons v. Ogden 9 Wheat. 215-217.
40. Id., p. 218.
41. Id.
42. City of New York v. Miln, 11 Peters 136-137; Jan., 1837. The case concerned a New York state law enacted in 1824 requiring the master of a ship bringing immigrants into New York to make a report stating the name, age, and last legal settlement of all foreign passengers.
43. Id., p. 139.

44. 4 O.A.G. 270, November 2, 1843.
45. Id.
46. Two passenger cases considered simultaneously by the Supreme Court in 1849 further addressed the principle of state taxing power over vessels in the foreign and interstate trades that had been the focus of the City of New York v. Miln case. Smith v. Turner, Norris v. the City of Boston, 48 U.S. 282-572. In Smith v. Turner, the New York City Health Commissioner was required by New York state law to charge passenger ships in the foreign and coastwise trades with a hospital tax based on the number of passengers and crew on board. The court held that this law was unconstitutional and therefore void. Norris v. the City of Boston was a similar case brought by the master of a Canadian schooner who was required by Massachusetts state law to pay a tax of two dollars per passenger brought from overseas. This law was also held to be unconstitutional and void by the U.S. Supreme Court.
47. *Ravesies v. U.S.*; 35 Fed. Rep. 919; July 24, 1888. Id. The Circuit Court for the Southern District of Alabama reversed and remanded the lower court's decision in this case, but only to the extent that coastwise trade applies only to the seacoast, and not to navigable rivers. The inclusion of passenger transportation in the term coastwise trade was not disputed by the Circuit Court.

48. Shannon v. Streckfus Steamers, 131 S.W. 2d 836 (1939).
49. The Granada 35 Fed. Supp. 892 et. seq., District Court for the Eastern District of Pennsylvania, December 4, 1940.
50. 28 O.A.G. 204, 208.
51. Foreign cruise ships repositioning between Los Angeles and Miami will take passengers with them and make a stop at, for example, Aruba, which is classified by the Customs Service as a non-nearby foreign port.
52. 18 O.A.G. 445 et. seq.
53. Id., p. 446.
54. 28 O.A.G. 204.
55. 19 C.F.R. 4.80a.
56. 29 O.A.G. 318.
57. See London Guarantee & Accident Company Ltd. v. Industrial Accident Commission of California 279 U.S. 109 (1928), where the court ruled that the transport of passengers for hire on pleasure trips is commerce for the purposes of admiralty jurisdiction. Whether the courts would rule that

this is also "coastwise trade" is uncertain.

Congress attempted to bring the cruises-to-nowhere under greater U.S. control in 1965 with a series of bills aimed at safeguarding U.S. passengers from potentially unsanitary and unsafe shipboard conditions. U.S. Congress, House, Hearings before the Merchant Marine Subcommittee on H.R. 2836, 6272, 10109, 10327, August 24, 25, 26, 31, 1965. Although none of the bills would have required a coastwise license to engage in cruises-to-nowhere, the most protective of the bills required the filing of information related to financial responsibility and a guarantee that the foreign operator's rates would not be prejudicial to U.S. operators, as well as a finding that the operation was not detrimental to the commerce of the U.S. Id., p. 3. In addition, one of the bills would have required all cruises to meet the safety standards of U.S. coastwise-qualified vessels, if the enforcing agency deemed necessary. None of the initiatives mustered the political support to be enacted into law.

58. 30 Q.A.G. 44.

59. Id., p. 46.

60. 34 Q.A.G. 340.

61. 36 Q.A.G. 352, August 13, 1930.

62. Id., p. 354.
63. U.S. Customs Service, T.D. 55147(19); T.D. 55193(2). A federal court case also established that the transport of passengers for hire on navigable waters for deep sea fishing is commerce, even if the voyage is to and from the same port. *London Guarantee & Accident Co. Ltd. v. Industrial Accident Commission of California*, 279 U.S. 110 (1928).
64. *Gillentine v. McKeand* 426 F.2d 717 (1970).
65. For an excellent discussion of charterboat law, see Mary Nathalie Peter, "Chartering Recreational Boats in the United States: A Compilation and Analysis of Applicable Federal Maritime Law," (Master of Arts thesis), University of Rhode Island, 1984.
66. Id., p. 67. A person is normally considered a passenger if they contribute in any way to the costs of a voyage.
67. 19 C.F.R. 4.80(a)(1).
68. 19 C.F.R. 4.80(a)(2). The Customs Service classifies nearby foreign ports as those outside the scope of U.S. cabotage law in North America, Central America, some of the West Indies (including the Bahamas, but not including, for example, Aruba), Bermuda, and the Virgin Islands.

69. U.S. Customs Service, unpublished Customs memo dated February 11, 1985. Personal communication with Edward B. Gable, Director of Carriers, Drawback, and Bonds Division, U.S. Customs Service. "Customs Regulations Amendments Relating to Passengers on Foreign Vessels Taken on Board and Landed in the United States," Federal Register, 50:126, July 1, 1985, pp. 26981-26984.
70. 19 C.F.R. 4.80(a)(3).
71. U.S. Customs Service, unpublished decision, File Number 105713, July 14, 1982.
72. The legal regime affecting the transportation of dredge spoil is differentiated from that affecting the activity of dredging.
73. U.S. Customs Service, unpublished decision, File Number 104762, June 27, 1980. See also U.S. Customs Service, unpublished decision, File Number 108252 PH, March 19, 1986.
74. Paul Hegland, Carriers Rulings Branch, U.S. Customs Service, personal communication, March 28, 1986.
75. The purpose of the dredging and transport was to construct artificial gravel islands to protect drilling rigs from shifting ice.

76. U.S. Customs Service, Customs Ruling, June 28, 1983 C.S.D. 83-94, pp. 23-26. For a discussion of what are deemed coastwise points on the Outer Continental Shelf and in the territorial sea, see chapter 4.
77. Great Lakes Dredge & Dock Co., v. Ludwig, 486 F. Supp. 1312 (1980).
78. P.L. 97-389. Act of December 29, 1982, sec. 502, 96 Stat. 1954; 46 App. U.S.C. 883. Foreign-flag incinerator ships were exempted from the Jones Act as long as they were under construction for U.S. owners by May 1, 1982. It is unclear from the statute whether it is the transportation of the waste itself which is exempt, or whether it includes transportation of things of value as well.
79. The foreign dredges Holm, Leviathan, Nereus, and Triton were employed to raise the grade of Galveston Island -- about two thousand acres in all -- an average of eight feet. The project required over 11 million yards of fill. For an excellent report of this project, see Daniel J. Donohue, "The Foreign-Built Dredge Act: Its Passage and Its Place Among Statutory Restrictions on Foreign Competition in the American Dredging Industry," unpublished paper.
80. See Donohue, p. 10.

81. The Act of May 28, 1906 provided in part that:

"A foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States unless documented as a vessel of the United States." Foreign-built Dredge Act. Act of May 28, 1906; ch. 2566, sec. 1; 46 App. U.S.C. 292. Hereafter cited as 1906 act.

In addition, a second section was included which has since been deleted as obsolete. It directed the Commissioner of Navigation to document the five foreign dredges as U.S. ships. Section two of the 1906 law stated:

"That the Commissioner of Navigation is hereby authorized and directed to document as vessels of the United States the foreign-built dredges Holm, Leviathan, Nereus, and Triton, owned by American citizens and now employed at Galveston, and the dredge Sea Lion, now under construction abroad for use at Galveston, on which an American citizen, the contractor at Galveston, has an option." 1906 act, sec. 2.

82. In the former case, a foreign-built dredge could obtain a registry simply by being U.S.-owned and greater than five net tons and would therefore be U.S.-documented.

83. In the Coast Guard documentation regulations, there is a note to the registry section which states that:

"A foreign-built vessel documented under this section is not permitted to engage in dredging ... in the United States ..." 46 C.F.R. sec. 67.13-3 note.

84. Mr. Joseph A. Iglesias, Coast Guard documentation office, personal communication, October 8, 1985.

85. Congressman Grosvenor, the House manager of the dredging bill, stated that:

"... this bill proposes that hereafter, foreign-built dredges shall come under the regular laws of the United States in regard to foreign ships ... and that hereafter all dredges shall be treated as other foreign ships are treated." U.S. Congress, House, Cong. Rec. vol. 40, p. 7029 (1906). When Congressman Loudenslager asked what portion of the bill prevented the future use of other foreign dredges, Grosvenor replied that the whole bill did.

It is unclear, when section 2 of the dredging law was repealed, whether the legislators who changed the law

intended that any foreign-built dredge could thereafter be used to dredge in the United States, provided that it had proper documentation.

86. Of course, if the dredge was foreign-built it would not be eligible for a coastwise license anyway.
87. U.S. Customs Service, C.S.D. 85-11, Customs Bulletin and Decisions, 19:7, February 13, 1985, p. 20. See also U.S. Congress, House, Cong. Rec. vol. 40, p. 7029 (1906).
Customs and the Coast Guard share oversight of the dredging law.
88. U.S. Customs Service, C.S.D. 85-11, pp. 20-21.
Interestingly, Customs also applied the dredging statute to the Outer Continental Shelf under the OCS Lands Act.
89. 41 Q.A.G. 189, 199-200, (August 7, 1963).
90. Great Lakes Dredge & Dock Co. v. Ludwig, 486 F. Supp. 1305 (1980); Interestingly, the Coast Guard issued the dredge a registry with an endorsement prohibiting it from engaging in the coastwise trade, although not specifically prohibiting it from dredging in the United States. The reasoning used by the court in this case bears some examination. The plaintiffs argued that the Jones Act proviso barring vessels at one time foreign-registered from engaging in the coastwise trade is broader than the main body of the

statute, which refers only to the transport of merchandise, and dredging should be included within the meaning of coastwise trade. The court, in rejecting that argument, held that "a cardinal rule of statutory construction is that the scope of a proviso is no broader than the language it modifies." Using that reasoning, one might wonder why an American-built ship, at some point registered overseas, could not legally obtain a coastwise license, provided only that it did not carry merchandise.

91. Id., p. 1312.

92. An earlier Customs Court decision had also tackled the issue of dredge documentation and had held that "the use to which the dredge in question was put, cannot fairly be said to come within the ordinary common definition of a vessel documented under the laws of the United States to engage in the foreign or coasting trade ..." Standard Dredging Co. v. U.S., T.D. 48136 (1936).

93. The statute provided:

"That all steam tug-boats, not of the United States, found employed in towing documented vessels of the United States plying from one port or place in the same to another, shall forfeit and pay the sum of fifty cents per ton on the admeasurement of every such vessel so

towed by them respectively, as aforesaid, which sum may be recovered by libel or suit." An act further to prevent smuggling and for other purposes, section 21, July 18, 1866, 39th Cong., 1st sess., chapter 201, 14 Stat. 182.

94. The 1866 act was amended by adding the following two provisos:

"Provided, that this section shall not apply, or be held to apply, to any case where the said towing in whole or in part is within or upon foreign waters. And provided, that any foreign railroad company or corporation, whose road enters the United States by means of a ferry or tugboat, may own such boat, and it shall be subject to no other or different restrictions or regulations in such employment, than if owned by a citizen of the United States." An act to amend the twenty-first section of "an act further to prevent smuggling and for other purposes," approved February 25, 1867, 39th Cong., 2nd sess., chapter 78.

95. U.S. v. Steam Tug Pilot, 50 Fed. Rep. 439, April 19, 1892. In a case decided simultaneously, the court reversed a lower court ruling holding that a foreign tug was liable for penalties for towing an American vessel from the high seas

to Tacoma, when part of the towing was in Canadian waters. However, the court hinted that if it had been alleged that a foreign tug had entered Canadian waters collusively for the purposes of evading the towing statute, a different ruling may have been issued.

96. U.S. Congress, House, Towing Between American Ports. Hearings before the Committee on Merchant Marine & Fisheries. U.S. House of Representatives, 75th Cong., 2nd sess., on H.R. 8533, April 14, 1938, U.S. Government Printing Office: Washington, 18 pp. Hereafter cited as 1938 Towing Hearing.
97. U.S. Congress, House, H.R. 8533, 75th Cong., 2nd sess.; A bill to amend section 4370 of the Revised Statutes of the United States (U.S.C., 1934 edition, title 46, sec. 316).
98. Id., section (a).
99. E.S. Land, Chairman of the U.S. Maritime Commission, pointed out in a letter that the \$250 penalty would be less than the existing law anytime the towed vessel was greater than 1000 tons. Letter to Schuyler O. Bland, Chairman of the Merchant Marine & Fisheries Committee dated March 4, 1938. Hereafter cited as March 4, 1938 letter.
100. Letter from J. U. Johnson, Acting Secretary of Commerce to Chairman Bland, dated March 15, 1938. This wording was

incorporated into the legislation that was finally enacted into law.

101. See 1938 Towing Hearing. Statement of Ralph Emerson, Representative of the maritime unions of the Committee for Industrial Organization. See also, letters from Foss Co., Inc., to Chairman Bland dated October 30, 1937, and December 10, 1937; letters from the Great Lakes Towing Company to Chairman Bland dated December 7, 1937 and March 16, 1938; and letter from Atlantic Coast & Gulf of Mexico Tow Boat Association to Chairman Bland dated April 15, 1938.

