

# Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulation in the United States

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## I. INTRODUCTION

Whether described as “indispensable cogs in the transportation system of every maritime economy”<sup>1</sup> or as “hoary figure[s]”,<sup>2</sup> pilots have one of

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1. *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552, 558, 1947 AMC 535 (1947). The court also noted that “pilotage is a unique institution and must be judged as such.”

the most challenging jobs in the maritime world.<sup>3</sup> They provide a vital safety service to the shipping industry and the public.<sup>4</sup> Compulsory state-licensed pilots in the United States use in-depth local knowledge, seasoned navigational and shiphandling expertise, and informed independent judgment to guide ocean going foreign trade vessels of all sizes and types into and out of this country's ports and waterways.

Although pilots<sup>5</sup> are thus a critical component of safe and efficient maritime transportation, pilotage law, particularly the interplay between state and federal regulatory authority, suffers from a reputation as being mysterious, obscure, arcane and even haphazard. This reputation is

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*Id.* at 557.

2. *Bach v. Trident Steamship Co.*, 920 F.2d 322, 328, 1991 AMC 928 (5th Cir. 1991) (Brown, J., dissenting). This dissent was written by Judge John R. Brown, whose opinions will be cited several more times in this paper. Judge Brown is considered a giant of U.S. maritime law and was called "our leading admiralty law authority" by the U.S. Supreme Court. *Chevron Oil Co., v. Huson*, 404 U.S. 97, 115, 1972 AMC 20 (1971). His dissent in *Bach* (the majority held that a state pilot is not a Jones Act seaman) is typically well-reasoned, evocative, and rich in maritime history and lore. He had a special understanding and knowledge of pilotage and piloting.

3. Rear Admiral Brian M. Salerno, the senior Coast Guard official responsible for navigation safety, has described the work of a pilot:

Each day, pilots are asked to take all sizes and types of vessels through narrow channels in congested waters where one miscalculation could mean disaster. They are trained, highly professional individuals, whose judgments must be spot-on for the hundreds of decisions they must make at every turn to bring a vessel safely to its berth or out to sea.

Paul G. Kirchner, *A Career as a Ship Pilot*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, THE COAST GUARD JOURNAL OF SAFETY & SECURITY AT SEA, Fall 2008, at 9.

4. The U.S. Supreme Court has described a pilot's services as follows:

In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters. The pilot's job generally requires that he go outside the harbor's entrance in a small boat to meet incoming ships, board them and direct their course from open water to the port. The same service is performed for vessels leaving the port. Pilots are thus *indispensable cogs in the transportation system of every maritime economy*. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the cost and time expended in port calls, and, in some measure, the competitive attractiveness of particular ports.

*Kotch*, 330 U.S. at 557-8 (emphasis added).

5. This article is focused on independent state-licensed compulsory pilots, who are experts in all navigational aspects of a local port or waterway and who temporarily go aboard vessels to guide them into and out of port. This is in contrast to individuals who may obtain a federal pilot license or otherwise "serve as" a pilot while being assigned as a permanent member of a ship's crew.

undeserved. The outlines of pilotage regulation have been rationally and carefully set by Congress, and the courts have had little trouble understanding and giving effect to the regulatory system envisioned by the first Congress in 1789 and reaffirmed many times since then.

Perhaps the most distinctive feature of pilotage regulation in the United States is that there are two jurisdictional spheres of government regulation – state and federal. Pilotage of international trade vessels in U.S. waters is governed by the twenty-four coastal states through comprehensive pilotage systems aimed at ensuring well-trained independent pilots are always available, without discrimination, to any vessel required to use a state pilot. Federal pilotage regulations, administered by the U.S. Coast Guard, require certain vessels to be piloted by an individual with a Coast Guard-issued federal pilot license,<sup>6</sup> and establish the rules and procedures for the issuance of a federal pilot license and for the oversight of federal pilots' professional conduct.

This paper can be viewed as a shipboard voyage, the purpose of which is to transit through a review of the history, development, and current state of the federal and state laws that govern the regulation of pilotage in the United States. When the voyage ends and we are safely moored, all should disembark with a better understanding of the state pilot system, the federal role in the regulation of pilotage, and with the recognition that pilotage law is not the mysterious or confusing body that some believe it to be.

The first leg of the transit will be a review of the historical background of the state pilot system and of the division of responsibilities between the states and the federal government, a division leaving no question that states are to play the preeminent role in the regulation of pilotage. We should gain from this segment of our journey an appreciation for how this structure was the product not of happenstance, but of reasoned deliberations by Congress. Altering course slightly, we will then explore the present federal statutory framework for pilotage law in the U.S., which provides the enabling authority for state regulation as well as the general requirements for federal compulsory pilotage.

The next two legs of the voyage will entail a discussion of the

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6. The phrase "federal pilot license", as used throughout this paper refers either to a federal first class pilot license or first class pilotage endorsement to some other underlying mariner license issued by the U.S. Coast Guard, or to the authority granted by Coast Guard rules for an individual without a first class pilot license or endorsement to "serve as" a pilot under specified circumstances.

comprehensive nature of state regulation of pilotage, followed by a description of the more limited federal regulatory activities. As we near the end of our voyage and the crew begins to look forward to our arrival in port, we will describe how the state and federal roles in the regulation of pilotage interact and should be mutually supportive in the aftermath of a marine casualty involving a state-licensed pilot.

By the time our voyage through pilotage law is on its last leg and the sea buoy is in sight, all aboard will recognize that the dual system of state and federal regulation of pilotage, with the primary role reserved for the individual states, has been carefully and thoughtfully constructed over the course of the Nation's history. When the ship finally moors, the voyage will have demonstrated that the body of pilotage law and regulation in this country is well-settled, logical, and transparent.

## II. HISTORICAL BACKGROUND

### *A. Congress Creates the State Pilotage System*

The power of the states to regulate pilotage is not inherent or derived from the U.S. Constitution. On the contrary, pilotage is an activity that falls within the Commerce Clause.<sup>7</sup> In *Gibbons v. Ogden*,<sup>8</sup> a landmark decision of constitutional interpretation, the Supreme Court in 1824 held that the power given to Congress to regulate commerce extends to the regulation of navigation.<sup>9</sup> Articulating an expansive view of the term "commerce," the Court struck down an exclusive license granted by the legislature of New York to operate a steamboat service on the Hudson River.<sup>10</sup>

Piloting and the regulation of pilotage are both activities that, like a steamboat service, clearly involve navigation. Moreover, an exclusive license to operate a steamboat service seems similar to the type of franchise that groups of regulated pilots have under state law. This begs the question: if a state is constitutionally barred from regulating a steamboat service, why are states able to regulate piloting services?

The answer to that question can be found in section 4 of the

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7. "Congress shall have the power '[t]o regulate Commerce with foreign Nations and among the several States.'" U.S. CONST. art. I, § 8, cl. 3.

8. 22 U.S. (9 Wheat.) 1 (1824).

9. *Id.* at 74.

10. *Id.* at 26-7.

Lighthouse Act of 1789.<sup>11</sup> Officially entitled “An Act for the Establishment and Support of Lighthouses, Beacons, Buoys and Public Piers,” this was one of the first acts of the first Congress.<sup>12</sup> The stated purpose was to encourage commerce through federal support for activities to make navigation “easy and safe.”<sup>13</sup> The act’s federalization of lighthouses has been recognized as the first exercise by Congress of its powers under the Commerce Clause. It is also considered noteworthy for the ease with which Congress apparently accepted the view that regulating commerce under the Clause would extend to facilitating commerce.<sup>14</sup>

While Congress decided that it was in the national interest to make lighthouses the responsibility of the new federal government, it reached the opposite conclusion for pilotage. The initial version of the legislation, which — like all legislation at the time — originated in the House of Representatives, included a provision declaring that river and harbor pilots would remain the responsibility of the states, but that pilotage laws enacted by state legislatures would be “subject to the revision and controul [sic] of Congress.”<sup>15</sup> South Carolina representative William Loughton Smith objected to the reservation of Congressional oversight of state pilotage laws.<sup>16</sup> His motion to strike the entire pilotage provision was ultimately

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11. Act of Aug. 7, 1789, ch. 9, 1 Stat 53, 54 (1789).

12. The Lighthouse Act was the ninth act of that Congress.

13. See *supra*, note 11.

14. Adam S. Grace, *From the Lighthouses: How the First Federal Internal Improvement Projects Created Precedent That Broadened the Commerce Clause, Shrunk [sic] the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate*, 68 ALB. L. REV. 97 (2004). The author also argues that the creation of a federal system of lighthouses was a consequence, and perhaps a necessary consequence, of the even earlier Tonnage Act, An Act Imposing Duties on Tonnage, July 20, 1789, reprinted in 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: LEGISLATIVE HISTORIES 1951 (Charlene Bangs Bickford & Helen E. Veit, eds., 1986), establishing an exclusively federal system of tonnage duties. Such duties had previously been the primary source of funding used by the states for their lighthouses (and, in fact, were often referred to as “light money”). As a result, according to the author, the Lighthouse Act was more the product of a larger effort to secure federal revenues in a way that was fair to the states (which had lost an important revenue source by the Tonnage Act) than of a specific decision as to the public benefits of a federal, as opposed to state, system of lighthouses.

15. U.S. Senate Historical Office - The Lighthouses Act of 1789 (1991), [http://www.uscg.mil/history/regulations/1789\\_LH\\_Act.pdf](http://www.uscg.mil/history/regulations/1789_LH_Act.pdf) (last visited July 29, 2010). This interesting pamphlet is the source of much of this account of the legislative history of the Lighthouse Act.

16. I U.S. Senate Historical Office - *The Lighthouses Act of 1789* (1991), at [http://www.uscg.mil/history/regulations/1789\\_LH\\_Act.pdf](http://www.uscg.mil/history/regulations/1789_LH_Act.pdf) (last visited July 29, 2010). This is

adopted by the House.<sup>17</sup>

When the Senate took up the bill, it restored a provision for state control over pilotage, but this time with a milder caveat that pilotage regulation would remain with the states “until further legislative provision is made by Congress.”<sup>18</sup> The provision was included in the final version of the bill, as enacted, and became section 4 of the Act:

That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.<sup>19</sup>

In 1854, the Supreme Court confirmed the constitutionality of section 4 of the Lighthouse Act in *Cooley v. Board of Wardens of the Port of Philadelphia*.<sup>20</sup> The Court’s opinion includes a detailed discussion of the Lighthouse Act and Congress’s decision to leave regulation of pilots with the states.

