United States Ownership, Control and Charter Restrictions: Maritime Coastwise Trade Laws vs. Aviation Laws

By: Destiny Scott

700 Daniel Ellis Drive Unit 9202 Charleston, SC 29412
dnscott@charlestonlaw.edu -- 845-453-7660
Charleston School of Law student

Abstract

Aviation law was developed as merely an extension of maritime law and many of its roots are taken from the ideas of maritime law. Over time though, these roots have progressed and developed into their own growing area of law. This paper examines U.S. and international law applicable to aviation and maritime services worldwide. It will review the evolution of maritime and aviation law that pertains to passengers and cargo in the air as well as on the sea. Specifically I am going to lay out the U.S. restrictions on owning and controlling vessels, as well as the regulations on the chartering of vessels under the maritime coastwise trade laws and the same restrictions under aviation laws. Finally, I am going to compare and contrast the restrictions of both with one another.

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I. INTRODUCTION

The nation's aviation and maritime transportation systems differ in scale, use, and history. The many differences have influenced how the modes of transportation have developed and how the federal government has taken on responsibility for providing the structure and services of each.

At first, aviation law was merely a branch of maritime law, however, over time, it has grown into its own distinct area of law. Nevertheless, many aviation law roots stem from maritime law. An active federal presence in the air transportation industry was viewed as essential, first to promote its technological and commercial development and then to ensure a consistently high level of safety and service.[1] By the time aviation became a major mode of transportation after World War II, the federal government had established a role similar to the one in the maritime domain, particularly in its concept of cabotage.

The word cabotage stems from the French word 'caboter' meaning to navigate from cape to cape, or to navigate along the coast.[2] The term was first applied in maritime navigation where it applied to domestic trade, or trade "between points in the United States ("U.S."), including districts, territories, and possessions thereof embraced within coastwise laws."[3] Similarly, under aviation law cabotage refers to "transportation of passengers, cargo, or mail by a nation's airlines between two points in the same nation."[4] Aviation law has thus played an essential role is defining the scope and the limits of the concept of cabotage, which can hardly be compared with the term as it is still used in maritime law today.

Cabotage is often subject to restrictions and regulations. Under such circumstances, each nation reserves for its national carriers the right to move domestic freight or passenger traffic. Thus stemming from the concept of cabotage the federal government has established a number of ownership, control and charter restrictions on their nations aviation and maritime laws. While both aviation and maritime law have these types of ownership, control and charter restrictions, this does not mean they emulate one another, nor does this mean they are completely distinct from one another. There are a number of similarities between aviation and maritime ownership, control and charter restrictions, while there are also a number of differences in the two areas as well.

This paper will set out the historical background of aviation law, looking at the establishment and growth of ownership and control restrictions as well as charter restrictions, specifically through statutes and administrative decisions. It will then lay out the history of maritime coastwise trade laws, looking at numerous statutes and their implications and amendments to the ownership, control and charter restrictions under the law. Finally, it will sum

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[1] Kirsten Bohmann, "The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law-Policy; Consideration; Comparison", 66 J. Air L. & Com. 689 (2001).
[2] Cf. J. Colombos, *The International Law of the Sea* 383-385 (1967).
[3] *See* Bohmann, *supra* note 1, at 734.
[4] Angela Edwards, "Foreign Investment in the U.S. Airline Industry: Friend or Foe?", 9 Emory Int'l L. Rev. 595, 624 (1995).

up the main similarities and differences of the ownership, control and charter restrictions of aviation law and maritime coastwise trade law.

II. AVIATION LAW

a. History

The idea of a government's authority to control its own territory can be traced back to the 1600's and the concept of state sovereignty. In 1919, the Paris Convention treaty recognized that every nation has exclusive sovereignty over its own airspace.[5]

In the early 1920's Congress was concerned that foreign countries could gain control over U.S. airlines and use them against the U.S., therefore they enacted the Air Commerce Act of 1926.[6] This act was the first U.S. statute to create citizenship requirements for U.S. airlines and it provided that an aircraft could only be registered in the U.S. if owned by U.S. citizens.[7] The act further clarified that for the airline to operate in the U.S., U.S. citizens must control a minimum of fifty-one percent of the airline's voting interest and the airline's president with at least two-thirds of the airline's board members must be U.S. citizens.[8] Congress felt as though this enactment would ensure that in an event of national emergency, aircraft and reserve pilots would be available.[9]

Congress remained concerned about foreign competition with U.S. airlines, thus just over a decade later, The Civil Aeronautics Act of 1938 was enacted with the hopes of providing greater support for economic growth and development of the airline industry. This act increased the minimum percentage of voting equity that was required to be held by U.S. citizens from fifty-one percent to seventy-five percent.[10] The Civil Aeronautics Act was based on the Shipping Act of 1916[11], which already required seventy-five percent U.S. citizen ownership.[12]

After World War II, the first piece of international aviation legislation was the Chicago Convention on International Civil Aviation ("Chicago Convention") of 1944.[13] The Chicago Convention established the basic rules for international civil aviation. Article 1 of the Convention established the principle that "every State has complete and exclusive sovereignty over the airspace above its territory."[14] Further, Article 7 of the Chicago Convention

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[5] Major Stephen M. Shrewsbury, "September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty", 68 J. AIR L. & COM. 115, 118 (2003)
[6] *See* Bohmann, *supra* note 1, at 695.
[7] *Id.*
[8] *Air Commerce Act of 1926*, ch. 344, § 9(a)(3), 44 Stat. 568 (1926).
[9] H.R. Rep. No. 1653, 68th Cong. at 527 (1925) (quoting Major General Patrick, "We will never have a military Air Service sufficient to meet a major war emergency. We will have to depend upon civilian agencies to supplement our needs in such emergency.")
[10] *Civil Aeronautics Act of 1938*, Pub. L. No. 75-706, 52 Stat. 973, § 1(13)(c) (1938).
[11] 39 Stat. 728 (1916), as amended, 46 U.S.C. §§ 801-42 (1958).
[12] *See* Bohmann, *supra* note 1, at 696.
[13] Convention on International Civil Aviation, December 7, 1944, 15 U.N.T.S. 295.
[14] The principle of sovereignty was already mentioned in the Convention of the Regulation of Aerial Navigation ("Paris Convention"), Oct. 13, 1919, 11 L.N.T.S. 173.