102. Id. Because of the wage disparities between U.S. tugs and Canadian tugs on the Great Lakes Canadian tugs were able to operate more cheaply than U.S. tugs and undercut U.S. rates. U.S. Congress, House, Towing Between Ports by Foreign Vessels. Hearings before the Committee on Merchant Marine & Fisheries. 76th Cong., 3rd sess.; See statement of H. N. Hobart of Great Lakes Towing Company, on H.R. 200, January 23, 1940, U.S. Government Printing Office: Washington, D.C., pp. 10-11. Hereafter cited as 1940 Towing Hearing. U.S. wages were estimated to be \$3666.60 per month per ship, while Canadian wages were \$945 per month.

103. See Foss letter of December 10, 1937 in 1938 Towing Hearing. This provision survived the legislative process and is still part of U.S. coastwise law at 46 App. U.S.C. 316(a).

104. See statement of Carleton W. Meyer, commerce counsel, New York Central System at 1938 Towing Hearing.
105. See 46 App. U.S.C. 883, third proviso, An act to amend section 27 of the Merchant Marine Act of 1920, 74th Cong., 1st sess., ch. 355, July 2, 1935.
106. See March 4, 1938 letter.
107. H.R. 200, A Bill to Amend Section 4370 of the Revised Statutes of the United States (U.S.C. 1934 edition, title 46, sec. 316).
108. See the comments of the Department of Commerce on H.R. 8283, Letter to Chairman Bland, March 6, 1940, in Towing Between American Ports by Foreign Vessels. House Report 2040, 76th Cong., 3rd sess., May 1, 1940, pp. 3-4. Hereafter cited as 1940 Towing Report. The language in question stated that a person owning a qualified tugboat had to be a citizen "within the meaning of the laws respecting the documentation of vessels," as opposed to the earlier language requiring that person to be a "citizen of the United States." Several other changes were made to the salvage portion of the bill.
109. U.S. Customs Service, T.D. 54600 (57), vol. 93, May 22, 1958. In a similar ruling issued in 1979, the agency decided that a foreign-built, U.S.-owned tug could not engage in towing services within a harbor. August 15, 1979.

case number 103910. The ruling cited an earlier holding that docking and undocking services provided within a harbor are towing within the meaning of the towing statute. Case number 102240, November 4, 1976. It is unclear why this interpretation was necessary, given the express language to that effect in the statute. In its analysis of the 1979 ruling request, Customs again asserted that a tug had to be coastwise-qualified in order to engage in towing, consistent with its 1958 ruling. See August 15, 1979 ruling.

110. U.S. Customs Service, Case number 104220, letter dated October 17, 1979. The firm that requested the ruling argued that since the anticipated towing would be done by a U.S.-owned tug with a valid Coast Guard document, the operation should be allowed, even if the tug was not coastwise-qualified.
111. U.S. Customs Service, letter dated April 7, 1954, file number 216.131. See also letter dated July 9, 1956, file number 216.132; letter dated January 19, 1954, file number 3-70113 and undated letter, file number 216.131.
112. U.S. Customs Service, letter dated October 4, 1967, file number MS 216.132 R. Other rulings issued on the subject include letter dated September 24, 1965, file number MS 212.01 M; letter dated June 26, 1969, file number MS 212.01 M. For towing voyages via a foreign port, see letter dated November 12, 1964, file number MS 216.132 which held that

the tow was in violation when the facts showed that it was substantially continuous voyage; and letters dated August 3, 1966, file number MS 216.132 R, and June 9, 1960, file number MA 216.132, which held that no violation occurred when the facts demonstrated that the voyage via a foreign port was essentially two separate voyages.

113. U.S. Customs Service, letter dated August 18, 1970, file number CR 212.01 PH.
114. U.S. Customs Service, letter dated September 24, 1970, file number CR 212.01 PH.
115. U.S. Customs Service, memorandum dated June 2, 1966. See letter dated August 18, 1970, where it was pointed out that the in rem penalty provided for in the towing statute was persuasive evidence that Congress intended the law to apply to any tow between U.S. ports because that type of penalty is only collectible when the offending tug is in U.S. waters. File number CR 212.01 PH.
116. H.R. 2466, A bill to make miscellaneous changes in laws affecting the United States Coast Guard, and for other purposes. Staff working draft, November 27, 1985. pp. 16-17.
117. Id., p. 16. The bill was vetoed by the President in March, 1986 because of other provisions.

118. As enacted, the law stated:

"That Canadian vessels of all descriptions may render aid or assistance to Canadian or other vessels wrecked or disabled in the waters of the United States contiguous to the Dominion of Canada: Provided that this act shall not take effect until proclamation by the President declaring that the privilege of aiding American or other vessels wrecked or disabled in Canadian waters contiguous to the United States has been extended by the Government of the Dominion of Canada and declaring this act to be in force: And provided further, That this act shall cease to be in force from and after the date of proclamation by the President to the effect that said reciprocal privilege has been withdrawn or revoked by said Government of the Dominion of Canada." An act to aid vessels wrecked or disabled in the waters coterminous to the United States and the Dominion of Canada, June 19, 1878, chapter 324, 20 Stat. 175.

119. The present wording of the statute in the Code is:

"Canadian vessels and wrecking appurtenance may

render aid and assistance to Canadian or other vessels and property wrecked, disabled, or in distress in the waters of the United States contiguous to the Dominion of Canada. This section shall be construed to apply to the canal and improvement of the waters between Lake Erie and Lake Huron, and to the waters of the Saint Mary's River and Canal: And provided further, That this section shall cease to be in force ..." 46 App. U.S.C. 725.

120. The pertinent part of article II of the treaty of May 18, 1908 provides:

"... that vessels and wrecking appliances, either from the United States or from the Dominion of Canada, may salvage any property wrecked and may render aid and assistance to any vessels wrecked, disabled or in distress in the waters or on the shores of the other country in that portion of the St. Lawrence River through which the International Boundary line extends, and, in Lake Ontario, Lake Erie, Lake St. Clair, Lake Huron, and Lake Superior, and in the Rivers Niagara, Detroit, St. Clair, and Ste. Marie, and the canals at Sault Ste. Marie, and on the shores and in the waters of the other country along the Atlantic and

Pacific coasts within a distance of thirty miles from the international boundary on such coasts." Article II of the Treaty with Great Britain dated May 18, 1908, 35 Stat. 2036.

Lake Michigan is the only Great Lake where the salvage rights are reserved exclusively to American vessels. Hereafter cited as 1908 Treaty.

121. Section (d) of H.R. 8533 provided that, in addition to not superceding the Act of June 19, 1878 or article II of the 1908 Treaty:

"That no foreign vessel shall, under penalty of forfeiture, engage in salvaging operations in any other portions of the Great Lakes, their connecting and tributary waters, including the portion of the Saint Lawrence River through which the international boundary line extends, than those specified in article II of the treaty above referred to."

122. March 4, 1938 letter. As evidence, Chairman Land produced correspondence with the American-Hawaii Steamship Company that outlined the inadequacy of U.S. salvage facilities on the west coast. Letter from the U.S. Maritime Commission to the Secretary of Commerce dated November 11, 1937. Hereafter cited as November 11, 1937 letter.

American-Hawaii had requested permission to use Canadian salvage equipment stationed at Victoria, British Columbia.

123. See March 4, 1938 letter.

124. See letter from the Secretary of Commerce to the Chairman of the Maritime Commission, dated December 9, 1937. Hereafter cited as December 9, 1937 letter.

125. See March 4, 1938 letter.

126. See letter from the Secretary of Commerce to Chairman Bland, dated March 15, 1938. Hereafter cited as March 15, 1938 letter.

127. Article I of the treaty states, in part, that:

"... vessels and rescue apparatus, public or private, of either country, may aid or assist vessels of their own nationality, including the passengers and crew thereof, which may be disabled or in distress on the shores or in the territorial waters of the other country ..."

Article I of the Treaty of June 13, 1935 between the United States and Mexico, 49 Stat. 3359. Hereafter cited as 1935 Treaty.

The provisions of this treaty are in force within 200 miles

of the boundary on the Gulf of Mexico coast and 720 miles on the Pacific coast. An obvious difference between this treaty and the Canadian treaty is that under the latter, ships of either country may salvage vessels of either country, whereas under the Mexican Treaty, ships may salvage only vessels of the same country.

The State Department had reviewed the impact of H.R. 8533, the original bill, on the Mexican treaty and, not surprisingly, found that there would be no impact, since it applied only to the Great Lakes. See letter from the Secretary of State to Chairman Bland dated April 14, 1938.

128. Statement of William R. Vallance, 1940 Towing Hearing. Hereafter cited as Vallance. The Maritime Commission concurred in this in a letter to Chairman Bland dated March 27, 1939.
129. Statement of Captain W. J. Peterson, Pacific American Steamship Association and the Shipowner's Association of the West Coast, at 1940 Towing Hearing.
130. Id. See Vallance.
131. See 1940 Towing Hearing, statement of Captain Sweet, senior navigation officer of the Department of Commerce, p. 14. The amendment he proposed was made part of H.R. 200 and also the final bill, H.R. 8283 and was enacted into law virtually intact.

132. Id. Oversight of the law was shifted from the Secretary of Commerce to the Commissioner of Customs under Reorganization Plan Number 3 of 1946, sections 101-104.
133. See 1940 Towing Report, p. 6.
134. U.S. Congress, Congressional Record, vol. 86, pt. 5, May 6, 1940, p. 5605.
135. U.S. Customs Service, letter to the Maritime Institute for Research and Industrial Development, case number 107038 PH.
136. Id. See also Customs telegram dated June 6, 1953; and Customs ruling of June 10, 1974, case number 100949.
137. Id.
138. 48 U.S.C. 744 and 46 App. U.S.C. 877.
139. Id.
140. U.S. Customs Service, Carrier Rulings Branch, Paul Hegland, personal communication, April 7, 1986.

Chapter IV

THE COASTWISE AREA

Some attempts have been made to define what is meant by a coastwise activity, both historically and at present, and to demonstrate what types of ships may engage in a coastwise activity. The geographic area of application of the coastwise trade laws, or the "coastwise area," is also important to this discussion. Generally speaking, when a ship is involved in a cabotage activity, such as the carriage of merchandise, between points in the coastwise area, such as Boston and Philadelphia, the ship is engaged in the coastwise trade and must be qualified to carry on that trade. On the other hand, if the ship is operating outside the coastwise area, the ship need not be coastwise-qualified (see Appendix D, p. 194).

There has not always been a clear consensus regarding what the coastwise area should be. In fact, because of the vague wording of early statutes, much of the federal policy toward the coastwise area was formulated in the courts. The Constitution provided little guidance to early policymakers, stating only that Congress has the right to regulate interstate and foreign commerce, without delimiting a

seaward boundary between state and federal control.¹ In an 1824 Supreme Court case, that boundary was held to be the navigable waters of the United States, so that federal control over navigation extended within state territorial waters.²

The implication for the coastwise trade at the time was that federal law applied to coastal shipments in navigable waters whether or not the shipment was interstate. In other words, a non coastwise-qualified ship could not operate in the coastwise trade simply because it was involved in intra-state commerce. In fact, another Supreme Court case the following year sharpened the definition of the coastwise area by including within that area "commercial intercourse, carried on between different districts in different states, between different districts in the same state, and between different places in the same district, on the sea-coast, or on a navigable river."³

Where Congress had left some ambiguity concerning the geographical application of the coastwise trade laws, the federal courts made it clear that they should apply to the navigable waters of the coast and rivers of the United States.⁴ *Ravesies v. U.S.* (1889) did much to clear up the application of coastwise trade law to navigable rivers. At least three cases from the mid 19th century held federal law inapplicable to navigation on a river completely within a state, despite an earlier ruling to the contrary.⁵ It might be argued that *Ravesies v. U.S.* scored something of a victory for federal control over inland navigation by

applying federal law to "coasting trade vessels bound from a district in one state to a district in the same or any other state, whether they navigate rivers or the seacoast proper."⁶

Clearly then, the courts played the dominant role in shaping the extent of the coastwise area, or the area in which U.S. coastwise law would apply. Court involvement in this aspect of cabotage policy resulted directly from the ambiguity and inconsistency of statutory wording. For example, the Act of March 1, 1817 prohibited the transport of merchandise in foreign vessels between American "ports" and restricted importation of merchandise into the U.S. from foreign "ports or places." The Act of July 7, 1838 regulated the transport of merchandise and passengers "in or upon the bays, lakes, rivers or other navigable waters." The Passenger Ship Act provided that only U.S. ships could transport passengers between "places or ports" in the United States. Section 27 of the Merchant Marine Act of 1920 prohibits transport of merchandise in foreign vessels between "points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws." This type of wording led to uncertainty in the application of the laws and abuses by operators who were able to take advantage of loopholes. For example, the Passenger Ship Act was amended in 1898 to include the transport by way of a foreign port as a prohibited action by a foreign passenger vessel. The reason for this policy change was the growing tendency of operators to transship

merchandise destined between U.S. ports at a foreign port, using foreign vessels for both legs of the voyage.⁷ Thus, domestic shipping in the navigable waters of the U.S. was brought under the purview of the coastwise trade laws primarily by the courts.