The *Cooley* case involved two ships that sailed from Philadelphia without taking a Pennsylvania licensed pilot, as was required by state statute.<sup>21</sup> The Board of Wardens brought suit to collect half-pilotage, which the statute provided as a penalty and an enforcement device. Cooley was the consignee of both ships. He appealed the Pennsylvania state courts’ eventual judgment ordering payment of the half-pilotage on the grounds that the state’s compulsory pilotage law violated the Commerce Clause as well as other provisions in the Constitution restricting states from imposing duties and taxes on imports or tonnage<sup>22</sup> or from giving

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17. *Id.*

18. *See supra*, note 11.

19. *Id.*

20. 53 U.S. (12 How.) 299, 2008 AMC 2674 (1852). This is not just a key decision in U.S. pilotage law; *Cooley* has been recognized as “the landmark case construing the interrelationship of state and federal regulatory power under the Commerce Clause.” *Jackson v. Marine Exploration Co.*, 583 F.2d 1336, 1340 (5th Cir. 1978). In his well-known dissent in the *Bach* case, *supra*, note 2, Judge Brown also described *Cooley* as “a really landmark case ... which resurrects vivid recollections in every lawyer, teacher and judge as students of constitutional law.” *Bach*, 920 F.2d at 328.

21. *Id.*

22. U.S. CONST. art. I, § 8, cls. 1, 3; *Cooley*, 53 U.S. at 301.

preferences to the ports in their own state.<sup>23</sup> The Supreme Court rejected the duties and preference arguments, simply finding that pilotage fees are not duties within the meaning of the Constitution and that such fees certainly do not give a preference to the port.<sup>24</sup>

Turning to the Commerce Clause argument, the Court acknowledged “that a regulation of pilots is a regulation of commerce, within the grant to Congress of the commercial power, contained in the third clause of the eighth section of the first article of the Constitution.”<sup>25</sup> Although in section 4 of the Lighthouse Act Congress clearly intended to give the states the right to regulate pilotage, Cooley had argued that Congress has no authority to give to the states power given to Congress by the Constitution, i.e., the regulation of commerce belongs exclusively to Congress.<sup>26</sup> The Court, however, stated that only regulations of commercial activities that “are in their nature national, or admit of only one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress” and concluded, “That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain.”<sup>27</sup>

The Court then reviewed Congress’ reasoning in enacting section 4:

The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and

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23. *Id.* art. I, § 9, cl. 5; *Cooley*, 53 U.S. 299.

24. *Cooley*, 53 U.S. at 314.

25. *Id.* at 317.

26. *Id.* at 301.

27. *Id.* at 319.

of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.

[T]he mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception,<sup>28</sup> not to regulate this subject, but to leave its regulation to the several States.<sup>29</sup>

The *Cooley* decision's explanation of the rationale for state regulation of pilotage offers an important lesson, and one that is useful for understanding pilotage regulation in the United States today. This country's system of state regulation of pilotage does not exist because of a mistake or because Congress has been too busy to create a comprehensive federal system or does not care about pilotage. To the contrary, Congress intentionally authorized the state system based on a specific determination that it is in the national interest for the states to be in charge of pilotage.

The first Congress no doubt considered the fact that the states had been managing their pilotage systems successfully since early colonial days and may have felt that there was no need for the new national government to intervene in the state systems or to take on a task already performed adequately by the states. More importantly, as the Supreme Court recognized in *Cooley*, Congress looked at the nature of piloting and reached the conclusion that it is "best provided for" at the state, not federal, level.<sup>30</sup> Congress wanted the states to regulate pilotage.

Since 1789, Congress has made "further legislative provision" on the subject of pilotage regulation and has placed some limitations on state regulation.<sup>31</sup> It has also retained and reaffirmed on several occasions its general intent that the states have the preeminent role in regulating

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28. The "Boundary Waters Act"; Act of March 2, 1837, c. 22, 5 Stat. 153 (1837).

29. *Cooley*, 53 U.S. 299.

30. *Id.* at 320.

31. See U.S. Senate Historical Office - The Lighthouses Act of 1789 (1991), at [http://www.uscg.mil/history/regulations/1789\\_LH\\_Act.pdf](http://www.uscg.mil/history/regulations/1789_LH_Act.pdf) (last visited July 29, 2010).



pilotage.<sup>32</sup>

***B. Congress Places Restrictions on State Regulation and Establishes Federal Requirements for Certain Vessels***

The first “further legislative provision” made by Congress following the Lighthouse Act was the “Boundary Waters Act”<sup>33</sup> in 1837. This was primarily in response to a dispute between New York and New Jersey over control of pilotage in the port of New York.<sup>34</sup> To resolve the dispute, Congress provided the Solomon-like answer of allowing vessels in waters that form a boundary between two or more states to take a pilot licensed by either of the states. Far from a retreat from its decision of 48 years earlier that the states should regulate pilotage, the Boundary Waters Statute was a reaffirmation of the decision. It was a limited federal action to preserve state regulation by resolving a matter that could be resolved only through federal intervention.

State regulation has been preempted by Congress in only two limited areas: (1) states may not regulate pilotage on U.S.-flagged vessels operating in the coastwise or domestic trade<sup>35</sup> and (2) states may not regulate pilotage on the Great Lakes.<sup>36</sup> These instances in which the federal government opted to displace the states in regulating pilotage were prompted by unique circumstances.

**1. Federal Pilotage of Coastwise Steam Vessels**

When Congress enacted the Lighthouse Act of 1789, commercial shipping traffic was powered by sail. This all began to change in 1807 when Robert Fulton and Robert Livingston began the first successful

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32. See, e.g., *Gillis v. Louisiana*, 294 F.3d 755, 2002 AMC 2010 (5th Cir. 2002) (holding that Congress had expressed an intent not to limit the states’ power to regulate pilotage). See also *Continental Insurance Company v. Cota*, 2010 AMC 313 (N.D. Cal. 2010).

33. Act of March 2, 1837, c. 22, 5 Stat. 153 (1837).

34. *Interport Pilots Agency, et al. v. New Jersey Board of Commissioners of Pilots*, No. Mon-C-385-91, at 15-16 (N.J. Super. Ct. Ch. Div. April 16, 1997) (recounting that the most prominent example of boundary disputes at the time leading up to enactment of Boundary Waters Act was “that of the Hudson River and New York harbor shared by New Jersey and New York”). Although a lower state court decision, the court’s opinion contains an excellent discussion of the history and development of the state pilotage system in America.

35. 46 U.S.C. § 8502 (2007), originally adopted as the Act of February 28, 1871, 16 Stat. 440 (1871).

36. 46 U.S.C. § 9302 (2006), originally adopted as the Great Lakes Pilotage Act of 1960, 74 Stat. 259 (1960).

commercial steamship operation on the Hudson River in New York.<sup>37</sup> In the next several decades, the number of commercial steamboat operations in the U.S. had reached 700.<sup>38</sup>

While replacing sail with steam led to predictable improvements in speed, reliability, and efficiency, steam power also brought with it serious safety concerns and, in too many cases, tragic consequences. From 1816 to 1848, there were more than 400 major explosions aboard commercial steamboats resulting in 3,270 deaths.<sup>39</sup> The ongoing accidents involving steamboats did not escape the attention of elected officials. In his 1837 State of the Union Address President Martin Van Buren cautioned the Congress:

The distressing casualties in steamboats which have so frequently happened during the year seem to evince the necessity of attempting to prevent them by means of severe provisions connected with their customhouse papers. This subject was submitted to the attention of Congress by the Secretary of the Treasury in his last annual report, and will be again noticed at the present session, with additional details. It will doubtless receive that early and careful consideration which its pressing importance appears to require.”<sup>40</sup>

In response to the rising concern regarding steamboat safety, Congress passed the Act of July 7, 1838<sup>41</sup> which focused primarily on the licensing of the owners and captains of steamships. Public angst over steamship safety continued, and the 1838 Act was later amended by the Act of August 30, 1852.<sup>42</sup> This Act’s forty-four sections included “precautions as to fire pumps, hoses, life-boats and life-preservers, buckets, floats, axes, safety-

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37. *Fulton’s First Steamboat Voyage, 1807*, EYEWITNESSTOHISTORY.COM, at <http://www.eyewitnesstohistory.com/fulton.htm> (last visited July 28 2010). The franchise to operate that steamship service, subsequently assigned by Fulton and Livingston to Aaron Ogden, was the focus of the dispute in the *Gibbons* case, *supra* page 3 and note 8.

38. JOHN KENNEDY BROWN, *LIMBS ON THE LEVEE: STEAMBOAT EXPLOSIONS AND THE ORIGINS OF FEDERAL PUBLIC WELFARE REGULATION, 1817-1852* 7 (1988).

39. LOUIS C. HUNTER, *STEAMBOATS ON THE WESTERN RIVERS: AN ECONOMIC AND TECHNOLOGICAL HISTORY* 287 (1949).

40. President Martin Van Buren State of the Union Address, December 5, 1837, <http://www.infoplease.com/t/hist/state-of-the-union/49.html> (last visited July 28, 2010).

41. 5 Stat. 304 (1838).

42. 10 Stat. 61 (1852).

valves, plugs” and other safety inspection items,<sup>43</sup> but also included the first ever legislative requirement for the federal licensing of pilots.<sup>44</sup>

The text of the 1852 law regarding pilots was ambiguous, however, and “immediately raised questions as to what types of pilotage were covered by the law and what the fundamental intent of the act really was.”<sup>45</sup> Fortunately, the courts stepped in. The Supreme Court in *Pacific Mail Steamship Company v. Joliffe*<sup>46</sup> emphasized that the Act of 1852 was focused on steamship safety generally and included “few provisions relating to pilots.”<sup>47</sup> The Court went on to make clear that the pilotage provisions of the 1852 law were aimed not at “port” pilots regulated by the states, but rather at regular members of the crew or “pilots having charge of steamers on the voyage.”<sup>48</sup> The *Joliffe* decision seemed to put to rest this brief period of doubts and return pilotage law to the calm stability it had enjoyed since the nation’s founding.

Questions were again briefly brought to the fore, however, when Congress passed the Act of July 25, 1866,<sup>49</sup> which provided that “every seagoing steam vessel should . . . ‘when underway, except upon the high seas, be under the control and direction of pilots licensed by’” the federal government.<sup>50</sup> This Act called into question the applicability of the state pilotage laws and for a period of seven months created “a vacuum in state pilotage.”<sup>51</sup> This time, Congress itself, rather than the courts, quickly took action to once again restore clarity to U.S. pilotage law. The Act of February 25, 1867<sup>52</sup> amended the 1866 Act by adding the stipulation “the act should not be construed to ‘annul or affect any regulation established by

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43. *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S.(2 Wall.) 450, 451 (1864).

44. 10 Stat. 61, Sec. 9 (1852).

45. ERNEST A. CLOTHIER, *STATE PILOTS IN AMERICA: HISTORICAL OUTLINE WITH EUROPEAN BACKGROUND*, 111 (2d. ed. 1979).

46. *Joliffe*, 69 U.S. at 461.