"recognizes that each nation has a right to reserve for its national airlines the carriage of passengers, mail, or cargo transported for compensation between two points within its territory. Thus, each nation may reserve its domestic traffic to domestic carriers. Article 17 of the Chicago Convention attributes to every aircraft a particular nationality, namely, the nationality of its place of registry."[15]

Congress further modified the provisions of prior legislation in its enactment of the Federal Aviation Act of 1958 ("FAA"), which governs who may operate a commercial aircraft in the U.S.[16] Under this act a person wishing to operate an aircraft within the U.S. is required to apply for a certificate of public convenience and necessity from the Department of Transportation ("DOT").[17] Once a person has applied, the Secretary of Transportation ("SOT") must determine whether they are fit, willing and able to provide the proposed transportation.[18] In order to pass the fitness review and obtain the certificate one must meet the citizenship requirements set forth in the statute, 49 U.S.C. § 40102(a)(15), which defines a "citizen of the U.S." as: "(A) an individual U.S. citizen, (B) a partnership, each of whose partners are U.S. citizens, or (C) a corporation or association organized under the laws of the U.S. whereby the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens, which is under the actual control of U.S. citizens, and at least seventy-five percent of the voting interest is owned or controlled by U.S. citizens."[19] Filing requirements necessitated by significant changes in ownership, management or operations are governed by 14 C.F.R. § 204.5 and require an amendment to the operating certificate, triggering a review to ensure U.S. citizenship requirements are met.[20]

b. Ownership & Control

Regulatory authorities have separated the issue of ownership and control into an analysis of the particular airline's legal and managerial structure. Interpretations of ownership and control have shifted from time to time in accordance with prevailing political and economic trends and whether or not the rule is being utilized as leverage to gain a concession or advantage.[21] Recently, structural changes, like alliances, are making it more difficult to determine real ownership and control. However, it has become generally accepted that "substantial ownership" means fifty-one percent of voting interest whereas "effective control" refers to the degree of influence that a party has over an airline's directors and senior management and shareholders.[22]

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[15] Article 17 of the Chicago Convention states "aircraft have the nationality of the State in which they are registered." Chicago Convention, supra note 12, at art. XVII, 15 U.N.T.S. at 308.
[16] *See* Bohmann, *supra* note 1, at 697.
[17] *Id.*
[18] 49 U.S.C. §§ 41703(b), 41102(a), 41103(a) (1994).
[19] 49 U.S.C. § 40102(a)(15) (1994).
[20] See 14 C.F.R. 204.5 (2000).
[21] Peter Francis Humcle, "The Withering of Foreign Ownership Restrictions and the Rise of Competition in the North American Airline Industry", Institute of Air and Space Law, McGill University, 73 (1996).
[22] H.A. Wassenbergh, "International Civil Aviation Policy and the Law of the Air", 2nd ed. (The Hague: Maninus Nijhoff, 1962) suggests that "substantial ownership and effective control" arises when a party owns, at least, 51 percent "of the shares in the airline;" Further, he says that even a 30 percent participation could be "substantial", depending upon the particular rights and powers accorded to the shareholder by the airline's by laws or other instruments.

The first statutory definition of "effective control" specifically devised for the airline industry came from the European Community's airline de-nationalization policy, Article 2(g) of Council Regulation No. 2407/92 on air carrier licensing and stated as follows: “'effective control' means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by: (a) the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.”[23]

A number of factors have been considered routine influences when regulatory authorities explore the issue of corporate control:

> “(1) constitution of the board of directors; (2) whether veto rights are granted to shareholders (3) with whom rests financial and operational responsibility; (4) share transfer conditions; (5) non-national’s right to purchase additional shares; (6) analysis of which shareholders bear risks of the arrangement and which receive the benefits; (7) the existence of non-voting shares and the rights and obligations accorded; (8) whether non-nationals provided loan finance and associated conditions; (9) whether lease agreements have been entered into; (10) the comparative size and financial strength of the participating entities; (11) which entity provides the working capital; (12) which shareholder comes to the rescue when the entity suffers financial difficulty; (13) any management agreements that may accord a non-national influence over senior personnel and decision making; (14) whether and entity is required to use the non-national’s computer reservation system or other forms of information management and the conditions attached thereto; (15) whether any ties exist in the form of code-sharing, block-space or lease charter or interchange agreements; (16) whether non-national holds the largest block of shares; (17) the similarity in names of the entities and (18) whether the non-national is itself an air carrier.”[24]

Control interpretations have evolved through case law, which tends to focus upon whether or not the foreign entity has direct or indirect power to influence the U.S. airlines' directors, officers or shareholders.[25] The Civil Aeronautics Board (“CAB”) interpreted that Congress’ intent in the FAA was to ensure that air carriers issued U.S. licenses, so U.S. air carriers would be owned and controlled by U.S. citizens. “To adopt the examiners' supposition that a construction to the effect that either ownership or control alternatively might suffice would defeat the congressional purpose of the citizenship provision.”[26] Accordingly, in 1971, the CAB formed the guidelines for citizenship determinations through this interpretation by creating a two

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[23] *See* Humcle, *supra* note 20, at 74 discussing EU, *Council Regulation 2407/92 on Licensing of Air Carriers,* O.J. L. 240/1, (1992).

[24] Dan M. Fiorit, *Globalization of Aviation and the Existing Domestic and International Framework*, (1992).

[25] James E. Gjerset, “Crippling U.S. Airlines: Archaic Interpretations of the Federal Aviation Act’s Restrictions on Foreign Capital Investments”, 7 AM. U. J. INT’L. L. & POL’Y 173, 181-82 (1991) suggests that the DOT has recognized two kinds of foreign control: (1) that arising through personal relationships and (2) through the financial control emanating from equity and debt ownership.

[26] Thomas D. Grant, “Foreign Take-overs of United States Airlines: Free Trade Process, Problems and Progress”, Harvard J on Legislation 63 at 91, (1994).

part test for investigating an airline's citizenship status: (1) control in fact, also called effective control and (2) ownership and control of voting interests, also called technical ownership.[27] Therefore, authorities must analyze every proposed foreign investment in a U.S. airline to ensure that its ownership and control do not fall into foreign hands.

The two part functional test is currently applied to prospective foreign investments to determine whether U.S. citizens will continue to own the required seventy-five percent of voting interest and whether the foreign entity will acquire actual or de facto control over the U.S. carrier.[28] In order to prevent the U.S. airline from having its domestic operating permit revoked, it had to meet both an ownership of voting interests test and a control in fact test.[29] Thus, cabotage rights are only available to air carriers that meet these requirements.