Territories and Possessions

Presumably, it has always been clear what was meant by the United States when that parameter was used in a cabotage statute. However, things became less clear when considering U.S. possessions and territories. For that reason, laws have been enacted specifically to extend the coastwise laws to possessions as they were acquired. For example, the Puerto Rico Organic Act extended to that island "all the benefits of the coasting trade of the United States; and the coasting trade between Puerto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States."⁸

Similarly, the trade from Alaska and Hawaii to the U.S. was reserved for coastwise qualified vessels.⁹

All territories and possessions of the U.S. were covered by a blanket provision in 1920 which included them within the coastwise area and which meant that any ship carrying on the coastwise trade to these areas had to be coastwise-qualified.¹⁰ One implication of this policy is that the federal government was attempting to strengthen the protectionist umbrella over the coastwise trade by mandating

greater involvement of coastwise-qualified ships in U.S. shipping. Alternatively, this policy was seen as a thinly veiled form of colonialism, whereby distant islands were forced to suffer the higher costs of U.S.-flag ships simply because they were a U.S. possession.¹¹

Therefore, the "coastwise area," as it is referred to, includes the navigable internal waters of the United States and its territories and possessions, except those areas specifically and statutorily excluded, as will be seen. The coastwise trade of these exempted areas may, depending on the type of exclusion, be served by foreign-flag or U.S.-flag, foreign-built ships.

Territorial Sea

Also included within the coastwise area is the U.S. territorial sea, under customary international law. Any structure or vessel, whether floating or anchored, in the territorial sea is considered part of the coastwise area by the Customs Service. In addition, some structures beyond the territorial sea may be included in the coastwise area in certain circumstances, as will be seen below.

The Outer Continental Shelf

Of growing concern in recent years is the extent to which structures and vessels on the Outer Continental Shelf (OCS) qualify as points or places in the United States for the purposes of our cabotage laws. Technological advances and the seaward search for oil have caused an increase in

the number and complexity of ships servicing offshore oil rigs. Several questions have arisen as to the applicability of coastwise law to these service type ships, which include diving inspection and survey boats, and icebreakers, among others. On one hand, the Customs Service has held that a ship of any nation may engage in offshore oil rig service operations, as long as the operation is not a coastwise activity. On the other hand, U.S. supply boat interests would like to see the coastwise laws applied to this industry, to ensure U.S.-flag participation. There is at present some degree of foreign-flag participation in these non-transportation services. The resolution of these issues may prove to be extremely important to the U.S. supply boat industry, since that industry stands to lose a great deal of economic benefit attributable to shipbuilding, manning, and ship operation if the offshore oil and gas industry experiences future growth.

The Outer Continental Shelf Lands Act (OCSLA) extended the application of the Constitution, laws, and the civil and political jurisdiction of the United States to the subsoil and seabed of the OCS and to all artificial islands and fixed structures erected there for the purpose of exploring for, developing, removing, or transporting the resources.¹² The Customs Service subsequently ruled that the coastwise trade laws applied to mobile drill rigs during the time they were attached to the OCS.¹³ In other rulings, Customs held that the laws also applied to drilling platforms and other artificial islands under section 4a of

the OCSLA.¹⁴ Simply stated, OCS equipment in offshore waters was as much a coastwise point as the port of New York. This was a significant extension of U.S. cabotage policy inasmuch as it meant that any ships trading between the rigs and any other coastwise point must qualify under American cabotage law.

An amendment to the OCSLA was passed into law on September 18, 1978.¹⁵ The amendment changed section 4a of the Act in that it included within federal jurisdiction structures permanently or temporarily attached to the OCS seabed.¹⁶ This change brought anchored vessels, including ships and other equipment temporarily in place, within the purview of the cabotage laws. The legislative history indicates that Congress intended no change to existing law as far as artificial islands and structures, fixed platforms, and mobile drilling rigs attached to OCS were concerned.¹⁷ In other words, this equipment was still considered to be a coastwise point; the change made by the 1978 amendment was that any equipment temporarily attached to the seabed for the purposes of oil and gas exploitation, was also to be considered a coastwise point.

The 1978 amendment was tested a number of times in the next few years. On October 22, 1980, the Customs Service ruled that a marker buoy in place on the OCS was an "installation" for the purpose of the OCSLA and the coastwise trade laws, namely the Jones Act. A marker buoy is secured to the seabed temporarily and is used to mark an offshore site which is to be drilled. Customs made the

ruling because of the wording in section 4a of the OCSLA, as amended, which stated that "devices temporarily attached to the seabed for the purposes of exploring for resources ..." are considered coastwise points.¹⁸ The significance of this holding was that it required a launch barge being used to transport a drill jacket from California to a marker buoy on the OCS to be coastwise-qualified. Drill jackets are the frame derrick-like structure that hold the drilling platform.

The main problem was that there were no U.S.-built launch barges in existence and, according to companies involved, no shipyards with the expertise to build them. In fact, only four "super launch barges" (greater than 500 feet and capable of deepwater launching) existed in 1984, and all were foreign-built.¹⁹ To circumvent the 1980 ruling, American drill jacket fabricating companies began towing their drill jackets on foreign-built barges from the U.S. mainland to open water and launching them in an area which was not marked by a buoy, and then making a secondary tow to the anticipated drilling site, which was indicated by a marker buoy.²⁰

Complicating the situation was the competition from Japan and Korea in drill jacket construction. Of the seven deepwater oil exploration platforms installed or contracted for on the U.S. west coast between 1980 and 1984, five were won by Japanese builders, one by an American builder, and one by a Korean builder.²¹ A drill jacket built in Japan or Korea may be transported from its place of manufacture to

the American OCS by a foreign launch barge, regardless of whether there is a marker buoy at the launch site or not, because it is being transported in the foreign trade. Notwithstanding higher costs and logistical problems associated with a trans-Pacific tow, American fabricators are concerned about the effect of this competition.

Under this scenario, Customs reversed its 1980 ruling and held that marker buoys do not constitute a coastwise point for the purposes of the coastwise trade laws.²² On the other hand, Customs has continued to hold that a capped or plugged exploratory well that will be produced is a coastwise point, regardless of whether there is a marker buoy at that point or not.²³

Warehouse Vessels

Customs issued two other significant and controversial rulings regarding coastwise trading privileges on the OCS. The first was on December 6, 1984, and held that:

1. A warehouse vessel, used to supply a drill rig on the OCS off Alaska, may be foreign flag; and
2. Supply vessels that transport foreign-origin goods from the anchored warehouse vessel to the drill rig do not need to be coastwise-qualified.²⁴

A warehouse vessel is essentially a floating storage shed which is used to support offshore drilling operations. One benefit of using such a vessel is that the equipment and

supplies necessary to sustain operations are close to the rig, rather than in port. The question that had arisen was whether these warehouse vessels, while tethered to the ocean floor, were considered coastwise points. The effect of the December 6, 1984 ruling was that anchored warehouse vessels on the OCS were not considered by Customs to be coastwise points for the purposes of the cabotage laws and, therefore, foreign-flag supply vessels could be used between the drill rig (a coastwise point) and the anchored warehouse ship (a non coastwise point), the same as if it were foreign trade.

The ruling drew a substantial amount of protest from the American supply boat industry, which claimed that Customs was unfairly favoring foreign interests, contrary to the intent of Congress.²⁵ In a subsequent letter to Customs, several members of the Merchant Marine & Fisheries Committee urged the agency to reverse its position on the status of anchored warehouse vessels.²⁶ They indicated the intent of Congress to include anchored warehouse vessels within the meaning of "structures permanently or temporarily attached to the seabed for the purposes of exploring for ... resources."²⁷ Based on this "legislative intent," Customs did reverse its position on the anchored warehouse vessel issue on May 9, 1985, holding that such a ship does constitute a point for the purposes of the Jones Act and other coastwise trade statutes.²⁸ This type of legislative action and wavering by the Customs Service raises obvious concerns regarding the clarity of the statutes as they now stand and, in fact, the agency has stated that it would

welcome Congressional clarification of the applicability of the coastwise laws to the outer continental shelf.²⁹

The second ruling was requested by Amoco Production Company and concerned their planned OCS exploration operations. Amoco had committed over \$168 million to lease a portion of the Navarin Basin for oil exploration, and planned to use two foreign-flag "warehouse ships" to support exploration work during the summer of 1985.³⁰ The warehouse ships consisted of a converted bulk carrier of Singapore registry, and a Danish registered product tanker.³¹ In addition to the warehouse ships, Amoco hired four supply vessels: two U.S.-flag and two foreign-flag. The purpose of the ruling was to determine whether Amoco could service drifting warehouse ships on the American OCS with foreign supply boats. The depth of water in the area precluded anchoring, according to Amoco officials.³² The Customs Service ruled on January 17, 1985 that this was legal, although any replacement supplies brought from Alaska to the drill rigs, whether or not via the warehouse ships, would have to be on the U.S. supply boats. In addition, any time the drifting warehouse ships are in the territorial sea, they would be considered U.S. coastwise points, regardless of whether they are anchored or not, and any transfer from that point would have to be on U.S. supply boats.

The action by Amoco was described by many officials in government and the industry as a deliberate circumvention of the coastwise trade laws and the ruling, although

technically a correct one, exacerbated the controversy within the industry.³³

Other OCS Activities

Customs has also ruled that in some cases the transport of dredged gravel from one point on the OCS to another point does not need to be done by coastwise-qualified vessels in some cases. The rationale behind the ruling is that the gravel -- used to create a "gravel island" to protect drilling structures in ice-covered areas -- does not constitute an "island" or "structure" until it rises above the mean high water level.³⁴ Industry officials argue, however, that the purpose of the gravel island is to assist in the exploration of resources, and its construction should be limited to U.S. coastwise-qualified ships.³⁵

In addition, Customs has ruled that ships providing services to offshore oil facilities need not be coastwise-qualified if they are not transporting material or passengers between coastwise points. Foreign ice breaking ships, diving support ships, and scientific vessels have been used to this end.³⁶ Therefore, a legal regime has been applied to the OCS whereby transportation services are considered to be coastwise trade, while other types of service are not. Moreover, a coastwise point on the OCS has been defined as any vessel or structure attached permanently or temporarily to the seabed which is in place for the purpose of oil and gas exploration, production, or development.

In the event of expanding exploitation of OCS oil and gas resources, the clear potential exists for a growing employment of support ships such as those mentioned above. On the one hand, U.S. support ship interests have argued that foreign vessels will invade this sector of the maritime unless it is reserved to U.S. vessels. Further, it is claimed, those support services should be viewed as a type of coastwise trade, and therefore should already be reserved to U.S. ships.

On the other hand, users of these maritime service vessels have a clear interest in maintaining a free market choice in what nationality equipment they will employ. In the middle is the Customs Service, which must rule whether certain activities constitute coastwise trade. It is perceived by some that Customs' policy toward the OCS is favoring foreign shipping interests to the point where it may allow them into a trade that should be protected. The rulings they have issued on the OCS have, while following the letter of the law, often been seen as contrary to the best interests of the U.S. merchant marine. Clearly, a more focused and comprehensive policy should be developed regarding the applicability of U.S. coastwise trade laws to the OCS.

NOTES

1. United States Constitution. Article 1, sec. 8.
2. Gibbons v. Ogden, 9 Wheat. 220 (1824).
3. North River Steamboat Co. v. Livingston, 3 Cow. 747 (1825).
4. In an 1889 case, the Circuit Court of Appeals for the Southern District of Alabama overturned a lower court ruling which exempted river navigation from the coastwise trade laws. The Circuit Court held that exempting trade carried out on the navigable rivers from "coastwise trade" was too narrow an opinion. Ravesies v. U.S., 37 Fed. Rep. 447, (1889).
5. In U.S. v. Morrison, 26 Fed. Cas. 579 (1846), the court allowed the operation of an unlicensed river ferry within a state, in violation of federal law. Judge Wells held that since the license required under the law was a coasting license, then the act could not apply to the river ferry, since "neither the phrase 'coasting trade,' nor the word 'coasting,' nor 'trade,' could with any propriety be applied to a ferry across a river." Part of the reasoning cited in

this case was the inconvenience to small ferries which might be forced to leave their employment twice a year and travel to be inspected, perhaps adding costly and time consuming regulations to their employment. The holding effectively removed all river ferries from the purview of existing coastwise trade law, and may have had interesting consequences for the make-up of inland fleets were it not overturned. Judge Wells issued a similar ruling in 1852, stating in part that the Constitution, in granting to Congress the right to regulate commerce, does not also grant it the right to regulate navigation. Here he clearly refuted the Supreme Court's holding in *Gibbons v. Ogden*.

In an analagous case from the District Court for the District of Maine, the court upheld a state law granting exclusive navigation rights to the upper reaches of the Penobscot River to a single operator. *Veazie v. Moor*, 14 L. Ed. 567 (1852). The defendants were granted a 20 year contract after they had done improvement work to a river channel which was above four dams and inaccessible to the open sea. The court reasoned that since the river was entirely within the state of Maine, the commerce clause of the Constitution was not violated.

6. *Ravesies v. U.S.*, 37 Fed. Rep. 448 (1889).
7. Congressman Payne expressed frustration at the practice of shipping goods from Seattle to Vancouver on an American ship (about 90 miles) and then transferring them to a foreign

ship for the voyage to Alaska (about 900-1000 miles). See U.S. Congress, House, Cong. Record, House vol. 31, Feb. 15, 1898, p. 1729. See also U.S. v. 250 Kegs of Nails, 61 Fed. 410 (1894), where merchandise was shipped from New York to Antwerp on one foreign vessel and then reshipped on another foreign vessel to California.)