47. *Id.* at 461.

48. *Id.* This type of pilot included author Mark Twain, whose written accounts of the nature of pilots and piloting are cherished by pilots of all types. See MARK TWAIN, *LIFE ON THE MISSISSIPPI* (1833).

49. 14 Stat. 227 (1866).

50. *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187, 196 (1912) (citing 14 Stat. 228 (1866)). The Act of 1899 also contained a provision barring states from adopting discriminatory pilotage rates for vessels from different states (now codified in 46 U.S.C. § 8501(c)).

51. CLOTHIER at 113.

52. 14 Stat. 411 (1867).

the existing law of any State, requiring vessels entering or leaving a port in such State' to take a state pilot,"<sup>53</sup> thus making clear that state pilotage laws were undisturbed by this federal legislation.

Finally, the Act of February 28, 1871<sup>54</sup> consolidated the Acts of 1852, 1866 and 1867, and further clarified the limited role the federal government would play in the regulation of pilotage. Under Section 51 of the Act "every coastwise seagoing steam vessel"<sup>55</sup> subject to the navigation laws of the U.S. . . , not sailing under register,<sup>56</sup> shall, when underway, except on the high seas, be under the control and direction of pilots licensed by [the federal government]." Section 51 also included the proviso that the Act in no way annulled or affected the states' authority to require a state-licensed pilot for foreign vessels and U.S. vessels sailing under register that are entering or leaving port. In addition to returning certainty to pilotage law, the Act of 1871 formalized the "broad outline"<sup>57</sup> of a system of "concurrent federal-state regulation of pilotage"<sup>58</sup> that remains in effect today.

## 2. Pilotage System for Ocean-going Vessels on the Great Lakes

Prior to the 1959 opening of the St. Lawrence Seaway, there was "no statutory requirement for compulsory pilotage of registered vessels of the United States or foreign vessels navigating U.S. waters of the Great Lakes."<sup>59</sup> The Seaway's opening, however, provided an accessible route for large merchant ships from the Atlantic Ocean to the Great Lakes and there was a "substantial increase" in shipping traffic.<sup>60</sup> As a result, Congress became concerned that the rapid surge of foreign vessels and U.S. ocean-going vessels navigating U.S. waters of the Great Lakes would "present a definite threat to safe navigation"<sup>61</sup> and turned its attention to

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53. *Anderson*, 225 U.S. at 197 (quoting Act of February 25, 1867, c. 83, 14 Stat. 411).

54. 16 Stat. at 440 (1871).

55. The Act of June 13, 1933, 48 Stat. 125 (1933), expanded the meaning of the term "steam vessel" to include vessels propelled by other means such as mechanical or electrical power.

56. "*Ships engaged in trade with foreign lands are 'registered,'* a documentation procedure set up . . . in the Act of Dec. 31, 1792, 1 Stat. 287 (1792)...." *Jackson*, *supra* note 20 at 1340.

57. *Jackson*, 583 F.2d at 1340.

58. *Id.*

59. Department of Treasury Letter of March 31, 1960, as found in S. REP. NO. 86-1284, at 10 (1960).

60. *Id.*

61. *Id.* at 4.

creating a pilotage system for the Great Lakes.

Having each individual Great Lakes state impose its own state regulated pilotage system would not be feasible and probably not legally possible. A pilotage system covering all of the U.S. waters of the Great Lakes would necessarily involve consultations and formal agreements with the Government of Canada and would therefore have significant foreign policy implications. From practical, diplomatic, and Constitutional law perspectives, a federal as opposed to state-by-state approach was required for the unique setting of the Great Lakes region.<sup>62</sup> To address these concerns, legislation was “prepared jointly by the Departments of State and Commerce and the Coast Guard” with the aim of establishing federal pilotage requirements in U.S. waters of the Great Lakes and “to provide the basis for a regulated system of pilotage to meet those requirements.”<sup>63</sup> The legislation was ultimately adopted as the Great Lakes Pilotage Act of 1960,<sup>64</sup> which provided the “basis for the first uniform pilotage system on the Great Lakes.”<sup>65</sup>

The federal Great Lakes pilotage system incorporated “essential elements of some State pilotage systems”<sup>66</sup> and was intentionally patterned after the state pilotage systems around the country.<sup>67</sup> The original text of the Act divided administration of the Great Lakes pilotage system between the Secretary of Commerce and the Department which housed the U.S. Coast Guard.<sup>68</sup> When the Department of Transportation (DOT) was established in 1966, however, most transportation functions formerly

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62. *Great Lakes Pilotage Act: Hearing on S. 3019 Before the S. Merchant Marine and Fisheries Subcomm. of the Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960) (Statement of Ivan B. White, Deputy Assistant Secretary of State).

63. Department of State Letter of February 11, 1960 as found in S. REP. NO. 86-1284 at 6 (1960).

64. Pub. L. No. 86-555, 74 Stat. 259, 260 (1960).

65. See CLOTHIER *supra* note 45, at 116.

66. *Great Lakes Pilotage Act: Hearing on S. 3019 Before the S. Merchant Marine and Fisheries Subcomm. of the Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960) (Statement of Ivan B. White, Deputy Assistant Secretary of State).

67. “A basic pattern similar to that of State pilotage systems...has been followed in provisions of the bill for the creation of a pool or pools by a voluntary association or associations of U.S. registered pilots to provide arrangements and facilities necessary for the efficient dispatching of vessels and the rendering of pilotage services required by the bill.” *Id.*

68. Section 4(a) of P.L. 86-555, 74 Stat. 259 (1960), authorized the Secretary of Commerce to promulgate regulations regarding the registration of Great Lakes pilots, but reserved for the U.S. Coast Guard questions of professional competency.

carried out by the Department of Commerce were transferred to the DOT, including Great Lakes pilotage responsibilities.<sup>69</sup> The DOT later delegated responsibility for administering the Great Lakes pilotage system to the Coast Guard.<sup>70</sup>

### III. CURRENT STATUTORY SCHEME: CHAPTER 85 OF TITLE 46, U.S. CODE

Congress consolidated, reorganized and restated the federal pilotage laws enacted since 1789 as part of a larger effort in 1983 to revise, consolidate, and enact into positive law many of the maritime safety statutes administered by the Coast Guard. These statutes were placed in a new subtitle II of title 46.<sup>71</sup> “[T]he stated purpose of the legislation was simply to recodify in an organized fashion the then-existing law relating to the safety of vessels and protection of seamen.”<sup>72</sup> Congress continued the job of constructing subtitle II with a package of technical amendments contained in the Coast Guard Authorization Act of 1984.<sup>73</sup>

All acts and laws governing pilotage, with the exception of the Great Lakes Pilotage Act, were placed in a new chapter 85 of the title. As a result, the enabling statutory authority for all state and federal pilotage law in the U.S., with the limited exception of the Great Lakes, can now be found in the three sections of chapter 85. The chapter confirms the traditional boundaries between the state and federal pilotage regulation.<sup>74</sup>

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69. See Sec. 6(a) of Public Law 89-670 (1966).

70. 49 C.F.R. 1.46(a) (2000). In 1995, the Department of Transportation (DOT) rescinded delegation of authority to administer the Great Lakes pilotage system to the Coast Guard and redelegated this authority to the St. Lawrence Seaway Development Corporation. The pilots in the Great Lakes challenged this redelegation on the grounds the DOT lacked the authority to delegate responsibility for the Great Lakes pilotage system to any agency but the Coast Guard. The pilots’ challenge was successful, and responsibility for the administration and oversight of the Great Lakes pilotage system was returned to the Coast Guard where it remains. See *Halverson v. Slater*, 129 F.3d 180, 2000 AMC 1793 (D.C. Cir. 1997).

71. Pub. L.No. 98-89, Aug. 26, 1983, 97 Stat. 553 (1983).

72. *United States v. Rivera*, 131 F.3d 222, 226 (1st Cir. 1997).

73. Pub. L.No. 98-557, 98 Stat. 2874 (1983).

74. Those boundaries were usefully summarized by the Supreme Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 159-60 (1978): the federal pilotage statutes “give the Federal Government exclusive authority to regulate pilots on enrolled [coastwise] vessels and ... preclude a State from imposing its own pilotage requirements upon them.” But “just as it is clear that States may not regulate the pilots of enrolled [coastwise] vessels, it is equally clear that they are

Section 8501 contains the enabling authority for state pilotage regulation. Section 4 of the Lighthouse Act, previously codified at 46 U.S.C. § 211, is now section 8501(a). The language of the provision was changed slightly in the recodification. The original 1789 text, “[u]ntil further legislative provision is made by Congress, all pilots in the bays, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States” became, “Except as otherwise provided in this subtitle,<sup>75</sup> pilots in the bays, rivers, harbors, and ports of the United States shall be regulated *only* in conformity with the laws of the States.”<sup>76</sup>

The House Report on the 1983 recodification bill explained that the new chapter “clearly spells out the preeminence of the State’s role in regulating pilots for vessels operating on the bays, rivers, harbors, and ports of the United States.”<sup>77</sup> Moreover, this Report went on to state:

Section 8501 established the general proposition that the States regulate pilots on the bays, rivers, harbors, and ports of the United States, unless otherwise specifically provided by law.

Subsection (a) states this general proposition and uses the word “only” for emphasis on this point. Further, except as specifically provided in law, the Committee intends that this chapter not be construed to annul or affect any regulation established by the laws of a State requiring a vessel entering or leaving a port in that State to employ a pilot licensed or authorized by the laws of that State. In at least two places in current law, this general proposition is stated in both a positive<sup>78</sup> and negative<sup>79</sup> manner. The Committee intends to consolidate those statements into one

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free to impose pilotage requirements on registered vessels entering and leaving their ports.” *See also*, the discussion of respective jurisdictions of the “concurrent” state and federal pilotage regulatory systems in *Jackson, supra* note 20.

75. The word “subtitle” was substituted for “part” in a 1984 package of technical amendments, Pub. L.No. 98-557, § 29(e), Oct. 30, 1984, 98 Stat 2874 (1984).

76. 46 USC §8501(a) (2008) (emphasis added).