Once the technical requirements are met, a number of factors may nevertheless jeopardize U.S. citizenship:

> (1) a supermajority voting power, a block voting power or a veto power associated with ownership" (2) a shareholder agreement that entitles the foreign shareholder to any rights beyond its equity interest (3) foreign debt or foreign lines of credit in the extraordinary case only, as when the loan agreement provides special rights to the debt holder; (4) close links of shareholders, directors, or management with a foreign investor."[30]

In *Willye Peter Daetwyler*[31], Interamerican Air Freight Corp. applied with the CAB for operating authorization as a U.S. citizen international airfreight forwarder. Here, the "technical" requirements were met; the airline was seventy-five percent owned by U.S. citizens and two-thirds of the directors and senior officers were U.S. citizens. Although these requirements were met, the airline failed to meet citizenship requirements under effective control because several of the airline's officers and employees enjoyed long-standing personal and professional relationships with Daetwyler, a Swiss national.[32] The CAB determined that Daetwyler could influence decisions to an extent that violated their interpretation of the foreign control limitation.[33]

In Intera Artic Services ("IAS")[34], the DOT placed heavy emphasis on the fact that although two IAS directors were U.S. citizens, they were also directors of a foreign carrier and considered them "ready conduits" for exercise of control by the foreign interest[35]. They failed to show independence from foreign control in two respects: first, the bylaws of the carrier allowed the foreign non-voting interests to force the company to buy them out and second, in the event

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[27] *See* Gjerset, *supra* note 24 at 184.
[28] Jeffrey Donner Brown, "Foreign Investment in U.S. Airlines: What Limits Should Be Placed on Foreign Ownership of U.S. Carriers?", 41 Syracuse L. Rev. 1269, 1287 (1990)
[29] *Id.*
[30] *See* Bohmann, *supra* note 1, at 706, discussing the Application of Wrangell Mountain Air, Inc., D.O.T. Order 99-3-13 at 6 (1999).
[31] Willye Peter Daetwyler, d.b.a. Interamerican Airfreight Company, Foreign Permit, 58 C.A.B. 118 (1971).
[32] *See* Bohmann, *supra* note 1, at 705, discussing *Id*.
[33] *See* Gjerset, *supra* note 24 at 188.
[34] Intera Arctic Services, Inc., D.O.T. Order No. 87-8-43, at 5 (1987).
[35] *See* Bohmann, *supra* note 1, at 705.

the carrier would be profitable, the foreign non-voting interests would receive most of the award.[36]

In Page Avjet[37], however, the DOT determined the carrier was a U.S. carrier because its bylaws prohibited the foreign investor from blocking corporate actions in a buy-out provision. The case involved a foreign investor who acquired 100% of the non-voting shares, which gave him the right to vote on company mergers, acquisitions, consolidations, and the liquidation, thus the CAB concluded that the non-voting shareholder had the right to influence many of the crucial decisions of the company.[38] In particular, they had the power to block any proposal by the voting-shareholders on the above-mentioned issues,[39] however after Page Avjet had established a buy-out provision according to which the voting shareholders could buy back the non-voting shares if the latter blocked a corporate action, the CAB approved the deal.[40]

The deregulation of the airline industry in 1978 was the U.S. government's first attempt to encourage more competition among airlines.[41] The policy considerations behind the Deregulation Act[42] were " the avoidance of unreasonable industry concentration, excessive market domination, and monopoly power" and " the encouragement of entry into air transportation market by new carriers."[43] Congress intended to force airlines to compete with one another for consumers as well as for capital investments.

c. Chartering

Historically, commercial carriers have provided efficient, economical and safe transportation services to travelers. More recently however, with air travel becoming more popular, commercial carriers are experiencing poor on-time arrivals, increasing boarding denials, passenger complaints, congestion around major hubs and business fare increases.[44] Air travelers are left looking for other, less problematic, alternatives to travel. Most alternatives though go hand in hand with substantial capital commitments, like owning.[45] Charters remain a viable alternative and their flexible nature tends to be very appealing to travelers. Chartering an aircraft is really just the rental of an aircraft and flight crew for a specific trip, much like hailing a taxi.

"Utilization of charter operators providing both aircraft and crew, operating on flexible client-driven schedules and itineraries provide lower aggregate time valued costs for multiple traveler scenarios and represent a viable alternative to the current commercial travel dilemma."[46]

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[36] *Id.*
[37] Page Avjet, Citizenship, DOT Order 83-7-5, 102 C.A.B. 488, at 490 (1983).
[38] *Id.*
[39] *Id.* at 491, see also Wrangler Aviation, Inc., D.O.T. Order 93-7-26 at 15 stating "veto control over substantive management decisions ... by "supermajority veto."
[40] *Id*. at 492.
[41] *Airline Deregulation Act of 1978*, 92 Stat. 1705, as amended, 49 U.S.C. 1301 (1978).
[42] 92 Stat. 1705, as amended, 49 U.S.C. 1301 (1978).
[43] *See* Gjerset, *supra* note 24 at 186 discussing *Id*.
[44] Bowen, B., & Headley, *The Airline Quality Rating 2000*, W. Frank Barton School of Business at Wichita State University (WSU) and the University of Nebraska at Omaha (UNOmaha) Aviation Institute. (2000)
[45] Robert W. Kaps, "Air Charter – The Business Airline of the Future… But, Does the Business Traveler Know?", Journal of Air Transportation World Wide at 95 (2001).
[46] *Id*.

Further, charter products are able to support multi-destination, multi-traveler itineraries with relative ease, like those in medium to large businesses with consistent travel demand requirements.[47]

Charter services have traditionally held a small, but stable share of the total U.S. domestic market. As used in the FAA, the term "charter air carrier" means an air carrier holding a certificate of public convenience and necessity that authorizes it to provide "charter air transportation."[48]

Under the FAA, charter flight operators are required to obtain a certificate of public convenience and necessity when such operator offers or furnishes transportation by air to the general public on a commercial basis.[49] Commercial operations require a commercial license (called an air carrier or commercial operating certificate) issued by the FAA.[50] Just as a taxi driver or limousine operator is required to have a commercial license to carry passengers; an aircraft operator needs a FAA commercial operating certificate to carry passengers or cargo for compensation or hire on a corporate jet. Corporate aircrafts flying commercially generally operate under Federal Aviation Regulations ("FAR") Part 135, the so-called air taxi or charter regulations.[51] The principal advantage of operating under a Part 135 certificate is that an operator then can lease the aircraft to gain additional utilization of the aircraft and, therefore, offset the fixed costs of owning the aircraft but some disadvantages also exist.[52] As a Part 135 operator, the company is a certificate-holding entity in the eyes of the FAA and must comply with specific requirements in regard to paperwork, maintenance and training.[53] As a certificate holder, the operator is subject to additional surveillance from FAA inspectors and has less flexibility in conducting flight operations.[54]

The charter company has exclusive direction and control over the aircraft, its crew, and all ground and airport terminal staff in its employment, as well as over all passengers and all cargo on board.[55] But U.S. aircraft used for commercial or charter purposes have stringent operational and maintenance rules under Part 135 of the FAA regulations. The FAA requires air charter services' airplanes to be properly accredited and airworthy in order to operate.[56] Additionally, the pilot should execute an airworthiness test before every single flight.[57] Airplanes should pass the conditions for secure and efficient operations, as well as comply with the engine emission demands along with other airplane equipment requirements.[58] Air charter flight procedural laws are also set forth by the FAA just like recordkeeping requirements which include