8. Puerto Rico Organic Act, April 12, 1900, ch. 191, section 9, 31 Stat. 79; 48 U.S.C. 744.
9. See Revised Statutes 4358 for Alaska and 31 Stat. 141, sec. 98 for Hawaii.
10. Merchant Marine Act of 1920 ch. 250, sec. 21, 41 Stat. 997, codified at 46 App. U.S.C. 877.
11. See Zeis, p. 122.
12. Outer Continental Shelf Lands Act, sec. 4(a), August 7, 1953. 43 U.S.C. 1333a(1)). The purpose of the Act was, in part, to see to it that the subsoil and seabed of the OCS "appertain to the United States and are subject to its jurisdiction, control, and power of disposition ..." Id. sec. 3.
13. U.S. Customs Service, TD 54281(1), Jan. 9, 1957.
14. U.S. Congress, House, Committee on Merchant Marine &

Fisheries, U.S. Customs Service, Hearing before the Oversight and Investigations Subcommittee, July 23, 1985.

Hereafter cited as Customs Oversight Hearing. Testimony of Edward B. Gable, Director of Carriers, Bonds, and Drawback Division, U.S. Customs Service.

15. Outer Continental Shelf Lands Act Amendments, September 18, 1978, P.L. 95-372, 92 Stat. 629. The amendments were prompted in part by concerns over dependence on foreign oil. See the Congressional Findings in sec. 101 of the Act, where Congress found that "demand for energy in the United States is increasing and will continue to increase for the foreseeable future." 43 U.S.C. 1801.

The legislative history of that portion of the amendments affecting the OCS transportation regime indicates that Congress intended to extend federal law to all "devices in contact" with the seabed. U.S. Congress, House, House Report 95-590, p. 128. Printed in U.S. Code Congressional and Administrative News, vol. 3, p. 1534. The OCSLA as amended, therefore, brought within the purview of American cabotage law "drilling ships, semi-submersible drilling rigs, and other watercraft, when they are connected to the seabed by drillstring, pipes, or other appurtenances, on the OCS for exploration, development or production purposes." Id.

16. Id., sec. 4(a), 43 U.S.C. 1333(a).

17. U.S. Congress, House, House Report No. 95-590, p. 129; Conference Report No. 95-1474, p. 80, 124(note 1)).
18. U.S. Customs Service, ruling of October 22, 1980.
19. U.S. Congress, House, Committee on Merchant Marine & Fisheries, Hearing before the Panama Canal and Outer Continental Shelf Subcommittee, March 21, 1984, p. 34, Serial No. 98-36.
20. Id., p. 36. In testimony, an official from Kaiser Steel, a drill jacket fabricating company, called this process "inefficient and hazardous." The two-tow practice raises another point, unaddressed at the hearing: the Jones Act forbids the transport of merchandise between coastwise points on foreign vessels for any part of the voyage, and this would seem to make the Kaiser practice illegal.
21. Ibid., p. 32.
22. U.S. Customs Service, C.S.D. 84-96; Letter to Carroll Hubbard, Chairman of the Panama Canal and Outer Continental Shelf Subcommittee.
23. U.S. Customs Service, C.S.D. 81-214, May 6, 1981.
24. U.S. Customs Service, ruling issued December 6, 1984. It should be remembered that domestic-origin supplies would

still have to be carried on coastwise-qualified ships, whether or not the warehouse vessel was considered a coastwise point. The reason is that the overall transportation would be coastwise, from a U.S. port to the rig itself.

25. Letter from the Transportation Institute to Walter B. Jones, Chairman of the Merchant Marine & Fisheries Committee, dated July 23, 1985. Hereafter cited as Transportation Institute Letter. See also testimony of Captain William Mayberry of the Offshore Marine Service Association at the Customs Oversight Hearing.
26. Letter to the U.S. Customs Service from Congressmen Walter B. Jones, Billy Tauzin, Jack Brooks, Norman Lent, and John Breaux, dated April 17, 1985.
27. Id.
28. Letter from Robert P. Schaffer, Assistant Commissioner for Commercial Operations, U.S. Customs Service, to Walter B. Jones, dated May 9, 1985.
29. Customs Oversight Hearing. Testimony of Edward B. Gable. Also, Edward B. Gable, personal communication, July 19, 1985.
30. Customs Oversight Hearing. Testimony of R. J. Criswell,

Division Production Manager, Amoco Production Company. Also R. J. Criswell, personal communication, July 22, 1985.

31. Id. The bulker was 739 feet long, 63,000 deadweight tons (dwt), and the tanker was 597 feet long and 47,000 dwt. The company planned to load up the warehouse ships in the far east, sail them to the Navarin Basin, and have an essentially self-contained operation for the summer drilling season.
32. Id.
33. Transportation Institute Letter. See also Customs Oversight Hearing, statement of Congressmen Mario Biaggi and Billy Tauzin; statement of Captain Mayberry.
34. U.S. Customs Service, ruling dated June 28, 1983, file no. 106152 PH. See also U.S. Customs Service, C.S.D. 83-94, file no. 106086 PH, May 13, 1983, pp. 23-26; U.S. Customs Service, C.S.D. 85-11, file no. 106807 PH, August 6, 1984, pp. 18-22.
35. Transportation Institute Letter, p. 2. See also, Letter from the Offshore Marine Service Association to Chairman Jones, dated May 22, 1985.
36. See for example Ocean Industry, "Foreign Vessels Seek Gulf of Mexico Work," June, 1985, p. 17.

Chapter V

EXCEPTIONS TO COASTWISE TRADE LAW

Although the consistent federal policy toward the coastwise trade appears to have been one of protection, certain circumstances have arisen necessitating exceptions to this approach. Proponents of a restrictive coastwise policy have argued that these exceptions tend to erode the integrity of one of the most fundamental supports of the U.S. merchant marine. Conversely, proponents of a free trade system in the shipping industry point to the poor competitive position of the coastwise shipping industry in relation to the trucking, rail, and pipeline industries as evidence that the regulatory burden is excessive and that the coastwise fleet would be better able to compete with land-based modes if the use of foreign tonnage was permitted. They see the various exceptions to U.S. coastwise law as part of a trend toward easing the requirements for participation in the coastwise shipping industry and possibly lowering the costs to shippers in the process.

There are several types of exceptions to U.S. coastwise trade law, most of which allow easier entry to the coastwise trade, but some of which restrict entry. This thesis will outline some of the more important exceptions, without attempting to cover them all. A thorough analysis of coastwise trade exceptions would be an appropriate topic for a separate paper.

As stated in earlier chapters, a ship engaging in a cabotage activity in the coastwise area must have a coastwise license. Simply put, the license is evidence that the ship was U.S.-built, is U.S.-owned, and is U.S.-documented.¹ Under certain circumstances, however, a coastwise license may be issued to a ship that does not fulfill all of the above requirements. Moreover, a U.S.-flag ship with a registry (instead of a coastwise license) may engage in some limited coastwise activity in the entire coastwise area. Likewise, this type of ship may be able to engage in any cabotage activity in limited portions of the coastwise area. Further, a foreign-flag ship may engage in limited coastwise operations, such as the towing of foreign vessels or ships in distress between coastwise points, or, in some cases, salvaging.

On the other hand, some U.S.-built, -owned, and -documented ships are prohibited from coastwise operation. These are primarily subsidized ships, although other vessels are prohibited as well.

Exceptions Restricting Entry

Subsidized Vessels

Construction-Differential Subsidy

Vessels receiving federal subsidies are, with certain exceptions, prohibited from engaging in the domestic trade of the United States. For example, a vessel built with a construction-differential subsidy (CDS) may operate in the foreign trade, and may stop at intercoastal or offshore ports only if a certain proportion of the voyage revenues are paid back to the Secretary of Transportation.²

However, the Secretary may authorize the transfer of CDS built vessels into the domestic trade of the United States for not more than six months in a year, if that helps carry out the purposes of the Act.³ Furthermore, the Secretary of Transportation issued a final rulemaking on May 7, 1985 that allowed CDS-built tankers to pay back the subsidy with interest and enter the coastwise trade.⁴

The CDS repayment issue erupted in the 1970s when the Maritime Administrator, James S. Dawson, permitted the full repayment of a CDS for the tanker Stuyvesant in exchange for permission to operate in the Alaskan oil trade.⁵ Maritime groups sought to overturn this decision through the courts but were unsuccessful, the Supreme Court holding that the Secretary had the power to permit a full repayment.⁶ The Reagan administration's position on this issue is that removal of obstacles to free market choice in the utilization of tanker tonnage will improve the stature of the coastwise fleet.⁷ In addition, the Department of

Transportation (DOT) held in its final rule that "there are a number of tankers currently laid up and more could be laid up, in part as a result of this rule, but these tankers are generally old, small and inefficient and have only remained in service until now because of the lack of competition from suitable vessels."⁸ Although the Reagan administration has supported the principles of U.S. coastwise trade law, the CDS payback policy is seen by some as an attack on existing coastwise operators, since many coastwise-qualified tankers are incapable of competing against the CDS-built ships.

Operating differential subsidy

Vessels are prohibited from receiving operating-differential subsidies (ODS) on voyages in the coastwise trade under the 1936 Act.⁹ However, ships receiving these subsidies are entitled to make intercoastal stops on a round-the-world voyage, a voyage from the west coast to Europe, a voyage from the east coast to the Orient, or a foreign voyage with a stop at Hawaii or the Pacific possessions, if some of the ODS is paid back.¹⁰

Ships Rebuilt Abroad

The second proviso of the Jones Act prohibits the use of ships in the coastwise trade that have been rebuilt abroad. The section states:

"That no vessel of more than five hundred gross tons

which has acquired the lawful right to engage in the coastwise trade ... and which later has been rebuilt shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States ..."¹¹

The purpose of the amendment, as stated by its sponsor in Congress, was to provide work for the U.S. shipyard and ship-repair industry "in order to enable the shipyards to keep their skilled workers and their facilities in readiness for any emergency."¹² It was felt by some in the administration that the issue of foreign conversion or reconstruction work was not a major problem at the time, and, although they did not object to the bill, two important changes were suggested.¹³ First was a limit of one thousand tons, so that ships under that size could be rebuilt abroad without penalty. However, the bill as enacted contained a limit of 500 tons, rather than 1000 tons. This represented a compromise between the bill's original language and the position of some in the administration, which was to provide a 1000 ton cut-off such that ships under that size could be repaired abroad without forfeiting coastwise privileges. Second was that the narrow definition of rebuilding be taken out of the bill so that a prior Supreme Court definition of the term, subsequently used in Customs' regulations, would be retained.¹⁴ This

suggestion was also incorporated in the bill and was quickly at issue after the passage of the law.

Specifically, the use of foreign midbodies in the reconstruction of a coastwise-qualified ship, not prohibited by the language of the 1956 amendment, was allowed by the Customs Service without forfeiture of coastwise privileges.¹⁵ A 1960 amendment to the Jones Act specifically sought to close this loophole, because it was felt that the use of foreign midbodies in the reconstruction of coastwise-qualified ships "would permit a frustration of the intent of Congress that vessels of foreign construction shall not be permitted to operate in the coastwise trade of the United States."¹⁶

The 1960 amendment did not end the confusion surrounding this issue, however. A Circuit Court found in 1970 that if part of a non coastwise-qualified ship is attached to part of a coastwise-qualified ship, the resulting ship might be coastwise-qualified, depending on where the actual rebuilding took place.¹⁷ Although the ruling would appear to be in contradiction to the 1960 amendment and its legislative history, that amendment deals only with components of foreign construction, and does not address components of U.S. construction which may have been part of a non coastwise-qualified ship, such as one that had been under foreign ownership.¹⁸ In other words, a component of foreign construction would taint a rebuilt vessel so that it would forfeit its coastwise privileges.

The Coast Guard, which enforces this statute, considers

a ship to have been rebuilt outside the U.S. when either:
1. a considerable part of its hull or superstructure is rebuilt or altered outside the U.S.; or 2. a major component of the hull or superstructure, which is foreign-built, is added to the vessel.¹⁹ Therefore, a ship would apparently not have to be entirely rebuilt in the U.S., as is specified in the statute. An example of rebuilding work permitted in foreign yards is the hotel work of a cruise ship, since such work does not fit one of the two criteria outlined above.

Ships Sold or Registered Foreign

Coastwise qualified ships that are sold or registered abroad are also prohibited from engaging in the coastwise trade, and the Coast Guard requires, as part of its documentation process, proof of a continuous chain of U.S. ownership.²⁰ The first proviso of the Jones Act states:

"That no vessel having at any time acquired the lawful right to engage in the coastwise trade ... and later sold foreign in whole or in part, or placed under foreign registry shall hereafter acquire the right to engage in the coastwise trade."²¹

The purpose of this amendment was to preclude the coastwise use of U.S.-built vessels that were sold foreign or built for a foreign account.²² At the time, some 174 U.S.-built ships were under the foreign flag, many of which

had been built for foreign ownership during World War I or were sold abroad as surplus by the Shipping Board after the war. The perception was that U.S. shipbuilding would be encouraged by eliminating the possibility of these ships reentering the coastwise trade and undercutting existing or proposed services.²³ Moreover, some 250 war surplus ships owned by the Shipping Board were in layup and could be purchased for coastwise use.²⁴

An interesting question arises at this point regarding the rebuilding and sale-foreign provisos outlined above. Specifically, the main body of the Jones Act refers to the transport of merchandise, whereas both of these modifying provisos refer to ship operation in the coastwise trade. The question is this: may the language of a proviso be broader than the statute that it modifies? In other words, may the proviso bar operation in the coastwise trade, including passenger carriage, when the main statute applies only to merchandise carriage?