77. H.R. REP. NO. 98-338 at 183-4 (1983).

78. This refers to the Lighthouse Act provision, then codified at 46 USC § 211.

79. The last sentence of the exemption from state pilotage for coastwise vessels, then at 46 U.S.C. § 215, which declared nothing in federal pilotage law “shall be construed to annul or affect any regulation established by the laws of any State....”

provision to avoid ambiguity and redundancy.<sup>80</sup>

As the legislative history thus indicates, the 1983 addition of the word “only” in the state pilotage provision is significant. It is a reaffirmation of the judgment made by the first and subsequent Congresses that the states are to have the preeminent role in regulating pilotage in the United States and to have the exclusive role in regulating pilotage of vessels other than coastwise vessels and those in the Great Lakes. “Congress has reenacted and recodified this provision [section 4 of the Lighthouse Act] several times since 1789, most recently in 1983 when it passed the current version of § 8501.”<sup>81</sup> Section 8501 “has been interpreted as an expression of Congress’s general intent *not* to limit the power already held by the states unless otherwise provided by Congress.”<sup>82</sup>

The remaining subsections of section 8501 place limits on state regulation. The Boundary Waters Statute, *supra*, is now in subsection (b). Subsection (c) contains the prohibition, formerly in 46 USC § 213, against states discriminating in pilotage rates between vessels sailing between the ports of one state and vessels sailing between the ports of another state, or against vessels because of their means of propulsion or against public vessels of the United States. It is unlikely that subsection (c) would have any application in the circumstances of U.S. pilotage today.

Subsection (d) contains the prohibition on state laws requiring the use of a state-licensed pilot on a U.S.-flag, coastwise vessel that is either self-propelled or a tank barge inspected under chapter 37 of title 46. This carries forward the exemption for coastwise “steam vessels.” from state pilotage requirements in the former 46 USC § 215.

Section 8502 sets out the requirement to take a federally-licensed pilot for coastwise vessels that are exempt from state pilotage requirements under 8501(d). The House Merchant Marine and Fisheries Committee report on the 1983 recodification explains: “The section has been carefully worded to clearly set out those vessels that are required at times to have a Federal pilot.”<sup>83</sup> Subsection (a) of section 8502 currently provides:

Except as otherwise provided in subsections (g) and (i) of this section, a coastwise seagoing vessel shall be under the direction

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80. H.R. REP. NO. 98-338 at 183.

81. *Gillis*, *supra* note 21, at 761 (internal footnote omitted).

82. *Id.* (emphasis in original) (internal footnote omitted).

83. H.R. REP. NO. 98-338 at 185 (1983).



and control of a pilot licensed under section 7101 of this title if the vessel is –

- (1) not sailing on register;
- (2) underway;
- (3) not beyond 3 nautical miles from the baselines from which the territorial sea of the United States is measured; and
- (4) (A) propelled by machinery and subject to inspection under part B of this subtitle; or  
(B) subject to inspection under chapter 37 of this title.

There are several significant terms used in the subsection. “Coastwise seagoing vessel” refers to a type of vessel, not a voyage on which a vessel may be engaged at any particular time. Coast Guard regulations define coastwise seagoing vessel for this purpose as “a vessel that is authorized by its Certificate of Inspection [COI] to proceed beyond the Boundary Line . . . .”<sup>84</sup>

A vessel subject to the federal compulsory pilotage requirement must be “under the direction and control” of the federal pilot.<sup>85</sup> This indicates that the federal pilot must be actively engaged in the vessel’s navigation, and a vessel cannot comply with the requirement of section 8501(a) merely by having someone with a federal pilot license present on the bridge or somewhere else on or near the vessel.

A vessel that is “not sailing on register”<sup>86</sup> — and thus required to use a federal pilot — is generally a U.S. flag vessel with a coastwise endorsement on its certificate of documentation,<sup>87</sup> that is not on a foreign voyage or on a domestic voyage during which it is carrying foreign destination or foreign origin cargo or passengers. In the case of a vessel with both a coastwise and a register endorsement (a so-called dual-documented vessel), the actual use of the vessel on a particular voyage determines whether it is sailing on register (subject to state pilotage) or not sailing on register (subject to federal pilotage).<sup>88</sup> A vessel is “underway”

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84. 46 C.F.R. § 15.301 (2009).

85. 46 U.S.C. § 8502 (2006).

86. 46 U.S.C. § 8502(a) (2006).

87. 46 U.S.C. §§ 12103, 12106 (2006).

88. Determining the use of a dual-documented vessel on a particular voyage and its documentation status under section 46 U.S.C. § 8501(a) is not always simple. Coast Guard interpretations can be found at Navigation and Vessel Inspection Circular No. 8-94, available at

when it is moving.<sup>89</sup> This includes a dead ship tow.

The application of the federal compulsory pilotage requirement to vessels “not beyond three miles from the baselines” effectively establishes the geographic limit of federal pilotage jurisdiction.<sup>90</sup> By contrast, the courts have confirmed that the states have no similar geographic limit to either their compulsory pilotage requirements or their pilotage jurisdiction. A state may impose its pilot requirement and assert its jurisdiction as far out as the state considers necessary to achieve the objectives of its pilotage system.<sup>91</sup>

Other subsections of section 8502 protect federal pilotage from interference by the states or create special rules for, or exemptions from, the federal pilotage requirement for certain vessels. Subsection (g)(2), for example, provides that the federal pilot on a vessel subject to the federal pilotage requirement in Prince William Sound, Alaska,<sup>92</sup> must also be a pilot licensed by the State of Alaska who is not a member of the crew of the vessel.<sup>93</sup> In order to preserve federal oversight of the pilot’s federal license, the subsection further provides that the pilot will be considered to be acting under his federal license. This is the only instance of a federal statute that requires a coastwise vessel subject to federal pilotage jurisdiction to use a state pilot. Not surprisingly, the provision was added

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<http://www.uscg.mil/hq/cg5/nvic/pdf/1994/n8-94.pdf> (last visited July 29, 2010). State pilot interests have not always agreed with the Coast Guard’s views on this question, although the courts seem quite willing to defer to the Coast Guard. *See e.g.*, *Schoenlank v. Kurz-Moran Shipping Agency*, 847 F. Supp. 311 (S.D.N.Y. 1994); *Wood v. Amerada Hess Corp.*, 845 F. Supp. 130, 1994 AMC 2472 (S.D.N.Y. 1994), *aff’d* 37 F.3d 87 (2d Cir. 1994).

89. Coast Guard regulations define the term “underway” for purposes of section 46 U.S.C. § 8501(b) as “a vessel that is: not at anchor, made fast to the shore, or aground.” 46 C.F.R. § 15.301 (2009).

90. A 1998 amendment to section 46 U.S.C. § 8502(a) substituted the term “not beyond three miles from the baselines” for the prior “not on the high seas” in order to preserve the traditional limit of the federal pilotage requirement notwithstanding other provisions in the legislation extending U.S. territorial waters from 3 to 12 miles. Coast Guard Authorization Act of 1998, Pub. L. No. 105-383, § 301(b)(7) (1998). *See* H.R. REP. NO. 105-236, at 20-24 (1997).

91. *See Gillis*, 294 F.3d at 761. *See also* *Wilson v. McNamee*, 102 U.S. 572, 572-574 (1881) (recognizing a State’s authority to establish pilotage requirements out to at least “fifty miles from port”), and *THE WHISTLER*, 13 F. 295, 296 (D.Or. 1882) (affirming state pilotage requirements out to at least “30 miles from the [river] mouth”).

92. As determined under 46 U.S.C. § 8502(g)(1) (2006).

93. “The requirement that this pilot not be a member of the crew should add a degree of independence and also ensure that the pilot is not in the employ of the tanker operator or owner.” H.R. REP. NO. 101-653, at 143 (1990).

by the Oil Pollution Act of 1990<sup>94</sup> following the grounding and resulting oil spill of the EXXON VALDEZ in 1989. According to the Conference Report, this “dual accountability . . . provision will promote the level of competence necessary in the uniquely vulnerable Prince William Sound.”<sup>95</sup>

After addressing first state pilotage in section 8501 and then federal pilotage in section 8502, chapter 85 concludes with a provision designed to prevent a gap in pilotage requirements between the two pilotage jurisdictions. Section 8503 authorizes the federal government<sup>96</sup> to establish, by rule, a requirement that a self-propelled vessel otherwise subject to state pilotage jurisdiction must take a federally licensed pilot if the state having jurisdiction fails to require the vessel to take a state-licensed pilot.<sup>97</sup> The original version of this provision was enacted as part of the Port and Tanker Safety Act of 1978<sup>98</sup> and was codified at 33 U.S.C. § 1226. The provision, with minor changes, was then moved to its present location in chapter 85 of title 46 by the Coast Guard Authorization Act of 1984.<sup>99</sup>

The Coast Guard has established several of these rules, commonly referred to “8503 Rules” that apply to foreign commerce vessels operating in designated waters, or to foreign commerce vessels engaged in specified movements or operations within designated waters. Each of the rules was based on a determination that vessels within the designated waters, or engaged in certain movements or operations within those waters, are subject to state pilotage jurisdiction but, the applicable state does not have a requirement to take a pilot licensed or authorized by the state.<sup>100</sup> Under the statute, the Coast Guard is required to terminate an 8503 rule when it

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94. Pub. L. No. 101-380, § 4108(a) (1990).

95. *Id.*

96. The Coast Guard has been delegated this authority for areas outside of the Great Lakes. For the Great Lakes, only the St. Lawrence Seaway Development Corporation may exercise the authority, 46 U.S.C. § 8503 (c) (2006).

97. 46 U.S.C. § 8503 (2006).

98. Pub. L. No. 95-474 § 7 (Oct. 17, 1978), 92 Stat. 1475 (1978).

99. Pub. L. No. 98-557, § 29(f)(3)(A), Oct. 30, 1984, 98 Stat. 2874 (1984).

100. 46 C.F.R. § 15.1010 (2009) (offshore marine terminals off the coast of California); 46 C.F.R. § 15.1020 (2009) (offshore marine oil terminals off the coast of Hawaii); 46 C.F.R. § 15.1030 (2009) (certain “intra-port transit” movements within certain waters of New York or New Jersey in the Port of New York); 46 C.F.R. § 15.1040 (2009) (certain vessel movements within areas of Cape Cod Bay, Cape Cod Canal and Buzzards Bay, Massachusetts); 46 C.F.R. § 15.1050 (2009) (certain intra-port movements in areas of the Cape Fear and Northeast Cape Fear Rivers).

receives notification from the state having jurisdiction that the state has established a requirement for a state pilot.<sup>101</sup>

Also as part of the recodification effort, Congress moved the provisions of the Great Lakes Pilotage Act of 1960 from former 46 U.S.C. § 261(a)-(f) to a separate chapter 93 of title 46.<sup>102</sup> There were no significant substantive changes made in the process. An amendment made to section 9302(b) by the Oil Pollution Act of 1990<sup>103</sup> tightened the prior rules under which non-Canadian ship masters had obtained pilotage exemption certificates from the Government of Canada (called “B Certificates”) and were allowed to serve as a pilot on undesignated waters of the Great Lakes system.<sup>104</sup> The stated intention of the amendment was to “eliminate the use of the ‘B Certificate’ on the undesignated waters of the Great Lakes.”<sup>105</sup>

Since 1983, the provisions of chapter 93 have governed the Coast Guard’s regulation of the approximately 35 United States-registered pilots operating in the Great Lakes. In the same way, the pilotage states have regulated the approximately 1,150 state-licensed pilots under the provisions of chapter 85.<sup>106</sup>

#### IV. THE STATE PILOTAGE SYSTEM

Each of the 24 coastal states has taken the authority given by Congress and fashioned a comprehensive pilotage system tailored to the specific local conditions and navigational demands of its waters. In contrast to federal pilotage regulation, state pilotage systems not only license pilots and oversee their professional activities (as the Coast Guard does for federal pilots), they also seek to ensure that each port in the state has a reliable, expert pilotage operation, and that all vessels that require a pilot will be provided, without delay or discrimination, a trained, competent, well-prepared pilot. Together, the 24 state systems comprise a national program of navigation safety regulation and environmental protection.