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47 *Id*. at 96.
48 *See* 49 U.S.C.A. § 40102(a)(13).
49 C.A.B. v. Carefree Travel, Inc., 513 F.2d 375 (2d Cir. 1975); Voyager 1000 v. C.A.B., 489 F.2d 792, 27 A.L.R. Fed. 140 (7th Cir. 1973).
50 *Id.*
51 Jeff Wieand, "Your Client vs. the Faa the Flight Department Company Trap", Bus. L. Today, March/April 2003, at 38, 39.
52 *Id*.
53 *Id*.
54 *Id*.
55 See Bohmann, supra note 1, at 709.
56 *Id.*
57 *Id*.
58 *Id*.

operator's qualification, airplane certification, pilot's qualification, and also the documents of aircraft pilots and also attendants working.[59]

III. MARITIME COASTWISE TRADE LAWS

a. History

The U.S. became a maritime power before it was even a nation. The British colonies were the world's leading shipbuilders and after the Revolutionary War, the U.S. maritime industry prospered through the late eighteenth and early nineteenth centuries. "From the early days of our history as a nation, the proposition that an adequate domestic merchant marine is essential to the defense and commercial welfare of the U.S. became a basic element of our national policy."[60] After the passage of the Constitution in 1789, the U.S. enjoyed sovereign powers to protect its merchant marine fleet from foreign-flag competition in its domestic maritime trades.[61]

"For decades the consensus among shipping nations has favored the exclusion of foreign vessels from domestic maritime trade."[62] The U.S. followed this trend and Congress took its first step in involving itself with the U.S. merchant marine by enacting cabotage laws to protect the American shipbuilding trade and to promote the domestic merchant marine industry.[63] Congress also passed a law imposing tax on foreign vessels operating in United States domestic trades.[64] From 1817-1866 these laws prohibited transportation of merchandise "from one port of the U.S. to another port of the U.S. in a vessel belonging wholly or in part to a subject of any foreign power."[65]

Merchants began testing these laws though. In one instance, a hardware merchant shipped kegs of nails from New York City to Antwerp on a Belgian flag vessel, briefly unloading and quickly reloading the cargo onto a British flag vessel bound for California.[66] After the U.S. brought a claim against the merchant, the court ruled for the merchant on the plain and ordinary meaning of the cabotage laws, which applied to goods carried on a continuous voyage, not to separate voyages or the use of separate vessels.[67] These laws were promptly amended in 1893 to prohibit foreign-flag transportation between two U.S. ports directly or indirectly "via a foreign port."[68] These amendments have remained a part of the U.S. cabotage laws through many

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59 8A Am. Jur. 2d Aviation § 66
60 Robert L. McGeorge, "United States Coastwise Trading Restrictions: A Comparison of Recent Customs Service Rulings with the Legislative Purpose of the Jones Act and the Demands of A Global Economy", 11 Nw. J. Int'l L. & Bus. 62, 64 (1990)
61 *Id.*
62 Han Deng, "'Built' or 'Rebuilt'? That Is the Question: Risk of Losing the Coastwise Privilege After Vessel Modification Projects Outside the United States", 35 Tul. Mar. L.J. 241, 242 (2010)
63 *See* McGeorge, *supra* note 58 at 65.
64 *Id.*
65 Chapter 31, § 4 of the Act of March 1, 1817, 3 Stat. 351 (1850).
66 United States v. Two Hundred & Fifty Kegs of Nails, 61 F. 410 (9th Cir. 1894)
67 *Id.*
68 This language was added to the cabotage laws even before the court of appeals printed its decision in the 250 Kegs of Nails case, Chapter 117 of the Act of February 15, 1893 (27 Stat. 455). It was adopted without revision when the Jones Act was passed in 1920, and remains unchanged to date.

revisions and can be found today in the Jones Act.[69] Simply put, as the primary U.S. maritime cabotage law, "the Jones Act requires merchandise carried between U.S. ports to be shipped in American bottoms."[70]

Following World War II, the U.S. merchant marine had the largest private merchant fleet in the world.[71] Unfortunately, since then, the private merchant fleet has shrunk considerably and today the U.S. is no longer a significant player in international shipping. U.S. carriers encounter diverse problems when competing against foreign-flag vessels, and these problems have contributed to the steady decline of the U.S. merchant marine fleet.[72] In 1948, 716 vessels were carrying the U.S.-flag, close to fifty percent the worlds shipping fleet, and in 1995, less than 150 vessels were flying the American flag, meaning the U.S. controlled only five percent of the world's fleet.[73] Today less than one percent of the world fleet is under U.S.-flag.

b. Legal Framework

Congress has taken a number of steps in order to encourage the maintenance of a merchant marine with U.S.-flag ships and American personnel and to support the shipbuilding industry. Like the aviation policies, the need for a national defense and national economic interest are the factors compelling Congress to act.[74] The U.S. has traditionally considered it very important to maintain registries of commercial vessels so as to enjoy access to those ships in the event of war or national emergencies.[75] A substantial merchant fleet ensures adequate sealift capability for the carriage of personnel and equipment.[76]

i. Registration

Every commercial vessel is attributed a nationality, namely the nationality of its registry and the U.S. has been known to have one of the most restrictive registration requirements of any maritime nation.[77] The United States Coast Guard ("USCG") is in charge of all vessel registration, which is governed by the Vessel Documentation Act of 1980 and in order to qualify for a registration, a vessel must be owned by an individual who is a citizen of the U.S. or by an entity, all of whose members are citizens of the U.S.[78] Additionally, for vessels registered in the

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[69] 46 U.S.C. § 883 (1989).
[70] Debra C. Buchanan, "United States Coastwise Laws in the Pacific", 31 J. Mar. L. & Com. 119, 119 n.1 (2000) ("[T]he Nicholson Act, 46 U.S.C. app. §251, which requires fish to be brought ashore in American bottoms; the Transportation of Passengers in Foreign Vessels Act, 46 U.S.C. app. §289, which requires passengers sailing between United States ports to be carried in American bottoms.").
[71] *See* Bohmann, *supra* note 1, at 730.
[72] *Id.*
[73] S. Rep. No. 104-167 (1995). This number presumably has further decline since three of the largest container companies, APL Ltd., Lukes Bros. Steamship Co. and the international services of Sea-Land Service Inc., were sold to foreign companies.
[74] See McGeorge, supra note 58, at 66.
[75] *Id*.
[76] *Id*.
[77] *See* Bohmann, *supra* note 1, at 731.
[78] 46 U.S.C. § 12102 (1997).