The reasoning used in the 1980 Great Lakes dredging case was that the "a cardinal rule of statutory construction is that the scope of a proviso is no broader than the language it modifies."²⁵ This would seem to have implications for the owner of, for example, a U.S.-built passenger vessel which has been sold, registered, or rebuilt overseas. The original Jones Act clearly deals only with merchandise and, under the court's reasoning, should not prohibit a reflagged passenger vessel of this type from engaging in U.S. coastwise operations.²⁶

A 1970 Circuit Court of Appeals case, on the other hand, established that there was no evidence to suggest that Congress intended the sale-foreign proviso to apply only to carriers of merchandise.²⁷ The Court essentially upheld Customs' position that "the proviso was intended to have an effect independent of the main clause of (the Jones Act)."²⁸ The federal courts seem to have added to the confusion, then, by ruling in one case that the provisos are independent of the main statute, and in another case that the provisos are not broader than the main statute.

Exceptions Easing Entry

Emergency Exceptions

Periodic attention has been given to the use of foreign ships in the coastwise trade, particularly during times of conflict when there have been shortages of coastwise-qualified tonnage. Waivers of this sort have been granted as a temporary blanket provision by Congress, where any foreign ship could operate in the coastwise trade. More recently, discretionary powers have been given to the President to waive necessary laws when deemed appropriate. In addition, it has been perceived to be in the best interest of the country to waive vessel-inspection law in times of emergency, and this discretionary power has been given to the President as well.²⁹

World War I

The decision of the Wilson administration to send American troops to France in 1917 created a severe strain on existing shipping services and had a number of unusual consequences. One of these was a Congressional appropriation of \$2,884,000,000 for ship construction, enough money at the time to triple the existing world commercial fleet.³⁰ In addition, foreign ships in American ports were commandeered, and U.S. ships both under construction and in operation were requisitioned.³¹ Further, one of the earliest exceptions to U.S. coastwise trade policy was enacted as a result of American involvement in World War I, when the federal government allowed foreign ships to operate between U.S. ports to relieve the wartime shortage of tonnage. It lasted for the duration of the war plus 120 days, and was repealed at the end of the war.³² Although there was some resistance to this measure from U.S.-flag carriers, it had support in the federal government. In the opinion of the U.S. Shipping Board, American shipping interests "would best be conserved ... by a permission to use ... during this present war or emergency, foreign-built and foreign-registered ships in our coastwise trade."³³

It was felt, therefore, that the best interests of the country would be served by allowing U.S. coastwise ships to operate on the trans-oceanic runs, and foreign ships to operate in the coastwise trade. Such an arrangement was made necessary by the withdrawal of allied shipping at the

outset of World War I and the insufficient tonnage under the U.S. flag to compensate.

Administrative Waivers

There are other methods by which an otherwise unqualified vessel -- foreign-flag or foreign-built -- may operate in the coastwise trade. One method is through an administrative waiver.³⁴ The Secretary of the Treasury is required to waive compliance with the coastwise trade laws if so requested by the Secretary of Defense. These waivers are granted in the interest of national defense, although they do not always involve emergencies. In addition, Treasury may waive compliance with the coastwise trade laws on its own initiative, or on the recommendation of the head of any other agency, if the interest of the national defense warrants the waiver.³⁵

Most of the initial waivers (15 of the first 19) were requested by the Commerce Department and waived the requirement of a Coast Guard certificate of inspection at the time of documentation. Other waivers have been initiated or requested by Treasury, the Department of Agriculture, the Department of Interior, the Atomic Energy Commission, and the Federal Aviation Administration, among others.³⁶ In general, they are granted for a specified time period, although some are for a certain number of voyages.³⁷ Not all waivers have met with public approval or acquiescence, however. A 1970 waiver granted by Treasury for the tanker Sansinena, a 70,000 ton, U.S.-built vessel

which had been foreign-owned and -documented met with such an outcry that it was withdrawn almost immediately.³⁸

Foreign Vessel Acquisition

A further method by which a non coastwise-qualified vessel may operate in the coastwise trade is through the Emergency Foreign Vessels Acquisition Act.³⁹ Whenever the President decides that the national security makes it advisable, or during any national emergency declared by him, he may, through the Secretary of Transportation, purchase or requisition "any merchant vessel not owned by citizens of the United States which is lying idle in waters within the jurisdiction of the United States and which the President finds to be necessary to the national defense."⁴⁰ Moreover, the vessel may be documented as a U.S. vessel and may then be chartered to any U.S. public or private operator for use in the coastwise trade.

The President, therefore, has the discretionary power not only to allow foreign ships to operate in the coastwise trade, but to force them to do so, if they are found in U.S. waters. As outlined above, the administrative waiver authority has been used relatively infrequently and is primarily a tool to bypass the strict requirements of U.S. coastwise trade law when it is perceived to be in the best interests of the nation to do so. Such a policy would seem to be consistent with the traditional role of the merchant marine to further the security interests of the United States.⁴¹

Wrecked Vessels, War Prizes, and Forfeitures

Certain ships in the coastwise trade may be exempt from the requirement that they be U.S.-built and continuously U.S.-owned. Unlike ships admitted under an administrative waiver, they must be U.S.-documented (with a coastwise license) and U.S.-owned when they enter coastwise service. For example, a foreign-built vessel may be granted a coastwise license if: 1. it was captured as a war prize or forfeited under U.S. law;⁴² or 2. it was a wrecked vessel and repairs to the vessel -- done in a U.S. shipyard -- cost at least three times the appraised salvaged value of the vessel, as determined by the Commissioner of Customs.⁴³

The wrecked vessel policy was initiated in 1852 and was similar to present law in all respects except that the original statute did not specify that repairs had to be performed in the United States.⁴⁴ It was probably assumed at the time that a ship that was wrecked in U.S. waters would have no choice but to undergo repairs in a U.S. yard. Not surprisingly, there has been some disagreement between shipyards and ship operators over the value of this exemption. This disagreement was illustrated by the introduction of a bill in Congress in 1898 to allow the use of wrecked vessels only in the U.S. foreign trade. Although the provision was not passed into law, shipyard interests maintained that it was detrimental to U.S. coastwise trade policy to allow the use of foreign-built wrecked vessels in

that trade, since "every foreign-built wrecked vessel, after being repaired and admitted to enrollment in the coastwise trade ... takes from American shipbuilders the building of a new ship."⁴⁵ The purpose of the bill, therefore, was "to compel a better adherence to the established policy ... prohibiting foreign-built vessels from taking part in the American coastwise trade to the injury of American-built vessels in that trade ..."⁴⁶

In 1915, perhaps indicative of the quid pro quo of maritime policymaking, the wrecked vessel statute was revised to expressly require that repairs on any wrecked vessel be done in U.S. shipyards if the intent was to document the vessel for the coastwise trade.⁴⁷ On the one hand, shipyards favored the 1898 bill, which would have stopped the use of foreign-built wrecked vessels in the coastwise trade, while on the other hand, ship operators probably favored no change to the existing policy.

The policy regarding documentation of war prizes and forfeitures originated in 1792, and likely was an effort to beef up the post-war merchant fleet with ships captured at sea.⁴⁸ However, there was some resistance to allowing war prizes to be used in the coastwise trade, and this feeling surfaced during the House debate prior to passage of the law.⁴⁹ In an effort to show how other nations approached the issue of war prize documentation, French law was cited, which did not allow a war prize to be registered under the French flag, despite the fact that they were engaged in a war.⁵⁰ Nevertheless, the provision survived the debate and

remains part of U.S. documentation law.

Ownership Exceptions

Bowater Act of 1958

A limited type of coastwise license may be issued to a ship that satisfies the requirements for a coastwise license, except for the 75% domestic ownership.⁵¹ Essentially, the corporation that owns the ship may be owned by a foreign citizen or corporation, although ships that qualify under this law may not transport merchandise or passengers, or engage in the fisheries in the U.S. except as a service to a parent or subsidiary corporation. The ship must also be chartered to a common carrier for use other than in the domestic noncontiguous trades. The common carrier may not be connected to the corporation that owns the ship. The common carrier must be a "citizen" under section 2 of the 1916 Shipping Act.⁵² While initially easing the requirements for entry into the coastwise trade, the Bowater Act strips most of the advantages through imposition of strict rules.

The Bowater Act was deemed necessary because the U.S. ownership principle of the cabotage laws at times merited "minor exceptions ... if equity and justice is to be done."⁵³ The law was named after Bowaters Southern Paper Corporation of Tennessee, a supplier of newsprint to a number of well-known American newspapers, including the Washington Post.⁵⁴ Bowaters was wholly owned by a Canadian company, however, and therefore was ineligible to

own a coastwise vessel. The Congress felt that this presented Bowaters with an undue hardship and, since the company's employees were 98% American and virtually all of the supplies and finished products were bought or sold here, there was a need to ease the participation obstacles for Bowaters and similar companies.⁵⁵ As a tradeoff, and to appease concerns of the measure's opponents, companies utilizing the provision could not engage in common carriage and could not use self-propelled ships of greater than 500 gross tons.⁵⁶ Therefore, Congress attempted to simultaneously mitigate the competitive disadvantage experienced by a small number of companies, and maintain the overall protection afforded by the cabotage laws.

Geographic Exceptions

Jones Act Provisos

The main body of the Jones Act, as outlined in a previous chapter, is a strict provision that leaves very little room for ambiguity in its application. There are, however, several provisos to the Jones Act, most of which relate to vessel operation in specific geographic areas, which make it possible for foreign-flag ships or non coastwise-qualified ships to engage in limited coastwise activities.

Part of the Merchant Marine Act of 1920 allowed any foreign-built ship that had been U.S.-registered to engage in the coastwise trade, as long as it was owned by an

American on February 1, 1920 and remained under U.S. ownership.⁵⁷ This provision, seemingly contrary to the strong protectionist language of the Jones Act, was probably intended to augment the post-war coastwise fleet. The first and second provisos, outlined earlier in this chapter, deal with foreign registry, sale, or rebuilding and are restrictive in nature.

Third Proviso. The third proviso is the only among the present ten that was part of the original statute. As originally enacted, it exempted from the Jones Act any merchandise transported between U.S. points by way of Canada, if part of the movement was on a foreign ship.⁵⁸ The purpose of this was to allow the movement of cargo from the U.S. on rail routes through Canada to a Canadian port and then on a Canadian or any other flag ship back to the United States. It is unclear why Alaska was specifically exempted from this proviso, since it is not normally considered part of the continental United States. Since the proviso did not apply to Alaska, cargo shipped from the U.S. via Vancouver, Canada to Alaska would have to travel on U.S. ships from Vancouver to Alaska. It may be that Wesley Jones, a Washington Senator who spearheaded passage of the Jones Act, was careful to prevent any possible cargo diversion from Seattle to Vancouver in the U.S. to Alaska trade.

The Alaskan exception was at issue almost immediately after passage of the Jones Act and a bill was introduced in

the 67th Congress that proposed two changes to the Act.⁵⁹ The first was to change the word "excluding" to "including." The second was to add another proviso which exempted the Yukon River until the Alaskan Railroad had been completed and proper facilities had been established for water transportation by Americans. In hearings on the bill, the point was brought out that the original "excluding Alaska" wording served to discriminate against Alaska because of the strict U.S.-flag requirement for shipments originating in the U.S.⁶⁰ For example, a shipment could originate in Boston, travel via the Canadian railroad to Vancouver, and be shipped on a foreign vessel from Vancouver to a California port. However, if the merchandise was destined for Alaska, the ship would have to be American. Some in the fishing industry were opposed as well, and it was felt that the fishermen of Alaska could be the hardest hit if American fishing companies closed operations there due to the higher transport costs of using U.S.-flag ships.⁶¹

On the other hand, American steamship representatives were vehemently opposed to any bill allowing Canadian ships to carry U.S.-origin cargo from Vancouver to Alaska.⁶² They saw the original proviso of the Jones Act, which allowed this type of operation to other west coast ports, as brought about by Canadian interests. They perceived that these interests, having gained a foothold in the U.S. coastwise trade during World War I, were reluctant to let it go.

Despite the arguments in favor of the bill, these

provisions did not become part of the Jones Act until much later. The Yukon River section was not passed into law until July 2, 1935.⁶³ Moreover, the Jones Act excluded Alaska from its "through-Canada" exemption until July 7, 1958, when the word "excluding" was changed to "including."⁶⁴

A more recent effort was made to repeal the third proviso entirely because of concern that it allows abuses of the Jones Act. It was felt at the time of introduction of a bill in 1983 that, although there was little use made of the proviso, it did leave the door open for shippers to divert their cargo to Canadian ports to make use of foreign carriers in the mainland U.S. to Alaska trade.⁶⁵

Fourth Proviso. A fourth proviso was added in 1935 which exempted from the application of the Jones Act the Yukon River "until the Alaska Railroad shall be completed ..." and a finding is made that U.S. citizens have established transportation services on the river.⁶⁶ An official of the National Merchant Marine Association had testified at the 1921 hearing in opposition to the Yukon River exemption, stating that "by misinterpretation of the coastwise laws of the United States ... British-flag vessels upon the Yukon River were granted authority by governmental departments of the United States to enter into competition upon that river with American carriers."⁶⁷

Fifth Proviso. Another geographically-related proviso was

added to the Jones Act in 1935.⁶⁸ It exempted merchandise and passengers carried aboard U.S.-built and -documented Great Lakes railroad ferries that are owned by a Canadian common carrier. One of the main purposes of the amendment was to allow Canadian-owned ferries operating in conjunction with an Interstate Commerce Commission (ICC) approved railroad to transport rail cars across the Great Lakes, an activity that supplemented rail movement between points in the United States.⁶⁹ Often these rail movements would pass through Canada and it was felt that allowing Canadian-owned car ferries to operate without penalty would help keep the Great Lakes channels open for navigation.⁷⁰ It is unclear whether Canadian interests perceived this proviso to be to their benefit, since only the ownership requirements were waived. At any rate, the Customs Service recently determined that there had been no activity under the fifth proviso since at least 1980.⁷¹

Exceptions to the Passenger Ship Act of 1886

The Passenger Ship Act, in addition to the regulatory exemptions outlined in chapter three, has three exemptions specifically enacted to relieve hardships brought on by the lack of coastwise-qualified vessels. It might be argued on the one hand that the regulatory loopholes and statutory exemptions have made it difficult for U.S.-flag passenger vessels to get started in the business. However, the statutory exemptions were provided because of a lack of U.S.-flag service to some remote places and they are, in

fact, rarely used.