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101. 46 U.S.C. § 8503 (b) (2006).

102. Pub. L. No. 98-89, Aug. 26, 1983,, 97 Stat. 553 (1983).

103. Pub. L. No. 101-380, § 4108(a) (1990).

104. *Id.*

105. H.R. REP. NO. 101-653 at 134 (1990).

106. The numbers of U.S Great Lakes pilots and state pilots are provided by the American Pilots’ Association, of which both groups of pilots are members. See [www.americanpilots.org](http://www.americanpilots.org) (last visited on Aug. 1, 2010).

This type of comprehensive pilotage system is similar to what exists in many other parts of the world and is familiar to the international shipping community.

As envisioned by Congress and as a consequence of the different particular needs and circumstances of each state, there are variations in the systems of the pilotage states. These variations are a strength, rather than a weakness, of the state system. At the same time, there are also substantial similarities and common features. It is therefore valid to talk of a national "state pilotage system," while noting variations in some of the details of the individual state systems and practices.<sup>107</sup> Some of these common features, and in some cases the variations within them, are discussed below.

A key aspect of the state pilotage system is that in virtually every circumstance the state pilot is independent of the vessel and vessel operator that uses the services of the pilot. The state pilot boards the vessel for a particular voyage or operation in state waters and is not considered a member of the vessel's crew. State systems have a number of mechanisms to preserve that independence. The primary responsibility of every state pilot is to protect the public interest by facilitating the safe and efficient movement of vessels in state waters. In that respect, the principal customer of the pilot's service is not the vessel or the vessel's operator but rather the state and its public interests.<sup>108</sup>

Each state's pilotage system and the enabling authority for its pilotage regulatory programs is set out in state statute.<sup>109</sup> Louisiana and Texas, with

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107. The courts have generally been willing to give the states broad discretion in fashioning their pilotage systems. "The sanctity of pilotage regulations from judicial second-guessing is even more firmly engrained than that of other forms of economic regulation." *Jackson, supra* note 20, at 1346.

108. The Supreme Court has described this aspect of state pilotage: "Pilots hold a unique position in the maritime world and have been regulated extensively both by the State and Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person, can tell them how to perform their pilotage duties." *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 93-94 (1955) (internal footnotes omitted). The value of the state pilot's independence from the vessel and vessel operator was also recognized by Congress in adopting the requirement for a State of Alaska pilot on coastwise vessels in Prince William Sound. *Supra*, note 92.

109. See, ALA. CODE TITLE 33, CHAPTER 1 (2010); ALASKA STAT. TITLE 8, CHAPTER 62 (2007); CAL. HARB. & NAV. CODE, DIV 5 (2008); CONN. GEN STAT. TITLE 15, CHAPTER 263 (2007); DEL. CODE ANN. TITLE 23, CHAPTER 1 (2009); FLA. STAT. CHAPTER 310 (2008); GA.

multiple ports and waterway areas, have separate statutes for each port or area.<sup>110</sup> They also have additional statutes that apply to all pilots throughout the state.<sup>111</sup> Other states with multiple ports and pilotage areas, for example Florida, have one statute for the entire state.<sup>112</sup>

California has a mixture of pilotage systems. There is a traditional state pilotage system in San Francisco with its own statute<sup>113</sup> and pilot commission.<sup>114</sup> The major ports of Los Angeles and Long Beach, as well as the smaller ports of San Diego, Port Hueneme and Humboldt Bay (Eureka) do not have a state pilotage statute or a traditional state pilotage system. Pilotage in these ports is the responsibility of the local port authority, and the pilots who work there, with the exception of those for Humboldt Bay, do not hold state pilot licenses. Pilotage requirements and regulations in each port are contained in the respective port tariffs. In Los Angeles, the pilots are municipal employees of the port;<sup>115</sup> in Long Beach, the pilots are employees or shareholders of a private company, Jacobsen Pilot Service, Inc., which holds an exclusive franchise from the port to provide pilotage services. Los Angeles and Long Beach are not considered part of the state pilotage system.

The central feature of every state pilotage statute is the compulsory pilotage requirement. This is the law that requires, i.e., compels, vessels to take a state-licensed pilot and identifies the vessels to which the requirement applies. All other aspects of a state pilotage system can be viewed as measures necessary to implement and support the pilotage

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CODE ANN. TITLE 52 (2009); HAW. REV. STAT. ANN. CHAPTER 462A (2009); LA. REV. STAT. ANN. TITLE 34, CHAPTER 6 (2008); ME. REV. STAT. ANN. CHAPTER 38, SECTION 86 (2008); MD. CODE ANN. BUS. OCC. & PROF. § 11 (2008); MASS. GEN. LAWS ANN. CH. 103 (2008); MISS. CODE ANN. TITLE 59, CHAPTER 1 (2008); N.H. REV. STAT. ANN. TITLE 1, CHAPTER 12G (2008); N.J. REV. STAT. CHAPTER 12.8 (2008); N.Y. NAV. LAW ARTICLE 6 (2008); N.C. GEN. STAT. CHAPTER 76A (2007); OR. REV. STAT. TITLE 58, CHAPTER 776 (2007); PA. CONS. STAT. TITLE 55 (2010); R.I. GEN. LAWS TITLE 46, CHAPTER 46-9 (2008); S.C. CODE ANN. TITLE 54 (2009); TEX. TRANSP. CODE, ANN. TITLE 4 (2009); VA. CODE ANN. TITLE 54.1 (2008); AND WASH. REV. CODE TITLE 88, CHAPTER 88.16 (2005).

110. See e.g., LA. REV. STAT. ANN. §§ 34:201, 34:241 (2008); TEX. TRANSP. CODE ANN. §§ 65-70 (2009).

111. See e.g., LA. REV. STAT. ANN. § 34:1133 (2008); TEX. TRANSP. CODE, ANN. §§ 61-64 (2009).

112. FLA. STAT. CHAPTER 310 (2008).

113. CAL. HARB. & NAV. CODE DIV. 5 (2010).

114. CAL. HARB. & NAV. CODE §§ 1150-1159.5 (2010).

115. *Los Angeles Port Pilots*, at <http://www.lapilots.org> (last visited July 29, 2010).

requirement. In compelling a vessel to take a pilot, the state assumes the responsibility to ensure that the vessel receives good service and fair treatment. That requires a comprehensive regulatory program.

In all but one of the pilotage states,<sup>116</sup> the system is administered by a commission or board. The make-up of these commissions varies from state to state, but the predominant model is a mixed and evenly divided membership of representatives of vessel operators (sometimes referred to as “pilot users”), pilots, port interests, environmental groups, government officials, and “public” members.<sup>117</sup> In New York and New Jersey, pilots are barred from serving on the commissions.<sup>118</sup> In Louisiana, each pilot group has its own a board of “Examiners” or “Commissioners” made up of pilots appointed by the governor.<sup>119</sup> The actions of those boards, however, are subject to review by a statewide “Board of Louisiana River Pilot Review and Oversight,” which has eleven members, four of which are pilots.<sup>120</sup> Other than these intermediate regulatory boards in Louisiana made up of pilots, no state pilot commission has pilots for all or a majority of its members.

Some commissions are autonomous entities of the state government; others are part of a state agency; others are merely “housed” in an agency, which typically provides secretariat and legal support for the commission. The commissions select individuals for admission to the pilot training program, oversee the training process, issue licenses, investigate accidents involving pilots or complaints against pilots, take disciplinary or remedial action against pilots when necessary, and administer various other aspects of the pilotage system.

Every pilotage state limits the number of licenses that it issues.<sup>121</sup> This is a key component of the states’ economic regulation of pilotage and a consequence of the determination by the states that the interests of

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116. In Hawaii, pilotage regulation is provided by an official within the state’s Department of Commerce and Consumer Affairs. HAW. REV. STAT. ANN. § 462A-3 (2009).

117. See, e.g., ALASKA STAT. ANN. § 08.62.010 (2007); CAL. HARB. & NAV. CODE § 1150 (2010); MD. BUS. OCC. & PROF. CODE ANN. § 11-202 (2008); OR. REV. STAT. § 776.105 (2009); S.C. CODE ANN. § 54-15-20 (2009).

118. N.J. REV. STAT. § 12:8-3 (2008) and N.Y. NAV. LAW § 87 (2010).

119. See LA. REV. STAT. ANN. §§ 34:942, 34:991, 34:1042, 34:1072 (2008).

120. *Id.* 34:1133. Each of the four pilot members is selected by the governor from one of the four boards of examiners or commissioners, respectively.

121. This violates neither the 14<sup>th</sup> Amendment nor antitrust laws. *Olsen v. Smith*, 195 U.S. 332, 344-5 (1904).

navigation safety are best served by independent, public service pilotage.<sup>122</sup> Limiting the number of pilot licenses issued also ensures that pilots receive the “right” amount of work. The right amount of work is enough work so that the pilots can earn sufficient revenues to pay the substantial infrastructure costs of a modern pilotage operation and so that each pilot remains current in his or her experience over a broad range of vessel types and geographic locations. The right amount of work is also not so much work that a pilot will be fatigued. Determining the right amount of work and the number of pilots that should be licensed is an important component of a state’s rate setting function. In some states, the pilot numbers are set in the rate decision itself, in others, the pilot numbers are set independently solely on the basis of safety considerations but then used as part of the rate calculations.

In virtually all places, state pilots are not government employees but must look to the vessels that use their services for their revenues. Every pilotage state sets and regulates the rates that pilots may charge for their services.<sup>123</sup> The purpose of regulated pilotage rates is not just to restrain rates to reasonable and necessary levels but also to ensure that the rates provide sufficient revenues to cover the costs of the pilotage operation that the state expects from its pilots. As a result, the goal of any state pilot rate setting entity is to determine rates levels that are neither too high nor too low. The standards and procedures for rate-setting are typically set out in the state pilotage statute.