U.S., only twenty-five percent of the unlicensed crew may be non-U.S. citizens, and only U.S. citizens may serve as high-level crewmembers, such as captains and officers.[79]

Complying with the requirements of registration in the U.S. is very costly. Many American ship owners have decided to "reflag" their vessels or change the registry of a ship to a different country, by using a "flag of convenience."[80] Most other countries use "open registry" which includes less strict registration requirements and permits the registration of almost all ships owned by foreign nations.[81] The major advantage of reflagging is cost. Once reflagged, a ship owned by a U.S. citizen can employ foreign seamen and pay lower foreign wages, thereby avoiding the high costs of unionized maritime labor in high wage countries, such as the U.S.[82] Another advantage is that the working conditions in flag of convenience countries are generally more favorable to ship owners.[83] Since crewing costs can total as much as half of the ship's operating costs, ship owners can make substantially higher profits and remain competitive by using a flag of convenience.[84]

Taxes play a huge role in the utilization of flags of convenience. In 'popular' countries of registry, such as Liberia and Panama, shipping operations that take place outside the country of registry are untaxed so foreign-flag ships are not required to pay taxes neither in the country of registry nor in the U.S.[85] In contrast, U.S. vessels must comply with the U.S. Tax Code. Most foreign-flag ships often enjoy shipping income tax exemptions, deferral devices, and accelerated depreciation while some do not pay any income taxes at all.[86] On the other hand, the U.S. Tax Code imposes high income taxes on U.S. maritime vessels.[87]

ii. Citizenship

Of importance to cabotage, the Shipping Act of 1916 established the standard for U.S. entity citizenship.[88] Similar to the registration requirements, in order for a vessel to obtain U.S. documentation from the USCG, the vessel cannot be documented under laws of a foreign country and it must be wholly owned by an eligible owner.[89] "An eligible owner is a U.S. citizen: either an individual who is a U.S. citizen, or an association, trust, joint venture, partnership, or corporation that qualifies as a U.S. citizen."[90] These entities are referred to as having

[79] *Id*.
[80] *See* Bohmann, *supra* note 1, at 731; *See also* McGeorge, *supra* note 58, at 67.
[81] E.g., in Liberia, corporations incorporated in Liberia qualify as a Liberian national; thus, any citizenship requirement can be circumvented by setting up a corporation. See H. Edwin Anderson III, The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives, 21 Tul. Mar. L.J. 139, 155 (1996).
[82] See Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 574, 100 S. Ct. 800, 63 L. Ed. 2d 36 (1980).
[83] *Id*.
[84] *See* Bohmann, *supra* note 1, at 732
[85] *Id*. stating even maritime nations that are not considered flag of convenience countries, such as European countries, have frequently adopted tax policies that enable their shippers to compete in international shipping.
[86] Constantine G. Papavizas, "New Developments in U.S. Flag Vessel Financing and Citizenship Requirements", 24 Tul. Mar. L.J. 205, 218 (1999) (hereinafter Papavizas #1)
[87] *Id.*
[88] *See* Act of July 15, 1918, ch. 152, sec. 2, § 2, 40 Stat. 900 (codified as amended at 46 U.S.C.A. § 50501 (2007)).
[89] 46 U.S.C.A. §12103(a)-(b) (2007).
[90] *Id.* §12103(b).

documentation or registry citizenship.[91] There are three types of U.S. citizenship for vessels: (1) documentation or registry citizen (2) controlling-interest citizen (3) coastwise or "Jones Act" citizen.[92]

The documentation citizen requirements vary by the type of legal entity, but a reoccurring theme is ensuring that the managers of the entity are U.S.[93] citizens. For partnerships, each general partner must be a U.S. citizen and the controlling interest in the partnership must be owned by U.S. citizens.[94] For a corporation, it must be incorporated under the laws of the U.S. or a state, the chief executive officer and chairman of the board of directors must both be U.S. citizens and no more than a minority of the directors necessary to constitute a quorum may be non-U.S. citizens.[95] For the other entities to be considered U.S. citizens, each member or beneficial owner must be a U.S. citizen.[96] A vessel with documentation citizenship is eligible for a registry endorsement and may operate in the trade between the U.S. and foreign countries.[97]

The next two types of citizens are both defined in section two of the Shipping Act of 1916 and can be referred to as "section two citizens."[98] A vessel with controlling-interest citizenship must be a documentation citizen and it must be majority owned by U.S. citizens.[99] A coastwise or "Jones Act" citizen is the only type generally eligible to own or operate vessels engaged in the U.S. coastwise trade and to operate U.S. flag vessels with fisheries endorsements.[100] A fisheries endorsement entitles a vessel to engage in fisheries, or "processing, storing, transporting, planting, cultivating, catching, taking, or harvesting fish, shellfish, marine animals, pearls, shells, or marine vegetation in the navigable waters of the U.S."[101]

The coastwise endorsement entitles a vessel to engage in coastwise trade which can be defined as "the transportation of merchandise by water, or by land and water, between points in the U.S. to which the coastwise laws apply, either directly or via a foreign port."[102] The Merchant Marine Act ("MMA"), 1920, regulates all coastwise trade.[103] The coastwise trade of

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[91] Constantine G. Papavizas, "U.S.-Flag Vessel Financing and Citizenship Requirements Update", 32 Tul. Mar. L.J. 35, 36 (2007) (hereinafter Papavizas #2)
[92] See 46 U.S.C. §12102(a) (1994); See also 46 U.S.C. app. §802(a) (1994); See also 46 U.S.C. §12106.
[93] See Papavizas #2, supra note 89, at 36-37.
[94] 46 U.S.C.A. §12103(b); see 46 C.F.R. §67.35.
[95] 46 U.S.C.A. §12103(b); see 46 C.F.R. §67.39.
[96] *See* 46 C.F.R. §67.37 (2006) (association and joint venture); 46 C.F.R. §67.36 (trust). For purposes of a registry endorsement, the beneficiaries of a trust do not have to be U.S. citizens if, among other things, each of the trustees is a U.S. citizen, the vessel is chartered to a U.S. citizen and the trustees can execute an affidavit relating to trust management. 46 U.S.C.A. §12111(c).
[97] 46 U.S.C.A. §12111(b) (allowing a vessel with a registry endorsement to engage in the trade between the United States and Guam, American Samoa, Wake, Midway, or Kingman Reef).
[98] 46 U.S.C. app. §802(a).
[99] See 46 U.S.C. app. §802(a), (b).
[100] *See* Papavizas #1, *supra* note 84, at 208.
[101] 46 U.S.C.A. §12113(c)(1). This requirement was added by the American Fisheries Act in 1998.
[102] *See* Papavizas #2, *supra* note 89, at 38. For example, the phrase "by land and water" was added in 1920 to reverse a 1913 opinion of U.S. Attorney General George W. Wickersham to the effect that the statute preceding the Jones Act (Act of Feb. 17, 1898, 30 Stat. 248) did not apply to mixed water/land transportation
[103] Pub. L. No. 66-261, §27, 41 Stat. 988, 999 (1920)

the U.S. is limited to ships that are owned and built or otherwise privileged to engage in the coastwise trade.[104]

"In the ordinary course, Jones Act-qualified vessels must be owned and operated by Jones Act-qualified U.S. citizens. A company that qualifies as a Jones Act or coastwise citizen is a documentation citizen that is at least seventy-five percent owned by individual U.S. citizens."[105]