In 1938, Canadians were allowed, upon receiving an annual permit, to operate passenger ships between Rochester, New York and Alexandria Bay, New York "until such time as passenger service shall be established by vessels of the United States."⁷² It is doubtful whether there is still a need for this statute, since it has not been used for at least 16 years.⁷³

In 1961, Congress enacted another exception to the Passenger Ship Act, allowing foreign ships to transport passengers between ports in southeastern Alaska.⁷⁴ The legislative history indicates that the exception was necessary because the "increased vessel operating costs, and ... the small and fluctuating seasonal population in the area in question (meant) U.S.-flag vessels ... found such service uneconomic."⁷⁵ Thus, many of the remote ports in the southeastern Alaska region would likely have been cut off from service without the presence of Canadian ships. The Customs Service has found that, while two Canadian-flag ships have served the Alaskan market in the past under the 1961 exception, "there would appear to be no justification today" for the 1938 and 1961 Passenger Ship Act exceptions.⁷⁶ It is interesting that so few of the exceptions to U.S. coastwise trade law appear to be utilized, given the frequent calls for easing the entry requirements.

A third exception to the Passenger Ship Act was passed into law in 1983, and allowed carriage of passengers between

Puerto Rico and the United States on non-qualified passenger ships.⁷⁷ The purpose of the provision was two-fold. First, it provides an alternate means of travel for islanders who, for medical or other reasons, are unable or unwilling to fly. Second, it was intended to spur the island's economic development through increased tourism.⁷⁸ The measure was also supported by the Reagan administration, which has not generally approved of measures weakening U.S. coastwise law.⁷⁹ Maritime unions and trade groups opposed the measure, fearing that it would undermine efforts to bring U.S.-flag, U.S.-built passenger ships into service.⁸⁰

Other geographically related, "activity-specific" exceptions have been enacted in recent years. For example, in 1962, cabotage restrictions were waived for lumber shipments originating in Pacific coast ports, the purpose of which was to aid the west coast lumber industry.⁸¹ Moreover, foreign-built ships under two hundred gross tons are permitted to trade fisheries products between places in Guam, American Samoa, and the Northern Mariana islands.⁸²

Territories and Possessions

The strict coastwise requirements covering the territories and possessions have been relaxed to some extent in recent years. For example, ships engaging in the coastwise trade with Guam, American Samoa, Wake, Midway, and Kingman Reef may have a registry endorsement which, of course, means they may be foreign-built, although they must

still be U.S.-flag.⁸³ Moreover, there is no requirement regarding the flag of a vessel trading between U.S. ports and the Virgin Islands,⁸⁴ American Samoa,⁸⁵ the Northern Mariana Islands⁸⁶ and Canton Island.⁸⁷ Therefore, ships of any flag may engage in any coastwise activity with these islands.

It may be argued that while the Jones Act broadened the applicability of the coastwise laws in 1920, their scope was weakened by the various exceptions granted to island territories and possessions subsequent to that law. Some insight may be gained into the rationale behind this policy by looking at the hearings on the Virgin Islands' exemption. The Interior Department's spokesman cited President Hoover's 1931 visit to the islands and his characterization of them as an "effective poorhouse" as impetus for reviving the area.⁸⁸ It was felt that successful economic development of the islands was linked to a less restrictive shipping policy and, in fact, a series of temporary suspensions of the coastwise laws had been in effect in the Virgin Islands prior to the permanent exemption.⁸⁹ In addition to the passenger trade served by foreign vessels, bunkering was a mainstay of the St. Thomas commerce at the time and much of the coal and oil came from the U.S. mainland. The feeling was that the difference in price between a U.S. vessel and a foreign vessel bringing the bunkering supplies was significant and that irreversible harm would be caused if only U.S. vessels were allowed in the trade.⁹⁰

There was some concern, however, that the measure would

act as the "nose of the camel under the tent" in breaking down the coastwise laws, and there was even speculation as to whether foreign interests were pushing the bill.⁹¹ In any event, while all U.S. territories and possessions have been included in the coastwise area since 1920, many areas have since been statutorily excluded. This exclusion may apply only to a specific coastwise activity, such as passenger carriage, or it may apply to all coastwise activities.

Miscellaneous Exceptions

A variety of other exceptions, most of which are limited in scope, have been enacted at various times to relieve perceived inequities in the law, or shortages in available tonnage. Some of these are outlined below, although it is not intended that this be an exhaustive list.

Shipping Act of 1916

Under the Shipping Act of 1916, a U.S. citizen may purchase, charter, or lease a vessel from the Secretary of Transportation.⁹² This includes foreign-built vessels and these ships may be used in the coastwise trade of the United States while they are owned, leased or chartered by the individual.⁹³ The Secretary must approve the transfer of these ships. This exception was originally intended to offset the scarcity of ships in the U.S. foreign trades that existed at the outbreak of World War I. Almost all U.S.-flag ships at the time were employed in the coastwise

trade and, as stated earlier, the withdrawal of foreign commercial shipping from the U.S. foreign trades left American shippers with increasing freight rates and forced coastwise vessels into the foreign trades.⁹⁴

Shipping conditions which motivated the enactment of such an exception to coastwise trade law can not be said to exist today. Ships could not be built fast enough for the market and the demand for shipping services was greater than the supply of ships. This is clearly not the case presently, especially in the coastwise trade, and therefore the exception provided for in the 1916 Shipping Act would appear to be inconsistent with the general trend of coastwise trade policy.

Jones Act Provisos

In addition to the geographically related provisos previously mentioned, the Jones Act contains exceptions which are specifically designed to mitigate hardships to certain types of coastwise operators, and they include the sixth, seventh, and final provisos.⁹⁵ Essentially, they allow foreign operators to relocate containers or associated equipment between U.S. ports, and to transfer merchandise from one LASH barge to another in U.S. waters, as long as the merchandise is bound to or from a foreign port.⁹⁶ In addition, fish processing and assembly gear aboard U.S. fishing vessels is classified as ship's equipment rather than merchandise.⁹⁷ It is argued that because of the limited scope of these coastwise trade exceptions, they are

less an expression of federal coastwise trade policy than a logistical relief to fishing vessels and certain liner operators in the U.S. foreign trade.

Legislative Exemptions

If all else fails, Congress may enact special legislation to exempt any ship from the requirements of the coastwise trade. Private laws of this type are enacted every Congress, although it is rare that a major, commercially useful ship is included because of strong opposition from interest groups and the federal government. An exception to this was the granting of coastwise privileges to the passenger ships Independence and Constitution in 1978 and 1981. Both ships are now operating in the Hawaiian inter-island trade. Normally, hearings are held to determine the nature of the vessel, the circumstances prohibiting its entry into the coastwise trade, and the likely impact that ship would have on the existing coastwise fleet.

Despite the strict standards with which a ship and owner must comply in order to participate in the coastwise trade, the federal government has seen fit, albeit with a great deal of reluctance in some cases, to grant certain exceptions to the cabotage requirements. Occasionally these exceptions are granted for national security reasons, but more frequently to mitigate a perceived hardship on a part of the country or on a constituency that might otherwise go without service, perhaps functioning in the process to help

develop the more remote sections of the country.

Naturally, maritime interests fought these exceptions when they were perceived to be contrary to their best interests, and it felt by some that they represent a significant erosion of the principle of cabotage protection.⁹⁸

NOTES

1. See 46 U.S.C. 121.
2. Merchant Marine Act of 1936, section 506, 46 App. U.S.C. 1156.
3. *Id.*
4. U.S. Department of Transportation, Maritime Administration, "Construction-Differential Subsidy Repayment; Total Payment Policy," Federal Register, vol. 50, no. 88, May 7, 1985, pp. 19170-19178. This rule will primarily affect the Alaskan oil trade, since the great majority of coastwise-qualified tankers are employed in that trade. Any tanker operator that has paid back CDS funds and interest by June 6, 1986 is eligible to enter the coastwise trade.
5. See Robert W. Gruendel, "The Weakening Grip of United States Cabotage Law," Fordham International Law Journal, vol. 4, pp. 404-407.
6. *Seatrain Shipbuilding Corporation v. Shell Oil Co.*, 444 U.S. 572, (1980). The 1936 act outlines circumstances where a CDS-built vessel may make limited, temporary coastwise voyages, paying back a pro-rated portion of its subsidy

amount. The act does not address the repayment of a full subsidy for permanent entry into the trade, and the court thereby ruled that such an activity was not prohibited.

7. See note 4 above.
8. Id. p. 19175.
9. Merchant Marine Act of 1936, section 605, 46 App. U.S.C. 1175.
10. The amount paid back is in the same ratio to the overall ODS received as the amount of revenue earned on the coastwise voyage is to the overall voyage.
11. 46 App. U.S.C. 883, second proviso. Act of July 14, 1956, ch. 600, 70 Stat. 544. Also, P.L. 86-583 added the wording to the effect that the entire rebuilding must take place in the U.S.
12. U.S. Congress, House, Committee on Merchant Marine & Fisheries, Hearing before the Subcommittee on Merchant Marine. Statement of Congressman Garmatz, May 8, 1956, p. 5.
13. Id., p. 2. See also Letter from the Secretary of Commerce to the Chairman of the Senate Commerce Committee, dated March 22, 1956.

14. U.S. Department of Treasury, Executive Memorandum from the Department of Treasury accompanying the report on S. 1864. Treasury held that rebuilding occurs when "any considerable part of the hull of the vessel in its intact condition, without being broken up, is built upon ..." See also *New Bedford Drydock Co. v. Purdy*, 258 U.S. 96 (1922).
15. U.S. Congress, Senate, Senate Report 1279. See also House Report 1887. 86th Cong., 2nd Sess., (1960).
16. U.S. Congress, House, House Report 1887. June 16, 1960, Printed in U.S. Code Cong. and Admin. News. vol. 2, p. 2664.
17. *Marine Carriers Corp. v. Fowler*, 429 F.2d 702 (2d. Cir.) cert. denied, 400 U.S. 1020 (1970).
18. Id. For an example of an extremely complex rebuilding case involving both qualified and non-qualified ships, see Gruendel, pp. 395-399.
19. 46 C.F.R. 67.27-3.
20. 46 C.F.R. 67.05-5.
21. Id., first proviso. 46 U.S.C. 883.

22. U.S. Congress, Senate, Senate Report 870, May 13, 1935, p. 2.
23. Id., p. 3.
24. In a hearing on the bill, an independent steamship operator from New York alleged that the Shipping Board was practicing favoritism in the sale of its laid-up tonnage in order to limit competition. This operator was not able to purchase laid-up ships from the Shipping Board and was opposed to the amendment, stating that "if I cannot succeed in buying these American ships here, my people are going to buy ... American-built ships sold abroad ..." U.S. Congress, House, Committee on Merchant Marine, Radio, & Fisheries, Prohibiting the Right to Engage in the Coastwise Trade to Vessels Built in the United States and Later Sold Foreign, Hearing on H.R. 9223, Testimony of B.L. Stafford, May 10, 1934, p. 27.
25. Great Lakes Dredging, 486 Fed. Supp. 1310. He was speaking specifically about the provisos attached to the Jones Act.
26. There are 8-10 such passenger ships currently precluded from U.S. coastwise documentation because of these provisos, including the Emerald Seas and the Britannis, which are under foreign flags.

27. Gillentine v. McKeand, 426 F.2d 717 (1970).
28. Id., p. 721.
29. In a message to Congress on June 17, 1941, President Roosevelt declared that "it is impossible to foretell what emergency might arise from day to day and to what extent the navigation or vessel-inspection laws may have to be waived to meet the situation. U.S. Congress, House, House Report 1038, 77th Cong., 1st sess., July 24, 1941, p. 2.
30. Zeis, p. 97.
31. Id.
32. Act of October 6, 1917, ch. 88, 40 Stat. 392. The U.S. Shipping Board was authorized by this legislation to issue permits to the foreign vessels and also to issue permits up to February 1, 1922 for the carriage of passengers from the Pacific coast to Hawaii. See H. David Bess and Martin T. Farris, U.S. Maritime Policy, History and Prospects. New York: Praeger, 1981, p. 44.
33. U.S. Congress, House, Committee on Merchant Marine & Fisheries, War Emergency -- Admission of Foreign Shipping to the Coastwise Trade, Hearing on H.R. 5609. Statement of Alfred Huger, Admiralty Counsel, U.S. Shipping Board, September 6, 1917, p. 4. See also U.S. Congress, House,

House Report 135, 66th Cong., 1st sess., July 19, 1919, p. 1.