In most pilotage states, *see, e.g.*, Oregon<sup>124</sup> and Washington,<sup>125</sup> rates are set by the pilot commission or by a committee or panel of the commission. Rates are set by the legislature in several states, *e.g.*, Pennsylvania, Delaware, and Massachusetts.<sup>126</sup> In San Francisco<sup>127</sup> and New York,<sup>128</sup> proposed rates are determined by the pilot commission but

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122. The rationale for limits on the number of licenses issued and other features of a state system that prevent competition is described in the Florida pilotage statute, FLA. STAT. § 310.0015. (2008).

123. Alaska has a traditional system of regulated pilot rates but also allows negotiated, contract rates under some circumstances. ALASKA STAT. § 08.62.046 (2007).

124. OR. REV. STAT. § 776.115 (2007).

125. WASH. REV. CODE § 88.16.035 (2005).

126. PA. CONS. STAT. § 173.1 (2010), DEL. CODE ANN. Tit. 23, § 131 (2009), and MASS. GEN. LAWS ANN. Ch. 103, § 31 (2008).

127. CAL. CODE REGS. tit. 7, § 236 (2009).

128. N.Y. NAV. LAW § 87 (2008).



then must be approved by the legislature and enacted into the state statute. In Virginia and Maryland, each state's public utility commission sets the pilot rates.<sup>129</sup> In Louisiana, rates for each of the four groups of pilots in the state are set by a special purpose "Pilotage Fee Commission."<sup>130</sup> Prior to 2010, Florida also had a separate pilot rate board, although it was housed within the state's Department of Professional Responsibility along with the Board of Pilot Commissioners. In legislation enacted and signed by the governor during the summer of 2010 and promoted by vessel operating interests, the rate board was terminated, and the rate setting function was moved to a committee of the Pilot Commission.<sup>131</sup> Ironically, it was vessel interests who in 1994 had pushed for taking rate setting away from the pilot commission and establishing the rate board.<sup>132</sup>

A number of compelling public policy considerations have prompted states to address pilot civil liability. Eight states have provisions in their statutes that limit the civil liability of pilots and pilot groups for damages caused by negligence in the performance of piloting services. These eight statutory provisions can be divided into two basic categories: (1) dual rate systems and (2) statutory damages caps.

Two states, Oregon<sup>133</sup> and California (San Francisco),<sup>134</sup> have dual rate liability allocation statutes. Generally, under a dual rate system, each vessel requiring a state pilot is offered the option of two rates. The higher rate includes the cost of obtaining reasonable trip insurance covering a portion of the potential liability of both the pilot and the ship in case of an accident caused by the pilot's negligence. Alternatively, a vessel may elect a lower rate. The acceptance of the lower rate constitutes an irrevocable, binding agreement by the vessel, its master, owners, agents and operators not to assert any personal liability against the pilot or pilot association and to defend, indemnify, and hold harmless the pilot from third party claims.

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129. MD. BUS. OCC. & PROF. CODE ANN. § 11-502 (2008); VA. CODE ANN. § 54.1-918 (2008).

130. LA. REV. STAT. ANN. § 34:1121 (2008).

131. FLA. STAT. §§ 310.0015, 310.002, 310.011, 310.151 (2008), as amended by C.S.C.S.C.S.H.B. 1271 – Transportation Bill, engrossed on June 7, 2010, 2010 Fla. Sess. Law Serv. Ch. 2010-225 (West).

132. Craig Dunlap, *Florida's New Pilot Law Backed by Both Sides*, JOURNAL OF COMMERCE (Apr. 25, 1994), at <http://www.joc.com/maritime/floridas-new-pilot-law-backed-both-sides>.

133. OR. REV. STAT. §§ 776.510, 776.520 (2007).

134. CAL. HARB. & NAV. CODE § 1198 (2007).

Five states have opted for a simple statutory damages cap provision: Washington (\$5,000),<sup>135</sup> Texas (\$1,000),<sup>136</sup> South Carolina (\$5,000),<sup>137</sup> Alaska (\$250,000),<sup>138</sup> Maine (ports other than Portland) (\$5,000).<sup>139</sup> Louisiana excludes pilots from liability for acts of simple negligence: “[a]ny party seeking to hold a pilot. . . liable for damages or loss occasioned by the pilot’s errors, omissions, fault, or neglect shall be required to prove by clear and convincing evidence that the damages arose from the pilot’s gross negligence or willful misconduct.”<sup>140</sup> Every damages cap or dual rate statute exempts from its coverage damages due to willful misconduct, gross negligence, or certain other described higher levels of culpability.

These statutory provisions dealing with pilot liability have been in place for a number of years and represent the judgment of state governments that a mechanism to limit or allocate liability is in the public interest as a component of the state’s comprehensive pilotage regulatory system.<sup>141</sup> Two recent orders of the U.S. District Court in San Francisco in a case arising out of the COSCO BUSAN accident upheld the dual rate system for San Francisco pilots. In the first, the court ruled that the indemnification, defense and hold harmless obligations under the statute applied to the owners and operators of the COSCO BUSAN.<sup>142</sup> In the second, noting Congress’s broad grant of authority to the states to regulate pilotage, the court concluded that the state’s dual rate system is not preempted by either the federal general maritime law or by the Oil Pollution Act of 1990 or other federal statutes.<sup>143</sup>

All states have procedures for investigating a pilot’s possible role in a

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135. WASH. REV. CODE § 88.16.118 (2005).

136. TEX. TRANSP. CODE ANN. §§ 66.083, 67.083, 68.083, 69.053, 70.083 (2008) (for Houston, Galveston, Brazoria, Jefferson and Orange County, and Corpus Christi, respectively).

137. S.C. CODE ANN. §§ 54-15-350, 360 (2007).

138. ALASKA STAT. §§ 08.62.150-165 (2007).

139. ME. REV. STAT. ANN. tit. 38, § 99-A (2008).

140. LA. REV. STAT. ANN. § 34:1137 (2007).

141. See, e.g., Oregon’s “Declaration of legislative intent” for its pilotage liability provision: “The stimulation and preservation of maritime commerce on the bar and river pilotage grounds of this state are declared to be affected with the public interest and limitation and regulation of liability of licensees, trainees and organizations of pilots are necessary to such stimulation and preservation of maritime commerce and are deemed to be in the public interest.” OR. REV. STAT. § 776.510 (2007).

142. Continental Ins. Co. v. Cota, 2010 AMC 23 (N.D. Cal. 2010).

143. Continental Ins. Co. v. Cota, 2010 AMC 313 (N.D. Cal. 2010).

marine casualty and for taking action against licensed pilots in connection with casualties or in response to complaints or evidence of misconduct or professional deficiencies. Actions that may be taken typically include suspension or revocation of licenses, fines, remedial training, and letters of warning or reprimand. State disciplinary and license oversight of pilots involved in marine casualties is discussed, *infra*.

The area of greatest variation among the state systems is in the selection and training of new pilots. This is a consequence of the diversity in the local conditions and navigational demands among the nation's ports and waterways. There is no "best" system for selecting and training new pilots; each state tailors its system to its own needs. The amount and type of prior maritime experience required by the states, for example, ranges from a specified number of months or years of service as a master on either ocean-going vessels or on tugs or ferries, to little or no prior maritime experience. The duration and content of training depends in large measure on the experience of the incoming trainees.

Variations in the selection and training of new pilots exist not only from state to state, but in some cases even within a single state. Oregon offers a good example. Vessels moving between the sea and Portland, Longview, Kalama or other ports on the Columbia River system, use pilots from two separate groups. The Columbia River Bar Pilots are used on vessels transiting between the sea and Astoria, just inside the mouth of the river. This involves bringing vessels over the storied Columbia River Bar with its frequent high seas and foul weather. The state requires applicants for a position as a "Bar Pilot" to have two years experience as master of ocean-going vessels.<sup>144</sup> The training period for a selectee is relatively short, however, and focuses on learning the peculiarities and ever-changing conditions of the bar as well as the special techniques for crossing the bar in bad weather.

For the portion of the voyage between Astoria and the ports along the Columbia and Willamette Rivers, vessels take a member of the Columbia River Pilots Association. This is a long and narrow route with frequent periods of fog, requiring typical "River Pilot" skills. Consequently, the state selection program has traditionally drawn its prospective trainees from the local towing industry.<sup>145</sup> These individuals are presumed to bring with

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144. OR. ADMIN. R. 856-010-0010 (3)(c) (2010).

145. There is an alternative path for individuals without significant experience in the towing industry. Such individuals must complete "a program of apprenticeship training" that has been

them considerable knowledge of the river. The training period, which is longer than that for the Bar Pilots, focuses on shiphandling skills, bank suction and other shallow water effects on large vessels, and docking and undocking.

In Oregon, therefore, two different groups of state-licensed pilots work on vessels on different sections of the Columbia River, in waters that have totally different navigational demands and piloting challenges. Recognizing this, the state system has developed different selection and training programs for each group of pilots. Other aspects of the state regulatory program, such as rate-setting, also take into account each group's different needs and operations. The pilots in the two groups all have state licenses, work on the same river, and hand ships off to each other in Astoria, but they come from different backgrounds, have different training programs and operate under different regulations, all of which are administered by one pilot commission under the system devised by the State of Oregon. This type of situation is what Congress envisioned in 1789 when it decided that pilotage "is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."<sup>146</sup> Location-specific regulation of this kind would not be possible with a federal, one-size-fits-all system.

## V. FEDERAL REGULATION OF PILOTAGE

In general, the implementing regulations for the federal statutes governing pilotage, which are promulgated and administered by the U.S. Coast Guard,<sup>147</sup> apply directly only to those individuals holding a federal pilot license and serving the relatively small number of U.S.-flag coastwise seagoing vessels operating in the domestic trade. However, these federal pilotage regulations also have an indirect, but potentially significant,

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approved by the Board of Maritime Pilots. OR. ADMIN. R. 856-010-0010 (4)(a) (2010).

146. *Cooley*, 53 U.S. at 299.

147. Per 49 C.F.R. 1.46(n) (1984), the Department of Transportation (DOT) delegated to the Coast Guard the authority to promulgate regulations to implement the various maritime statutes in Title 46. In 2002, the Coast Guard was transferred to the Department of Homeland Security (DHS) under the authority of the Homeland Security Act of 2002, P.L. 107-296 (2002). Later, DHS, similar to DOT, delegated authority to the Coast Guard to promulgate and administer regulations for Title 46 Subtitle II. See Department of Homeland Security Delegation No. 0170.1 of 20 June 2003.

impact on state pilotage.