The USCG believes that vessel citizenship responsibilities are traced back to the ultimate parent entity.[106] The USCG regulation provides

> "that when an entity owns a vessel, in order to meet the equity interests requirements for citizenship, each entity contributing to the equity interest must be a citizen eligible to document vessels in its own right with the trade endorsement sought. Thus, the ultimate parent entity in a typical corporate family must itself be eligible to document a vessel with a coastwise endorsement in order for any subsidiary to document a vessel."[107]

Simply put, the seventy-five percent requirement applies to all corporations in the chain of ownership, including the parent corporation.[108]

However, when the ownership of a coast-wise eligible vessel is public and widely dispersed, the rules of tracing back to a 'parent entity' can become an issue. Thus the Maritime Administration ("MARAD") adopted a fair inference rule for companies with more than thirty stockholders.[109] Under the fair inference rule, the seventy-five percent requirement can be proven by showing that at least ninety-five percent of the registered addresses of the stockholders of the company are located in the U.S.[110] In 1990, the USCG rejected the fair inference rule, instead recommending that these "public companies" restrict the sale of stock to U.S. citizens.[111] "The foregoing is important to an understanding of the Jones Act because the citizenship standard was later applied generally to vessels engaged in coastwise trade in the MMA."[112]

In 1920, Congress enacted section twenty-seven of the MMA which "was considered by some to be landmark maritime legislation because it first enunciated the maritime goals of the U.S."[113] Popularly referred to as the Jones Act, it exclusively reserves the U.S. cabotage for

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[104] 46 U.S.C. app. § 883 (Supp. III 1985). 'No merchandise shall be transported by water . . . between points in the United States . . . in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States . . ..'; *See also* 46 U.S.C. app. § 808 (Supp. III 1985) (permitting registration and enrollment of any vessel purchased by United States citizens as a United States vessel, entitling said vessel to the benefits and privileges thereof).

[105] U.S.C.A. §§12122, 50501, 50502(b).

[106] *See* Papavizas #2, *supra* note 89, at 41.

[107] 46 C.F.R. §67.31(d).

[108] Conoco, Inc. v. Skinner, 970 F.2d 1206 (3d Cir. 1992) ("The strong protectionist sentiment which pervades the various maritime statutes compels the [conclusion that] the 75% requirement applies to all corporations in the chain of ownership, including the parent corporation.").

[109] See 46 C.F.R. §355.3(a). The source of this rule, as indicated in the regulation itself, is Collier Advertising Service, Inc. v. Hudson River Day Line, 14 F. Supp. 335 (S.D.N.Y. 1936), aff'd, 93 F.2d 457 (2d Cir. 1937).

[110] 46 C.F.R. §355.3(b).

[111] 55 Fed. Reg. 51,244, 51,245 (Dec. 12, 1990).

[112] Constantine G. Papavizas & Bryant E. Gardner, "Is the Jones Act Redundant?", 21 U.S.F. Mar. L.J. 95, 137 (2009)

[113] Section 1 of the Merchant Marine Act, 1920, containing those goals, is codified at 46 U.S.C. app. § 861 (repealed 2006).

vessels built in the U.S. and owned and crewed by its citizens and operated under the U.S. flag, i.e., registered in the U.S.[114] The rationale behind the Jones Act was to protect the national fleet against lower-cost foreign competition by excluding foreign ships from the domestic market while keeping a competitive balance for all U.S. carriers operating in the domestic trade by maintaining equal constructing and operating costs.[115] Apart from the requirement that the ships must be built in the U.S., the Jones Act strikingly resembles the cabotage regulation of the FAA.[116]

1. Transfers to Non-U.S. Citizens – Charters

Under the Shipping Act of 1916 the U.S. government can generally prohibit the transfer of a U.S.-flag vessel to a foreign-flag.[117] This authority extends to any transfer of control including vessel charters. However, MARAD has permitted a number of exceptions to these restrictions by regulations.[118] One of these exceptions is the time charter of any U.S.-flag vessel to a non-U.S. citizen (weighing less than 100 gross tons).[119] MARAD first proposed the exception to provide a general approval of all time charters of six months or less in duration, but the durational limit was increased to five years, and then removed entirely.[120] However, the MARAD regulations do not approve bareboat charters of vessels operating in the coastwise trade to non-U.S. citizens.[121]

Transfer of citizenship can take many forms. One of these forms is control exercised through contracts between the company and non-citizens; or chartering a vessel. A charter party is a contract between the owner of the vessel and the charterer, whereby the charterer engages the use of the vessel for a period of time.[122] "Charterers may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage."[123] But where the general owner retains the possession, command, and navigation of the ship and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract and not a demise or passing of the vessel, and the charterer is not burdened with the character or legal responsibility of ownership.[124]

Charter parties technically fall into three categories: voyage, time, and bareboat.[125] Essentially these can further be put into two categories: time and bareboat.[126] In a time charter,

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[114] *See* Gardner, *supra* note 110, at 38.
[115] *See* Bohmann, *supra* note 1, at 734.
[116] Warren L. Dean, "Jones Act Reflects Fundamentals of U.S. Legal System", J. of Com., Dec. 1, 54 (1998).
[117] 39 Stat. 728 (1916) (codified at 46 U.S.C.A. §56102).
[118] *See Regulated Transactions Involving Documented Vessels*, 46 C.F.R. §221.13 (1998).
[119] *See Id*. §221.15(a).
[120] *See* Papavizas #1, *supra* note 84, at 210.
[121] 46 C.F.R. § 221.15(a).
[122] Wilford et al., Time Charters 60 (4th ed. 1995)
[123] 22 Williston on Contracts § 58:6 (4th ed.)
[124] Rose v. Chaplin Marine Transport, Inc., 895 F. Supp. 856 (S.D. W. Va. 1995).
[125] Hyundai Corp., U.S.A. v. Hull Ins. Proceeds of M/V Vulca, 800 F. Supp. 124 (D.N.J. 1992).
[126] Walker v. Braus, 995 F.2d 77 (5th Cir. 1993) discussing the nature of a charter generally from 80 C.J.S. Shipping § 112.

the charterer engages for the use of the vessel for a particular period of time, and the owner agrees to operate the vessel and provide the captain and crew.[127] Under a time charter physical control of the vessel remains with the owner, but the time charterer directs what cargo it carries and where it trades, thus he has more operational control.[128] Finally, in a bareboat or demise charter, the charterer fully controls the vessel and provides the captain and crew.[129]

"It is clear that a bareboat charter, in which full operational control of the vessel is transferred from the owner to the charterer, to a non-citizen does not affect the citizenship of the owner at least where the term of the charter was less than the useful life of the vessel."[130] MARAD has taken the position that the citizenship of a bareboat charterer can only be affected if essentially all of its risk is effectively assumed by a non-citizen entity that time charters the vessel for a corresponding period.