34. Act of December 27, 1950; 46 App. U.S.C. 1 (note). Several executive waiver laws were passed -- all of which expired -- before the 1950 law was enacted.

35. Since 1950, 132 waivers to the navigation laws have been granted. U.S. Customs Service, Summary of the Administrative Waivers of Navigation Laws Administered by the Customs Service Under the Act of December 27, 1950, 64 Stat. 1120, T.D. 52646, 19 pp. Hereafter cited as Treasury list.

36. U.S. Congress, House, Committee on Merchant Marine & Fisheries, U.S. Customs Service, Hearings before the Subcommittee on Oversight and Investigations, Testimony of Edward B. Gable, Director of Carriers, Bonds, and Drawback, U.S. Customs Service, July 23, 1985. From 1954 to about 1960, 39 waivers were issued at the request of the Defense Department for the use of Canadian-flag vessels in the construction of the St. Lawrence Seaway. Further waivers were granted for the transport of materials between California and Nicholas Island on a Mexican vessel for the construction of an airstrip in 1951; the transport of Navy and Commerce personnel and merchandise on foreign-flag vessels between Swan Island and Tampa, Florida in 1954; the transport of sulphur between coastwise points for the Texas

Gulf Sulphur Company in 1963, among others. Id.

37. Treasury list. The most recent waivers were granted in December, 1983 (for one year) and in June, 1984 (for six months). They were requested by the Departments of Defense and Treasury, and by the Maritime Administration. The former is for one U.S.-built, non coastwise-qualified jetfoil to be used in a passenger-freight service in Southeast Alaska. The latter is for two foreign-built air cushion vehicles to be used in a test commuter service in San Francisco. It is unclear how the national defense interests of the country are served by these waivers.
38. See Edward G. Lowry, "Jones Act," ICC Practitioners Journal, vol. 20, Sept.-Oct., 1973, pp. 791-792.
39. Act of August 9, 1954, ch. 659, 68 Stat. 675; codified at 50 U.S.C. 196 et seq.
40. Id., sec. 1.
41. See for example the declaration of policy of the Merchant Marine Act of 1936, which holds that "it is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marime ..." Section 101, 46 App. U.S.C. 1101.
42. 46 U.S.C. 12106(a)(2)(B).

43. Id., 46 App. U.S.C. 14 (1982).
44. Act of December 23, 1852, 10 Stat. 149. Amended by the Act of February 24, 1915, ch. 57, 38 Stat. 812, R.S. 4136.
45. U.S. Congress, Senate, Senate Report 1129 on S. 3213. 55th Cong., 2nd sess., May 23, 1898, p. 2.
46. Id., p. 1.
47. Act of February 24, 1915, ch. 57, 38 Stat. 812.
48. An act concerning the registering and recording of ships or vessels. December 31, 1792, section 2.
49. In particular, some Congressmen felt that the provision encouraged a "savage practice, now exploded and laid aside by civilized nations." History of Congress. U.S. House of Representatives, November 22, 1792, p. 724.
50. Id.
51. This type of license applies to a vessel that:
 1. Is less than 500 tons or non self-propelled;
 2. Is owned by a corporation and -
 - a. a majority of its officers and directors are U.S. citizens;

- b. at least 90% of its employees are U.S. employees;
- c. it is engaged primarily in a manufacturing or mineral industry in the United States or any of its Territories, Districts, or possessions;
- d. the value of the vessels is not more than 10% of the value of the corporation;
- e. at least 75% of the raw materials used or sold in its operations are purchased or produced in the United States.

Merchant Marine Act of 1920, section 27(A). 46 App. U.S.C. 883-1.

52. Id.

53. U.S. Congress, Senate, S. Rept. No. 2145 to Accompany H.R. 9833, Aug. 4, 1958. Published in U.S. Code Congressional and Administrative News, vol. 3, 1958, p. 5191.

54. Id., p. 5192.

55. Id.

56. Id., p. 5193.

57. Merchant Marine Act of 1920, ch. 250, section 22, 41 Stat. 997. 46 App. U.S.C. 13. It is unclear how many ships were able to take advantage of this provision, since the 1912

build-foreign law was by some accounts a total failure and no ships were built overseas for U.S. registry. See Zeis, p. 66. It is unlikely that any vessel is operating under the authority of this law today.

58. The statute stated that:

"... merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission ... when such routes are in part over Canadian rail lines and their own or connecting water facilities." Merchant Marine Act of 1920, sec. 27, ch. 250; 46 App. U.S.C. 883, third proviso.

59. H.R. 6645, 67th Cong., 1st sess.

60. U.S. Congress, House, Committee on Merchant Marine & Fisheries, Hearings before the Committee on Merchant Marine & Fisheries. to Amend section 27 of the Merchant Marine Act of 1920. Statement of Dan A. Sutherland, Delegate from Alaska, October 28, 1921, 67th Cong., 1st sess., pp. 5-7. Sutherland mentioned that the "excluding Alaska" wording was put in during Senate deliberations of the Jones Act and that "not ... half a dozen Members of Congress knew it was there when they voted for the bill."

61. Id., Statement of Orson M. Arnold, president of the New England Fish Company, pp. 3-5.
62. Id. See testimony of W. L. Clark of the National Merchant Marine Association.
63. An act to amend section 27 of the Merchant Marine Act of 1920, July 2, 1935, ch. 355, 74th Cong., 1st sess., P.L. 191, 49 Stat. 442.
64. July 7, 1958, P.L. 85-508, section 27(a), 72 Stat. 351.
65. U.S. Congress, House, Committee on Merchant Marine & Fisheries, Hearing before the Subcommittee on Merchant Marine on H.R. 1076. See statement of Chairman Biaggi and testimony of U.S.-flag carriers. March 18, 1983. The bill never gained the political momentum needed to be enacted.
66. Act of July 2, 1935, ch. 355, 49 Stat. 442. Although the Alaska Railroad has been completed for a number of years, the finding has never been made and, according to the Customs Service, at least one Canadian-built tug and barge unit has been transporting supplies on the Yukon River. U.S. Customs Service, Letter from Edward B. Gable to Mark Aspinwall, dated November 19, 1985, File no. 107926 PH. Hereafter cited as Aspinwall letter.
67. U.S. Congress, House, Committee on Merchant Marine &

Fisheries, Hearings before the Merchant Marine & Fisheries Committee to amend 27 of the Merchant Marine Act of 1920.

October 28, 1921, 67th Cong., 1st sess., p. 58. The published hearing record is an excellent account of the problems in applying certain U.S. coastwise trade laws to Alaska at the time of enactment of the Jones Act.

68. Act of April 11, 1935, ch. 58, 49 Stat. 154.
69. U.S. Congress, House, Committee on Merchant Marine & Fisheries, Hearing before the Merchant Marine & Fisheries Committee on Towing Between American Ports. Statement of the Chairman, April 14, 1938, p. 7.
70. Id.
71. See Aspinwall letter.
72. Act of April 26, 1938, ch. 174, 52 Stat. 223.
73. See Aspinwall letter. Also, U.S. Customs Service, Letters from the Customs Service to Charles Kern. U.S. Senate, dated Feb. 5, 1973, CR 216.31; Congressman McCloskey. dated May 28, 1982, 105643 EBG. Hereafter cited as McCloskey letter.
74. Act of June 30, 1961, P.L. 87-77, 75 Stat. 196. The statute loses effect if the Secretary of Transportation finds that

U.S. ships are available to provide the service. The permanent exception followed 12 consecutive annual exceptions enacted by Congress.

75. U.S. Congress, House, House Report 538, June 14, 1961, p. 1.
76. See McCloskey letter.
77. P.L. 98-563; 46 App. U.S.C. 289(c). The measure allows the use of a foreign-flag ship unless service is begun with a U.S.-flag, coastwise-qualified or non coastwise-qualified ship. A U.S.-flag, coastwise-qualified ships may displace a U.S.-flag non coastwise-qualified ship. In any case, a 270 "grace period" is allowed before service must be halted.
78. U.S. Congress, Senate, Committee on Commerce, Science, & Transportation, Hearing before the Senate Merchant Marine Subcommittee, Testimony of Baltasar Corrada, Resident Commissioner from Puerto Rico, August 3, 1984, on H.R. 89.
79. U.S. Department of Transportation, letter from the Department of Transportation to Chairman Jones, House Merchant Marine & Fisheries Committee, October 18, 1983.
80. U.S. Congress, House, Committee on Merchant Marine & Fisheries, Puerto Rico Passenger Transportation -- H.R. 89. Hearing before the House Merchant Marine Subcommittee. See

testimony of Frank Drozak, Peter Luciano, M. Lee Rice, and Robert J. Lowen, October, 19, 1983.

81. P.L. 87-877, 76 Stat. 1200; See U.S. Congress, Cong. Rec. vol. 108, no. 15, p. 20424.
82. P.L. 98-454, title III, sec. 301(b), 98 Stat. 1734, Oct. 5, 1984.
83. Codified at 46 U.S.C. 12105(b).
84. Act of April 16, 1936, ch. 228, 49 Stat. 1207, codified at 46 App. U.S.C. 877.
85. Act of June 14, 1934, ch. 523, 48 Stat. 963, codified at 48 U.S.C. 1664. It is unclear why section 121 of title 46 states that a ship with a registry may engage in the coastwise trade with American Samoa when for fifty years the coastwise laws have been held not to apply to that island.
86. Section 503(b) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, codified at 48 U.S.C. 1681 (note).
87. Presidential Proclamation 32-15. December 12, 1959.
88. U.S. Congress, House, Committee on Merchant Marine &

Fisheries, Hearings before the Merchant Marine & Fisheries Committee on S. 754, 74th Cong., 2nd Sess., March 26, 1936, p. 1.

89. Id., p. 2.

90. Id., Statement of Lawrence W. Cramer, Governor of the Virgin Islands, pp. 21-23.

91. Id., See statements of Chairman Bland, pp. 3-5.

92. Merchant Marine Act of 1916, section 9; 46 App. U.S.C. 808.

93. Id.

94. See Lawrence, pp. 38-39. Maritime policymakers at the time used a number of measures to get ships under the U.S.-flag, including the "flag-of-convenience" ships, and as part of this effort, the U.S. Shipping Board was created. The purpose of the Board, among other things, was to purchase and construct vessels so that the U.S., as a neutral country, could engage in world commerce. Id.

95. P.L. 89-194, 79 Stat. 823; P.L. 90-474, 82 Stat. 700; P.L. 92-163, sec. 1, 85 Stat. 486; P.L. 97-389, sec. 504, 96 Stat. 1956.

96. 46 App. U.S.C. 833. See the sixth and seventh provisos. Where foreign-flag ships carry out these operations, reciprocity was made a part of the law.
97. 46 App. U.S.C. 883. See the final proviso. This is necessary because in some cases, fishing vessels need not be coastwise-qualified and any transport of merchandise between U.S. ports would be a technical Jones Act violation.
98. See Gruendel.

Chapter VI

CONCLUSION

This study has traced the development of the legal regime governing domestic maritime transportation, dredging, towing, and salvage, and has attempted to show that the requirements for participation in these activities vary depending on the type of service provided and the area in which it is undertaken. Further, it has been demonstrated that the Congress, the federal courts, and the executive agencies charged with oversight of the coastwise trade have all participated in the shaping of a protectionist policy toward U.S. domestic shipping.

It is clear that the reservation of the coastwise trade to American ships has been among the most protective components of U.S. maritime policy. The protection extends to both the operators and builders of coastwise vessels, in most cases, and also to the ownership of the vessels. All foreign-flagged, -built, and -owned ships have been barred from U.S. coastwise operation since 1817 and, with a few exceptions, the cabotage principles have tended to become more stringent since that time.

In addition, individual states have no authority to make coastwise trade policy. The Constitution granted to

the Congress and the federal courts the power to make and interpret, respectively, laws relating to commerce and navigation. California, for example, is not permitted to enact legislation allowing foreign ships to undertake coastwise activities in its waters. The rationale for this is that it is in the best interests of the nation as a whole to maintain a uniform, consistent federal maritime policy that applies to all navigable waters of the United States, so that economic and strategic benefits accrue to all states equally.¹

Customs, the lead agency in enforcing U.S. cabotage law, considers coastwise trade to be the transportation of merchandise and passengers, towing, and salvage. The agency's rulings, while following the letter of the law, have tended to err on the side of protecting U.S. shipyards and ship operators. For example, the wording of the Passenger Ship Act and the towing statute could be construed to allow participation by U.S.-flag, foreign-built ships in certain cabotage activities, although Customs has ruled that only U.S.-built ships qualify, and by so doing, has actively safeguarded domestic shipping rights for U.S. interests.