Unlike the comprehensive regulatory regimes of each coastal states (see *supra*), the implementing regulations for the federal pilotage statutory scheme are limited to pilot licensing and disciplinary oversight. As discussed *infra*, these implementing regulations serve two purposes: (1) to permit a U.S.-flag coastwise vessel to satisfy the federal compulsory pilotage requirement by having one its crewmembers obtain a federal pilot license or to “serve as” a pilot; and, (2) to serve, in effect, as a minimum national pilot license standard for the states. A discussion of the federal pilotage regulations follows.

Federal pilotage regulations establish the program for issuing federal pilot licenses. The federal first class pilot license issued by the U.S. Coast Guard is similar in one respect to state pilot licenses in that the federal license is issued for specific routes within a specific geographic area.<sup>148</sup> Unlike a state pilot license, however, a federal pilot license may be issued to an individual who has had no prior training as a pilot.<sup>149</sup> Section 7101(3) of title 46 sets out general eligibility requirements for a federal pilot license.<sup>150</sup> Coast Guard regulations impose more detailed requirements for obtaining a federal pilot license, including: experience aboard a vessel in some capacity in the deck department,<sup>151</sup> a small number of roundtrips of the pilotage area for which a federal license is sought,<sup>152</sup> an annual physical examination,<sup>153</sup> a written examination,<sup>154</sup> and a chart sketch.<sup>155</sup>

The regulatory requirement for federally-licensed pilots to maintain proficiency and a current working knowledge of the waters and routes to which the federal license applies is minimal. There are no continuing education or training requirements for those holding a federal license, and there is only one re-familiarization standard (the holder of a federal pilot

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148. 46 C.F.R. § 11.701 (2009).

149. 46 C.F.R. § 11.703 (2009).

150. 46 U.S.C. § 7101(e) lists certain requirements for a federal pilot license, e.g., minimum age of 21, annual physical examination, “requisite general knowledge and skill to hold the license”, “proficiency in the use of electronic aids to navigation”, “adequate knowledge of the waters to be navigated”, and “sufficient experience...to handle any vessel of the type and size which the applicant may handle.”

151. 46 C.F.R. § 11.703 (2009).

152. 46 C.F.R. § 11.705 (2009).

153. 46 C.F.R. § 11.709 (2009).

154. 46 C.F.R. § 11.707 (2009).

155. 46 C.F.R. § 11.910 (2009).

license is required to transit the particular pilotage route once every 5 years).<sup>156</sup>

The requirement that a U.S.-flag coastwise seagoing vessel “be under the direction and control” of an individual holding a federal pilot license<sup>157</sup> can be satisfied using a member of the vessel’s crew who has obtained a federal first class pilotage license for the particular route the vessel is traversing.<sup>158</sup> In addition, for most tank barges subject to the federal pilotage requirement, the U.S. Coast Guard has, through regulation, established a mechanism by which the federal pilotage requirement can be satisfied by a member of the crew who does not possess a federal pilot license but is authorized to “serve as” a pilot, provided the crewmember completes a small number of roundtrips of a pilotage area.<sup>159</sup> These regulatory “carve outs” to a more traditional, strict view of pilotage requirements<sup>160</sup> are somewhat complicated and, as a result necessitated the inclusion of a reference table in the federal regulations.<sup>161</sup>

Federal pilotage regulations also address license oversight and disciplinary authority. In order to “promote safety at sea”, the U.S. Coast Guard has been provided the authority to, following a hearing,<sup>162</sup> suspend or revoke licenses issued to mariners for certain specified acts.<sup>163</sup> For example, when an individual is “acting under the authority of” his or her federal pilot license, that license can be suspended or revoked for violation of federal marine safety or navigation statutes or regulations, or for

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156. 46 C.F.R. § 11.713 (2009).

157. 46 U.S.C. § 8502(a) (2006).

158. 46 C.F.R. § 15.812(b)(1) (2009).

159. See 46 C.F.R. §§ 15.812(b)(2) and (3) (2009). To the extent that a federal pilot license entitles a member of the crew to “serve as” a pilot, the license is similar to a “pilot exemption certificate” available in some parts of the world.

160. In *American Pilots’ Ass’n, v. Gracey*, 631 F. Supp. 827 (D.D.C. 1986), the American Pilots’ Association (APA), the national association for the piloting profession, challenged the regulatory “carve outs” established by the Coast Guard. The plain language of 46 U.S.C. § 8502(a) requires coastwise seagoing vessels to be “under the direction and control of a pilot licensed under section 7101.” The APA argued that the so-called “serving as” pilots authorized by the Coast Guard’s regulations “do not qualify as pilots licensed under § 7101” and instead represented an unauthorized exemption from the statutory pilotage requirement contained in § 8502(a). The challenge was ultimately unsuccessful as the court deferred to the Coast Guard.

161. See Tables 15.812(e)(1) and (2) in 46 C.F.R. § 15.812 (2009).

162. 46 U.S.C. § 7702(a) (2006).

163. 46 U.S.C. § 7701 (2006).

misconduct or negligence.<sup>164</sup>

Further, regardless of whether or not a mariner is acting under the authority of the federal license, the license can be suspended or revoked if the license holder: is “convicted of an offense that would prevent the issuance or renewal”<sup>165</sup> of the license; is, within a 3-year period before the initiation of a suspension or revocation proceeding, convicted of driving a motor vehicle while under the influence of alcohol or a controlled substance, or convicted of a traffic violation involving a fatality or reckless driving;<sup>166</sup> has “committed an act of incompetence relating to the operation of a vessel”;<sup>167</sup> is a “security risk that poses a threat to the safety or security of a vessel or a public or commercial structure”;<sup>168</sup> is convicted of violating a “dangerous drug law” within ten years of the commencement of a hearing on the matter;<sup>169</sup> or, is shown to be “a user of, or addicted to, a dangerous drug.”<sup>170</sup>

In addition to having the authority to suspend a pilot license through an administrative hearing, the Coast Guard has the authority to temporarily suspend a federal pilot license, without a hearing, for a period not more than 45 days. The Coast Guard may exercise this temporary suspension authority if there is probable cause to believe that the individual: has been convicted of an offense that would preclude issuance or renewal of the license; is, within a 3-year period before the initiation of a suspension proceeding, convicted of driving a motor vehicle while under the influence of alcohol or a controlled substance, or of a traffic violation involving a fatality or reckless driving; or is a security risk to the vessel or shoreside structure.<sup>171</sup>

Suspension and revocation of a mariner’s federal pilot license is not the only disciplinary option the Coast Guard has at its disposal. The Coast

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164. 46 U.S.C. § 7703(1) (2006).

165. 46 U.S.C. § 7703(2) (2006).

166. 46 U.S.C. § 7703(3) (2006).

167. 46 U.S.C. § 7703(4) (2006). Per Coast Guard regulation, “incompetence is the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity or any combination thereof.” See 46 C.F.R. § 5.31 (2009).

168. 46 U.S.C. § 7703(5) (2006).

169. 46 U.S.C. § 7704(b) (2006).

170. 46 U.S.C. § 7704(c) (2006).

171. 46 U.S.C. § 7702(d) (2006). This temporary suspension authority applies to a mariner who “performs a safety sensitive function on a vessel”, which applies, without question, to pilotage duties.

Guard may also pursue civil penalties for violations of federal maritime safety laws. For instance, the Coast Guard could seek a civil penalty against an individual for operating a vessel in a negligent or grossly negligent manner.<sup>172</sup> In addition, the Ports and Waterways Safety Act of 1972, as amended by the Port and Tanker Safety Act of 1978, provides authority to the Coast Guard to pursue civil and criminal sanctions for violation of navigational and vessel safety requirements.<sup>173</sup>

The federal pilotage licensing and disciplinary regulations obviously affect those individuals holding a federal pilot license and those individuals without an actual pilot license but who “serve as” a pilot pursuant to Coast Guard regulations. In addition, however, these federal regulations also have an indirect impact on state pilots.

By state statute,<sup>174</sup> state regulation,<sup>175</sup> or local pilot association rule, all state-licensed pilots are required to hold a federal pilot license.<sup>176</sup> State-licensed pilots are therefore subject to the federal licensing regulations and to some of the disciplinary standards.<sup>177</sup> In this regard, a federal pilot license and the federal pilot regulations serve as a national minimum standard for the state pilot system.

## **VI. OVERLAP BETWEEN STATE AND FEDERAL SYSTEMS: ADMINISTRATIVE RESPONSES TO MARINE CASUALTIES.**

In the oversight of the professional activities of state pilots, particularly in the case of a marine casualty, the states and the Coast Guard have separate and potentially overlapping roles. The range of responsive

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172. 46 U.S.C. § 2302 (2008).

173. 33 U.S.C. §§ 1221-1232 (2008).

174. See e.g., FLA. STAT. ANN. ch. 310 (2009).

175. See e.g., CAL. CODE REGS. tit. 7, § 216 (2010).

176. The states take differing approaches to the circumstance in which a state-licensed pilot's federal license is suspended, revoked, or not renewed. See e.g., FLA. STAT. ANN. § 310.101(1) (2008), which provides that failure of a state-licensed pilot to maintain a federal pilot license is grounds for disciplinary action; OR. ADMIN. R. 856-010-0035(2) and 956-010-0045(8) (2010), which indicates that if at any time a state pilot's federal license is suspended or revoked, the pilot is subject to suspension or revocation of the state license for the same period; Maine Pilotage Commission Rules and Regulations, Chapter 1, Part A.12.e, available at <http://www.maine-pilotage.com/rules.htm#1>, which directs that a state pilot “must surrender the state license immediately upon notification of the suspension or revocation of the federal license”; and TEX. TRANSP. CODE, ANN. § 61.011 (2009), which prohibits an individual from serving as a state-commissioned pilot unless that individual possesses a valid federal first class pilot license.

177. Discussed in the next section, *infra*.



administrative actions available to each of the two regulatory authorities, however, is carefully balanced to accommodate both the comprehensive state pilotage regulation system and the important federal marine safety functions of the Coast Guard.

When a state pilot is working on a vessel subject to the federal compulsory pilotage requirement in 46 U.S.C. § 8502(a), the pilot is considered to be “working under the federal license.” In case of an accident that occurs while a pilot is working under his or her federal pilot license, the Coast Guard is primarily responsible for overseeing the pilot’s performance and taking appropriate responsive action, including suspension or revocation of the federal license and the other actions described in the preceding section. In most states, the state pilotage authority may also take action against the pilot and his state license for these activities under a federal license.<sup>178</sup>

When a state pilot is working on a vessel subject to a state compulsory pilotage requirement (i.e., a foreign-flag vessel or a U.S.-flag vessel operating under a registry endorsement), the pilot is considered to be “working under the state license.” As a consequence, the state pilotage authority (the applicable pilot commission) has the primary role in overseeing the pilot’s performance. The state authority will investigate the pilot’s performance and has a range of administrative responses, including letters of warning, fines, remedial training, and suspension or revocation of the state license.