In 1996, Congress enacted an exception to the usual ownership requirements of coastwise-qualified U.S.-flag vessels permitting documentation citizens owned by foreign leasing companies to own coastwise-qualified vessels as long as the vessels were under a long-term bareboat charter to a coastwise citizen.[131] A demise or bareboat charter from a leasing company owned by a foreign citizen to a U.S. citizen must be filed with the USCG, along with the vessel's certificate of documentation.[132]

iii. Subsidies

All trading partners have similar interests in promoting their merchant marine and equal rights to have their cargoes transported by their merchant marine; accordingly the U.S. has attempted to equalize foreign and domestic cost structures by granting various offsetting subsidies to U.S. shipbuilders and vessel operators competing in foreign trades.[133] The MMA aimed at promoting the development of an effective merchant marine capable of handling the nation's commercial and military needs.[134] Developments in the MMA authorized MARAD to grant subsidies to enable vessels that were built in the U.S. and staffed with U.S. personnel to compete effectively in the foreign trade.[135]

In order to promote the construction of vessels in U.S. shipyards, a carrier was able to receive construction-differential subsidies, if in return it agreed that it would operate that vessel exclusively in the foreign trade.[136] Constructing ships in American shipyards was, and continues to be, much more expensive than constructing ships in foreign shipyards.[137] Under the construction-differential subsidies program, the government could pay up to half the construction

[127] CHARTERS, MLP FL-CLE 7-1
[128] 1P1 Nichols Cyc. Legal Forms § 11:53.70
[129] Grant Gilmore & Charles Black, *The Law of Admiralty* § 4-1, at 193 (2d ed. 1975).
[130] *See* CHARTERS, *supra* note 125
[131] Pub. L. No. 104-324, §1113(d), 110 Stat. 3901, 3971 (1996).
[132] *Id.*
[133] E.g., construction and operating differential subsidies pursuant to 46 U.S.C. §§ 1151 *et seq.,* 1171 *et seq.* (1989).
[134] 46 U.S.C. § 1101 (1994); Seatrain Shipbuilding Corp. v. Shell Oil. Co., 444 U.S. 572, 584 (1980).
[135] Pub. L. No. 104-239, 110 Stat. 3118 (1996).
[136] 46 U.S.C § 1151 (1994).
[137] *See* Seatrain Shipbuilding Corp., *supra* note 132, at 574.

costs of a vessel built in the U.S. while, the operating differential subsidies were intended to enable U.S. vessels to successfully compete with all foreign-flag vessels that can be crewed and maintained at lower costs.[138]

These subsidies divided the U.S. merchant marine into two distinct segments. The first segment operated in the domestic trade of the U.S. and consisted of U.S. built vessels, which were constructed without the benefit of construction differential subsidies and operated in the coastwise trades without the benefit of operating differential subsidies.[139] The second segment operated in the foreign trades of the U.S. and consisted of U.S.-built vessels, which were constructed with the benefit of construction differential subsidies.[140] In short, unsubsidized vessels could not compete with lower-cost foreign vessels so they remained in U.S. domestic trade, while subsidized vessels' involvement in U.S. domestic trade was not permitted.[141]

Without a bill supporting the U.S. fleet, it seemed as though any U.S.-flag presence in international trade would diminish. Thus in 1996, the Maritime Security Act ("MSA") was enacted and under this act, the Maritime Security Program ("MSP") was established as a direct subsidy program for militarily useful U.S.-flag vessels.[142] It ensured that forty-seven vessels remained documented in the U.S. and available for national defense.[143] Unlike the MMA, the MSP granted a flat fee per vessel and did not require adhering to specific trade routes.[144] Ship owners received $2.3 million per vessel in 1996 and $2.1 million per vessel for each following year.[145] Because the MSP was set to expire in 2005, Congress enacted the MSA of 2003 to permit a follow up MSP for sixty vessels (the forty-seven original vessels were grandfathered) through 2015.[146] In return, carriers had to participate in the Maritime Security Fleet and in the event of war or national emergency; carriers must make their participating vessels available for the use of the Department of Defense.[147] The government provided these subsidies pursuant to agreements between MARAD and the owner or operator of the vessel. Therefore the MSP essentially replaced the operating differential subsidy agreement system contained in the MMA.[148] However, all existing operating differential subsidy contracts were to continue to be honored until they contract expired, but on the other hand, all construction differential subsidy funding was to be phased out and cut off entirely.[149]

The MSP had a number of citizenship requirements affecting U.S.-flag vessels. In order to be considered first priority in the MSP a vessel had to be "owned and operated by persons who were controlling interest citizens of the U.S." under the Shipping Act of 1916.[150] However, as time went on, these requirements became less stringent.

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[138] *See* Bohmann, *supra* note 1, at 735.
[139] *See* McGeorge, *supra* note 58, at 66.
[140] Independent United States Tanker Owners Committee v. Lewis, 690 F.2d 908, 912 (D.C. Cir. 1980).
[141] *Id.*
[142] Pub. L. No. 104-239, 110 Stat. 3118 (1996).
[143] *See* Papavizas #2, *supra* note 89, at 57.
[144] *Id*.
[145] *See* McGeorge, *supra* note 58, at 68.
[146] See Pub. L. No. 108-136, §3531, 117 Stat. 1392, 1802 (2003).
[147] *See* Papavizas #1, *supra* note 84, at 207.
[148] *See* Papavizas #2, *supra* note 89, at 57.
[149] *Id*.
[150] *Id*.

Further, under this act, in order to promote financing of vessels engaged in the coastwise trade, congress included a provision that allowed companies owned by foreign citizens to own coastwise qualified vessels as long as four conditions were met.[151] Even if the beneficial owners of the vessel were not U.S. citizens, a vessel may qualify provided that: "1) the vessel is otherwise eligible for documentation, (2) the foreign owner is primarily engaged in leasing or other financing transactions, (3) the vessel is under a demise charter to a U.S. citizen vessel operator, and (4) such demise charter is for a period of at least three years."[152]

The MSP also granted U.S.-flag vessels free transferability under section nine of the Shipping Act

> "(1) where the owner simultaneously documents under the U.S.-flag an equivalent vessel less than ten years old; (2) where the vessel is eligible for the MSP but is not awarded a MSP operating agreement within ninety days of the filing of an application; and (3) where the vessel was receiving a subsidy pursuant to an operating differential subsidy agreement, such subsidy agreement has expired, and the vessel is more than fifteen years old."[153]

Currently, the MSP provides nearly $100 million in subsidies for U.S.-flag vessels and remarkably, most of these vessels are ultimately owned by foreign companies, many of the once U.S. companies that participate in the program have since been sold to foreign companies.[154] Despite the change in ownership, MARAD approved the transfer of the subsidies to the new owners that continue to operate the ships under the U.S.-flag.[155] The method by which this is all accomplished is: the buyers regularly set up U.S.-owned trusts that operate the vessels for the foreign owner and employ and direct captain and crew.[156] Evidently, MARAD believes that the creation of a 'straw-man' U.S. trust is sufficient to keep ownership and control in U.S. hands, even though the vessel is presumably time chartered exclusively to its foreign owner that directs where, when, and how the vessel operates.[157]