Having identified a history of protection in the coastwise trade, an obvious question presents itself: should this protection be continued? Have the benefits to the nation as a whole equalled or exceeded the extra cost to shippers associated with using domestically constructed and operated ships? The number of ships operating and being constructed for operation in the coastwise trade help answer

this question. Data from the Maritime Administration indicate that only 177 ships currently ply the coastwise trade with unrestricted privileges and of this number, 52 are in the Alaskan oil trade and operate virtually without competition from other modes² (see Appendix E, p. 195). In fact, 84 of the 177 ships in the U.S. coastwise fleet operate in the offshore trades -- such as the mainland to Hawaii, Alaska, or Puerto Rico routes -- and are free from competition from overland modes of transport.³ Despite their per unit cost advantage, ships have carried a decreasing proportion of coastal commerce since World War II, while trucks, railroads, and pipelines have assumed greater proportions.⁴ Because of this, some have advocated allowing foreign ships to engage in cabotage activities, thereby reducing costs to shippers and subsequently to consumers.⁵

It is proposed that two policy changes be pursued with respect to the coastwise trade with the final objective being the revitalization of a U.S.-flag domestic fleet. First, the application of U.S. cabotage law should be expanded to include all commercial shipping services provided in U.S. waters and on the OCS where artificial islands are in place for resource exploitation activities. This would bring activities such as cruises-to-nowhere and offshore oil and gas rig services under the purview of the coastwise trade laws, thereby mandating strict U.S. involvement.

The second change would be to ease the participation

requirement for ships in the coastwise trade such that foreign-built ships, as well as ships that have been rebuilt or sold abroad, would qualify for coastwise operation as long as they are under the U.S.-flag. Under this regime, all repairs or modifications to ships would have to be undertaken in U.S. yards. This is likely to cause a significant reduction in costs of U.S.-flag operation, although it is uncertain whether the savings would be sufficient to capture cargo from other transportation modes.

The historical analysis presented in this thesis supports an initiative of this type. It has been shown that all three branches of the federal government participated in the formulation of a protectionist cabotage policy. It can be argued, however, that after the 1906 dredging law, new developments in the coastwise trade were not met with new legal initiatives, other than to update existing law. Consequently, lower cost foreign ships have exploited emerging non-transportation maritime services, such as cruises-to-nowhere, because these activities have not been reserved for U.S. ships.

Despite this phenomenon, U.S. public policy has consistently called for the promotion of the merchant marine for both economic and strategic reasons. The existing legal framework is not accomplishing this promotion, although the change outlined here would attempt to rectify the situation by encouraging the growth of an American coastwise fleet. The beneficiaries of this change include domestic ship

operators and crews since revenues and wages would accrue to U.S. companies and seamen. The federal government would benefit from the receipt of tax revenues as well. Likewise, the intangible security benefit to the nation as a whole would be enhanced by an increase in the number of American ships and trained seamen.

Further, the use of lower cost foreign-built, U.S.-flag tonnage would encourage efficiency and competitiveness on the part of the ship operators. In the transportation industry, this would help the operators reduce freight rates and might result in lower costs to the consumer. In other service industries, the costs to the consumer would depend on the extent to which the operator keeps expenses at the same level as the foreign operators who had been providing that service.

Several problems will need to be addressed in order to make such a policy successful. One is that port costs may be so high that the cost reductions achieved through the use of foreign-built ships would be insignificant by comparison, so that coastwise operators providing transportation services are still not able to compete with land-based modes. In addition, shipyards will undoubtedly complain about a change of this type, although it may be that shipyards would actually benefit from such a policy shift, because U.S. yards are building very few ships for the domestic trades at present anyway, and requiring that repairs be performed in domestic yards could stimulate shipyard activity.

A further problem confronting implementation of this policy is the fact that some U.S. operators have established themselves under the existing legal regime, and could be adversely affected by competing against carriers with lower operating costs.⁶ An arrangement which will mitigate this impact -- possibly remunerative -- may have to be created. Moreover, some foreign-flag operators presently engaged in coastwise service activities would be affected by the proposal outlined above. These operations include passenger cruise ships which sail to and from ports such as Miami, Los Angeles, and New York on cruises-to-nowhere. Local ports derive significant economic benefits from these operations and would certainly oppose any measure that would cause foreign-flag ships to be banned from U.S. ports. It may thus be necessary to allow existing foreign-flag ships to operate without penalty in some coastal services under a "grandfather" provision. Further, an incremental approach to allowing foreign-built tonnage in the coastwise trade might be taken whereby the domestic construction requirement is removed on a piecemeal basis. For example, vessels in certain trades, or vessels over a certain tonnage might be exempted from the build-America requirement initially, with incremental additions to the exemption.

The objective of the policy change outlined here is to create an atmosphere where U.S.-flag coastwise shipping can be revitalized. It is assumed by this author that the declarations of policy outlined in the Merchant Marine Acts of 1920 and 1936 are still valid, and that retaining

expertise in ship operation and management, as well as construction and repair is a desirable goal. The proposed policy change outlined in this study is a partial response to the growing importance of coastal service operations above and beyond traditional merchandise transportation which is addressed by the Jones Act. It is hoped that by stimulating U.S. participation in growing marine service activities in the coastwise area, the competitive posture of the U.S. merchant marine will be improved.

NOTES

1. See for example the Declaration of Policy of the Merchant Marine Act of 1920, 46 App. U.S.C. 861, and the Declaration of Policy of the Merchant Marine Act of 1936, 46 App. U.S.C. 1101.

2. U.S. Department of Transportation, Maritime Administration, Privately Owned Tankers and Dry Cargo Vessels with Unrestricted Domestic Trading Privileges of 1,000 Gross Tons and Over as of March 1, 1985. 14 pp. In addition, only about 16 ships were on order for the Jones Act trades for delivery between October, 1983 and December, 1985. See Clinton H. Whitehurst, American Domestic Shipping in American Ships: Jones Act Costs, Benefits and Options. Washington, D.C.: American Enterprise Institute, 1985, 47 pp. Hereafter cited as Whitehurst, 1985.

3. Naturally, these offshore areas are free to receive goods from foreign nations aboard any flag vessel, and this has a tendency to maintain competition for freight.

4. See Clark G. Reynolds, "American Maritime Power Since World War II," in America's Maritime Legacy: A History of the

U.S. Merchant Marine and Shipbuilding Industry Since Colonial Times, Robert A. Kilmarx, ed., Boulder, Colorado: Westview Press, 1979, p. 227.

5. See Whitehurst, 1985. See also Clinton H. Whitehurst, The U.S. Merchant Marine, Annapolis, Maryland: Naval Institute Press, 1983, 314 pp.

6. A study done by the Transportation Institute on general cargo carriage between the Pacific Northwest and Alaska estimated that if new foreign-built containerships were allowed to operate between the U.S. mainland and Alaska, the corresponding drop in freight rates would drive the existing carriers out of business. The study further estimated that freight costs make up only about 1.7% of the cost of finished consumer products in Alaska, so the lower freight rates would not be reflected in lower consumer prices. Transportation Institute, Jones Act Coordinating Committee, "Foreign-Built Vessels in the Alaska Liner Trades: Effect on Consumer Prices and Existing Vessel Service," June, 1983, 11 pp.

APPENDIX A

Eligibility for Coast Guard Documents for the
Foreign and Domestic Trades

I. Vessels Eligible for Documentation.

A vessel of at least 5 net tons not registered under the laws of a foreign country is eligible for documentation if the vessel is owned by --

- (1) an individual who is a citizen of the United States;
- (2) an association, trust, joint venture, or other entity --
 - (A) all of whose members are citizens of the United States; and
 - (B) that is capable of holding title to a vessel under the laws of the United States or of a State;
- (3) a partnership whose general partners are citizens of the United States, and the controlling interest in the partnership is owned by citizens of the United States;
- (4) a corporation established under the laws of the United States or of a State, whose president or other chief executive officer and chairman of its board of directors are citizens of the United States, and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum;
- (5) the United States Government; or
- (6) the government of a State.

II. Registry.

(a) A registry may be issued for a vessel eligible for documentation.

(b) A vessel for which a registry is issued may be employed in foreign trade or trade with Guam, American Samoa, Wake, Midway, or Kingman Reef.

(c) On application of the owner of a vessel that qualifies for a coastwise license under section 12106 of this title, a Great Lakes license under section 12107 of this title, or a fishery license under section 12108 of this title, the Secretary may issue a registry appropriately endorsed authorizing the vessel to be employed in the coastwise trade, the Great Lakes trade, or the fisheries, as the case may be.

(d) Except as provided in sections 12106-12108 of this title, a foreign-built vessel registered under this section may not engage in the coastwise trade, the Great Lakes trade, or the fisheries.

III. Coastwise Licenses and Registry.

(a) A coastwise license or, as provided in section 12105(c) of title, an appropriately endorsed registry, may be issued for a vessel that --

- (1) is eligible for documentation;
- (2)(A) was built in the United States; or

(B) if not built in the United States, was captured in war by citizens of the United States and lawfully condemned as prize, was adjudged to be forfeited for a breach of the laws of the United States, or qualified for documentation under section 4136 of the Revised Statutes (46 App. U.S.C. 14); and

(3) otherwise qualifies under the laws of the United States to be employed in the coastwise trade.

(b) Subject to the laws of the United States regulating the coastwise trade and the fisheries, only a vessel for which a coastwise license or an appropriately endorsed registry is issued may be employed in --

- (1) the coastwise trade; and
- (2) the fisheries.

(c) a coastwise license to engage in the coastwise trade of fisheries products between places in Guam, American Samoa, and the Northern Mariana Islands may be issued for a vessel that --

- (1) is less than two hundred gross tons;
- (2) was not built in the United States;
- (3) is eligible for documentation; and
- (4) otherwise qualifies under the laws of the United States to be employed in the coastwise trade.

Source: United States Code, title 46, sections 12102, 12105, 12106.

APPENDIX B

Domestic Build and Ownership Characteristics Necessary
for U.S. Documents

	Document	
	<u>Coastwise</u>	<u>Registry</u>
U.S.- Built	X	
U.S.- Owned ¹	X	X

-
1. See Appendix C for further information regarding ownership requirements.

APPENDIX C

Entities Which Qualify as a U.S. Citizen

	Document	
	<u>Coastwise</u>	<u>Registry</u>
Individual of U.S. Citizenship	X	X
Govt. of a State or Possession.	X	X
Fed. Gov't.	X	X
Partnership ¹	75% U.S.- owned.	Majority U.S.-owned.
Association or Joint Venture ²	X	X
Corporation ³	75% U.S.- owned.	Majority U.S.-owned.
Trust ⁴	X	X

1. All the general partners must be U.S. citizens.
2. Each member must be a U.S. citizen.
3. The corporation must be incorporated under the laws of the United States. In addition, the chief executive officer, chairman of the board, and a majority of the number of directors necessary to constitute a quorum must be U.S. citizens.
4. All of the trustees and beneficiaries must be U.S. citizens.

APPENDIX D

Domestic Participation in the Coastwise Trade

	Geographic Area				
	U.S. ¹	Puerto Rico	Am. Samoa ² NMI Canton Is. VI	Midway ³ King. Reef Wake Guam	OCS ⁴
Merch. transp.	Build ⁵ Flag ⁶	Build Flag		Flag	Build Flag
Pass. transp.	Build Flag			Flag	Build Flag
Dredging ⁷	Build	Build		Build (Guam only)	Build
Towing	Build Flag	Build Flag		Flag	Build Flag
Salvage	Flag				

1. The navigable internal and territorial waters of the States of the United States, including the District of Columbia.
2. Includes American Samoa, the Northern Mariana Islands, Canton Island, and the Virgin Islands.
3. Includes Midway, Kingman Reef, Wake, and Guam.
4. Includes structures attached to the Outer Continental Shelf of the United States for the purposes of oil and gas exploitation between the seaward boundary of the territorial sea and the seaward boundary of the Continental Shelf.
5. The vessel must be built in the United States.
6. The vessel must be U.S.-flagged.
7. The dredging statute applies to Guam, but not to the Virgin Islands by an Opinion of the Attorney General dated August 13, 1963. Other island possessions have not been ruled on, although it is unlikely the dredging statute would be held applicable to them.

APPENDIX E

Breakdown of Ships Actively Operating with Unrestricted Privileges in the Coastwise Trade

<u>Type of Ship</u>	<u>Area of Operation</u>	<u>Number in Operation</u>	<u>Average Age (Years)</u>
TANKER	Alaska	51	12
	Gulf/Atlantic	48	16.8
	Gulf/Pacific	6	24
	Atlantic/Gulf/ Pacific	2	18.5
	Atlantic	2	22.5
	Pacific	8	18.8
	Gulf	6	11.5
	Puerto Rico/ Virgin Islands	3	17.7
LPG	Alaska	1	8
TUG/BARGE	Gulf/Atlantic	4	9
	Atlantic	2	4
	Gulf	2	5.5
CHEMICAL TANKERS	Gulf/Atlantic	3	16
	Gulf/Atlantic/ Pacific	1	15

SULPHUR TANKERS	Gulf/Atlantic	1	18
	Gulf	2	17.5
BULK	Atlantic/Pacific	1	21
	Hawaii	1	12
PASSENGER	Hawaii	2	34
CONTAINER	Alaska	6	17.7
	Puerto Rico	6	17.8
	Hawaii	5	12
COLLIER	Atlantic	1	2
ROLL-ON ROLL-OFF	Alaska	2	9
	Puerto Rico	5	10.6
	Hawaii	1	3
BULK/OIL	Gulf/Atlantic	1	4
TUG/BARGE	Gulf	2	10
	Atlantic/Gulf/ Pacific	1	9
	Hawaii	1	3

Source: U.S. Department of Transportation, Maritime Administration, Privately Owned Tankers and Dry Cargo Vessels with Unrestricted Domestic Trading Privileges of 1,000 Gross Tons and Over as of March 1, 1985, 14 pp.

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