The Coast Guard also has several measures that it can take against a state pilot for actions by the pilot while working under the state license. For example, the Coast Guard can initiate a license suspension or revocation proceeding against the pilot’s federal license if the pilot committed an “act of incompetence relating to the operation of a vessel,”<sup>179</sup> even if that act occurred while working under the state license. Under Coast Guard regulations, “[i]ncompetence is the inability on the part of a person to perform required duties, whether due to professional deficiencies,

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178. See, e.g., *Hochstetler v. Board of Com’rs for the Bays of San Francisco, San Pablo, and Suisun*, 6 Cal App 4th 1659, 8 Cal. Rptr 2nd 403, 1992 AMC 2367 (1992).

179. 46 U.S.C. 7703(4) (6). The Coast Guard also has authority to suspend or revoke a state pilot’s federal license for certain other types of conditions, offenses, and transgressions listed in subsections 2, 3, and 5 of section 7703 even if those may have occurred while acting under the authority of a state pilot license.

physical disability, mental incapacity, or any combination thereof.”<sup>180</sup> This license authority in the case of incompetence, for example, was the basis for the suspension and revocation proceeding threatened by the Coast Guard against the pilot of the COSCO BUSAN. The Coast Guard also has available the wide range of civil penalties previously described even if the pilot was working under his or her state license at the time.

There is one important limitation on the Coast Guard’s authority to suspend or revoke a state pilot’s federal license. The Coast Guard can suspend or revoke a federal license for negligence, misconduct or a violation of Coast Guard marine safety regulations only if the asserted offense occurred while the holder was acting under the authority of the federal license.<sup>181</sup> In the case of a state pilot, this bars the Coast Guard from proceeding against the federal license of the pilot for asserted offenses of those specified types while working under the pilot’s state license. This result is a necessary consequence of the Congressional decision to give the states the preeminent role in regulating pilotage.

The rationale of the limitation is that to permit Coast Guard action against a state pilot’s federal pilot license for asserted offenses while acting under the pilot’s state license would interfere with and undermine the state’s regulatory role. Because virtually every state pilot is required to have a federal pilot license,<sup>182</sup> the loss of a state pilot’s federal license would effectively mean the loss of the pilot’s ability to work as a state pilot. That would have the Coast Guard, not the state pilotage authority, exercise the ultimate control over state pilots.

The courts have recognized the critical role that this limitation on the Coast Guard license authority plays in preserving the state pilotage system and the destructive impact that removing the limitation would have. For example, in 1974 the Ninth Circuit struck down a Coast Guard effort to avoid the limitation and proceed against the federal pilot license of a pilot licensed by the State of Washington.<sup>183</sup> The Coast Guard tried to use its regulation, currently at 46 CFR § 5.57(a), providing that an individual is considered to be acting under the authority of a federal license when the license is required by law or is a condition of employment (a Washington pilot is required by law to hold a federal pilot license). The Court held that

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180. 46 C.F.R. § 5.31 (2009).

181. 46 U.S.C. § 7703 (2008).

182. *Supra*, notes 173, 174, 175.

183. *Soriano v. United States*, 494 F.2d 681, 1974 AMC 283 (9th Cir. 1974).

the regulation could not be used to obtain jurisdiction over a state pilot:

The Commandant's condition-of-employment regulation leads to precisely this result: it affects the power of the states to regulate pilots of foreign-flag, merchant vessels in state waters. . . . [E]ven though it chooses to require a federal pilot's license as a condition for the issuance of a state license, the state of Washington still might not wish to see its own pilots investigated and reprimanded for alleged misconduct while serving as compulsory pilots pursuant to state law.

. . . The Commandant's regulation, which purports to place state pilots under Coast Guard discipline, infringes upon an area specifically reserved by Congress for 185 years for regulation by the states and acknowledged by the Supreme Court for more than 120 years to be a subject of peculiarly local concern. See *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851). The regulation is void.<sup>184</sup>

Another attempt to avoid the limitation of 46 U.S.C. § 7703 was struck down two years after the *Soriano* decision in *Dietze v. Siler*.<sup>185</sup> Again, the importance of the limitation in preserving the state pilotage system was recognized. The *Dietze* court observed:

Thus retained [in the predecessor of 46 U.S.C. § 7703] is the traditional right of each state to enforce the standards of state pilotage laws as to acts under state licenses, free from the possibility that the same acts will be subject to federal investigation and the same pilots subject to sanction under federal law.<sup>186</sup>

In addition, the court described the limiting phrase, "acting under the authority of his license" in the predecessor of 46 U.S.C. § 7703 as the product of the "historical attempt by Congress to preserve the integrity of state regulation even while promoting public safety."<sup>187</sup>

The COSCO BUSAN incident provides a useful example of how the respective jurisdictions can each respond, when necessary, to a marine

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184. *Id.* at 684.

185. 414 F. Supp. 1105 (E.D. La. 1976).

186. *Id.* at 1113 (internal footnote omitted).

187. *Id.* at 1112, n.9.

casualty involving a state pilot. The pilot of the COSCO BUSAN, when it allided with the Oakland Bay Bridge on November 7, 2007, was a San Francisco pilot acting under the authority of his state license issued by the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun (the “Board”).<sup>188</sup>

Immediately following the incident, the Board’s Incident Review Committee (“IRC”) commenced an investigation of the accident and the actions of the pilot.<sup>189</sup> The pilot was placed on administrative leave, and his license was subsequently suspended by the Board on December 1, 2007 under a summary procedure authorizing such action when the “public interest requires.”<sup>190</sup> On December 6, 2007, the IRC filed an “accusation” against the pilot charging him generally with negligence and listing a number of asserted errors in his performance on the COSCO BUSAN.<sup>191</sup> The filing of an accusation marks the start of a formal license suspension or revocation proceeding under state statute and commission regulations.<sup>192</sup> The matter was set for a hearing before an administrative law judge. In his answer to the accusation, the pilot waived his statutory right under the summary suspension procedure to a hearing within 40 days, citing difficulties in obtaining evidence for his defense. The hearing originally set for April 28, 2008, was subsequently postponed until September due to the continuing difficulties that the pilot and his attorneys were having securing evidence. The contemporaneous federal criminal investigation was identified as a major source of those difficulties. During this period, the pilot’s state license remained suspended.

On June 23, 2008 the pilot gave written notice of his retirement as a state-licensed pilot, with the suspension of his license to continue until the effective date of the retirement, at which time his license would expire by operation of law. In the absence of a license, the suspension and revocation proceeding became moot and was dismissed as of the effective date of his retirement. The pilot’s career was officially over at that point, although as

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188. Board of California Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun, at <http://www.bopc.ca.gov> (last visited July 29, 2010).

189. CAL. HARB. & NAV. CODE § 1180.3 (2008).

190. *Id.* at §1180; Board of California Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun, <http://www.bopc.ca.gov> (last visited July 29, 2010).

191. Board of California Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun, at <http://www.bopc.ca.gov> (last visited July 29, 2010).

192. *Id.* at §1180.6; CAL. CODE REGS. tit. 7, §210 (2010).

a practical matter he had ceased piloting after November 7, 2007.

Despite the fact that the Board's suspension and revocation authority legally ended when the pilot's license expired, the IRC submitted a formal report of its investigation and its findings as to the pilot's performance. The report was adopted by the Board on October 23, 2008 and is available on the Board's website.<sup>193</sup>

Approximately a month after the accident, the Coast Guard requested that the pilot "voluntarily deposit"<sup>194</sup> his federal license. The Coast Guard stated that it believed that the pilot was not physically competent to maintain his license and that this belief was based on the Coast Guard's review of information that he had previously disclosed in connection with the Coast Guard's normal medical review program for pilots and other mariners. The request for the deposit was accompanied by a warning that if the pilot refused to deposit the license, the Coast Guard could charge the pilot with incompetence and initiate a suspension and revocation proceeding.<sup>195</sup> The pilot deposited his license two weeks later.<sup>196</sup>

Both the state of California and the federal government used different procedures and authorities to take action against the pilot's state and federal licenses, respectively. The result of their actions, however, was the same: the loss of the pilot's license. The two actions were therefore independent but complementary.

## VII. CONCLUSION

Although the states and the federal government each have separate regulatory programs for pilots, it is appropriate to consider that the two

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193. Board of California Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun, <http://www.bopc.ca.gov> (last visited July 29, 2010).

194. According to the explanation in the Coast Guard's Press Release concerning the request: "Voluntary deposit is an administrative procedure used in cases where there is evidence of mental or physical incompetence. The mariner deposits his license with the Coast Guard on condition that the Coast Guard will not return it until the Coast Guard receives satisfactory evidence that the mariner is considered fit for full duty without qualification, and the mariner initiates action to regain his credentials. This gives the Coast Guard an assurance that the mariner is not working as a vessel pilot or officer." United States Coast Guard District 11 Public Affairs, *Coast Guard Requests Cosco Busan Pilot's License*, at <http://www.uscg-sanfrancisco.com/go/doc/823/185353> (last visited July 29, 2010).

195. Under 46 U.S.C. §7703(4) (2008) and 46 C.F.R. part 5 (2009).

196. Press Release, United States Coast Guard District 11 Public Affairs, *Cosco Busan Pilot Voluntarily Deposits License*, at <http://www.uscg-sanfrancisco.com/go/doc/823/185720> (last visited July 29, 2010).

programs together constitute a national system of pilotage regulation, albeit one in which the states play the preeminent role. The two programs are not in conflict or competition. They have different historical backgrounds and perform different functions. The so-called “dual system” of pilotage regulation in the U.S. is a logical and thoughtfully crafted response to the special nature of piloting and the important role that pilotage plays in navigation safety, environmental protection, and commerce. It is based on a series of judgments made by Congress over the last 221 years as to the best and most efficient way not only to regulate pilotage but also to ensure that expert, efficient, and accountable pilotage services are available for all oceangoing international trade vessels using the ports and waterways of the country.

Far from being mysterious or arcane, pilotage regulation in the U.S. – both by the states and by the federal government – is transparent and available. The regulatory systems are set out in federal and state statutes, in considerable detail in the case of the latter. Both state authorities (pilot commissions) and the federal authority (the Coast Guard) administer their respective programs through published, publicly available regulations and records.

While pilotage and pilotage regulation may not be part of every American’s knowledge base, the subject is easily accessible to those who seek to learn about it. This is true for attorneys as well. As the celebrated Judge John R. Brown stated:

To be sure, state compulsory pilotage is not a body of law familiar to most legal practitioners, much less one at the forefront of public attention. Yet it is not a particularly difficult body of law. Indeed, unlike the state of flux that characterizes many areas of contemporary law, pilotage law is remarkably straightforward and firmly established.<sup>197</sup>

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197. *Jackson*, *supra* note 20 at 1350.