IV. CONCLUSION: THE BIG COMPARISON

Following the step-by-step analysis of the above sections this section compare and contrasts ownership, control and charter restrictions in aviation law and maritime coastwise trade law. Looking at the historical framework first, both maritime law and aviation law followed the

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[151] See 46 U.S.C. §12106(e) (Supp. III 1998).
[152] Id.
[153] In its discussion of the final rule implementing the MSP, MARAD stated that the new section would not remove the requirement for approval by MARAD for transfer to foreign registry of a U.S.-flag vessel that applied for MSP but was not qualified for award other than by reason of age.... Therefore, if MARAD has determined that the applicant is qualified and the vessel is eligible under the provisions of section 651(b)(1) [of the Merchant Marine Act, 1936 as amended by the Maritime Security Act], but does not award a MSP operating agreement due to lack of funds or an inadequate program level, the applicant may remove the subject vessel from U.S. registry and reflag the vessel under a foreign registry without section 9 approval by MARAD. 62 Fed. Reg. 37,733, 37,734 (1997); *See* 46 U.S.C. app. §808(e).
[154] 46 U.S.C. §53103(c)(1)(B) (Supp. 2004).
[155] *See* Id. at § 53102(c)(3); Tim Sansbury, MARAD Approves Transfer of Sea-Land Subsidies, J. of Com., Dec. 10, 1999.
[156] *See* Bohmann, *supra* note 1, at 737.
[157] Id.

idea of sovereignty. They shared the main policy concerns behind the limitation of ownership and control to U.S. citizens: (1) the need for national security and defense, especially for instances of national emergency i.e. a domestic air fleet and a domestic merchant marine (2) national economic interest (3) regulation of foreign and international trade and commerce and (4) maintain a national power. On a side note, the need for both airlift and sealift in times of national emergencies is a topic to discuss. Although airlift could respond rapidly and deliver in a short time, their delivers will be limited because of size. And while sealift may require much more time to deliver, it will be able to deliver and immense amount more. Thus an airlift system would be ideal for putting forces in place quickly while a sealift system will be able to carry to bulk of military cargo.

The maritime side began implementing restrictions almost 100 years before its 'little cousin' (i.e. somewhat related, but not entirely the same). Cabotage laws were first created to promote domestic maritime trade and shipbuilding. U.S. aviation law never enacted its own cabotage laws but under International aviation law, nations were granted the right to reserve certain carriage between two points within its territory to its national airlines. On both sides, cabotage laws were seen as a way to protect a nation's domestic wellbeing by keeping foreign competition from becoming overly involved.

Operating concerns for both sides are also very similar. Under the FAA in order to operate an aircraft, an airline needs a certificate of public convenience and necessity, which they must apply for. Likewise, in order to operate a vessel in the U.S. it must be registered in the U.S., which is also done by an application process for documentation in the U.S. The application requirement, for both, is to determine the carrier has standing and fitness to operate in the U.S.. Maritime law goes a step further though, and allows for foreign registration, or reflagging U.S. vessels to flags of convenience (of other nations) in order to save on expenses and be able to compete with foreign nations.

Both sectors were concerned with foreign competition, thus the enactment of strict citizen requirements followed accordingly. The first restrictions on the aviation side were citizenship requirements that stated that an aircraft could only be registered in the U.S. if U.S. citizens owned it. Further it could only be operated in the U.S. if U.S. citizens controlled fifty-one percent of the voting interest while the president, along with two thirds of the board members, also had to be U.S. citizens. Soon after, the fifty-one percent requirement increased to a seventy-five percent requirement. Strikingly similar to the aviation requirements, the maritime citizen requirements also stated the vessel had to be U.S. owned and could not be under any foreign laws. It also shared the seventy-five percent requirement with aviation. (However, in reality, the ACA actually followed the Shipping Act of 1916's requirements in their creation of citizenship requirements). On another note, the statutory definitions of citizen are almost identical for both laws.

From here, is where the two sectors somewhat fade away from one another. Aviation law focuses on the substantial ownership and control of aircrafts in ownership and control restrictions. Substantial ownership is fifty-one percent of the voting interest and control is the degree of influence that interest has over the aircraft/airline. When an aircraft/airline can pass the fifty-one percent ownership requirement as well as the effective control through managerial influence, it can operate in the U.S.

Maritime law however, gets very precise on its citizenship requirements for ownership and control. The Shipping Act of 1916 lays out three levels of U.S. citizens, the first being able to operate in the U.S. and the last being able to operate in the U.S. coastwise trade. The coastwise citizen has the strictest requirements; it must be built in the U.S., owned by U.S. citizens, crewed by U.S. citizens, and operated (registered) in the U.S.. Ideally, these requirements would protect the U.S. domestic trade from the lower-cost foreign competition. Compared with the situation in the aviation sector, it appears that the standards regarding ownership requirements are very different, and much less strict, in the maritime sector. While the DOT closely examines any links of the U.S. owners or trustees of U.S. carriers with foreign interests, MARAD does not seem to be equally interested in the ultimate ownership situation of U.S. shipping companies that receive federal subsidies.

Under charter restrictions, the main difference between the two laws is, maritime charters focus on carrying cargo while aviation charters focus on carrying passengers. Thus the charter maintenance and conditions rules for aviation law are much more strict than those for maritime law, while maritime documentation-type restrictions are much more strict. Both have lease options where charterers do not have to take full ownership liability while in control of the carriers. But again, maritime law takes it one step further to ley out three different types of charters and separate restrictions for those.

While the CAB may be authorized to provide direct subsidy to U.S. air carriers, it just does not. However, if it did, subsidies could be paid regardless of where the aircraft was built. On the other hand, most U.S.-flag ocean carriers that were paid subsidies directly had build ships in the U.S.. Many of these subsidy programs have been phased out of the maritime sector though, thus the two sectors are very similar in that sense now. However, in the promotional area, both aviation and maritime industries benefit from military spending.

U.S. air carriers are similar to U.S. ocean carriers in that they operate in an international market but they are dissimilar in that their major concentration is in passenger services as opposed to cargo services. Additionally, air carriers operate within a system of international agreements setting rules for the majority of air commerce while in the maritime world there are few intergovernmental rules of competition that are agreed on.

To summarize, while both aviation and maritime law are similar, they are distinct from one another in many ways; specifically by the fact that maritime law tends to go much more in depth in most of the areas. But this may just be because of a longer existence and a more developed system; aviation law may be well on its way to catching up. However, in the future the most effective U.S. maritime and aviation policies will be those that can respond to changing conditions of the industry and competition, changing conditions in trade and technology, and changing conditions in the international arena.