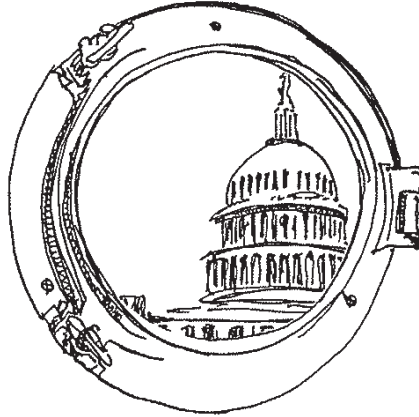


WINDOW ON WASHINGTON



TRIMMING THE TREE ON CAPITOL HILL

By Bryant E. Gardner

Just before the close of the 113th Congress and almost on the eve of Christmas, Congress passed the Coast Guard and National Defense Authorization bills for fiscal year 2015. These two pieces of hopefully annual legislation, and the Coast Guard bill in particular, have frequently attracted a variety of maritime-related legislative provisions in need of a vehicle, leading some commentators to quip that they have become “Christmas tree bills” ornamented with legislative add-ons.

This year was no different. Seeing these two bills as the only likely pieces of legislation with a decent chance of becoming law before the end of the session and the 2014 holiday recess, various interest groups tacked their provisions onto the legislation. While some maritime interests received presents in time for the holidays, others are more apt to see lumps of coal in these bills. But, as House Appropriations Chairman Hal Rogers and Senate Appropriations Chairwoman Barbara Mikulski observed in a recent joint statement, “While not everyone got everything they wanted, such compromises must be made in a divided government.”¹

¹ Rep. Hal Rogers & Sen. Barbara Mikulski, Rogers-Mikulski Joint Statement on Omnibus Agreement (Dec. 9, 2014), available at <http://haldogers.house.gov>.

I. Howard Coble Coast Guard and Maritime Transportation Act of 2014

After over a year of deliberations and amendments, Congress passed the Howard Coble Coast Guard and Maritime Transportation Act of 2014 (“CGMTA” or the “Act”) on December 12, 2014, and President Barack Obama signed the bill into law on December 18, 2014 just in time for the holidays and the end of the 113th Congress.² Besides authorizing funding for the Coast Guard during fiscal year 2015, the legislation contains a number of important provisions affecting the maritime industry.

Gassing Up the U.S. Fleet. The Act contains a provision fiercely championed by Congressman Garamendi (D-CA), ranking member of the Coast Guard and Maritime Transportation Subcommittee of the House Transportation and Infrastructure Committee that is intended to harness natural gas exports to promote and expand opportunities for the U.S. flag commercial fleet. Under existing provisions of law, the U.S. Maritime Administration (“MARAD”) has authority to prioritize licenses under the Deepwater Port Act of 1974 for

² Pub. L. No. 113-281, 128 Stat. 3022 (2014) (“CGMTA”).

facilities that import LNG on U.S.-flag vessels.³ However, recent developments in U.S. “tight” oil production (such as “fracking”) have generated a surfeit of LNG, such that many terminals are now being rejiggered to facilitate the export of LNG from the United States.⁴ Congressman Garamendi’s provision amends the MARAD promotional authority to prioritize licenses for facilities that utilize U.S.-flag exports as well as imports of LNG.⁵ The Act also requires that the Government Accountability Office submit a report to Congress within one year of enactment detailing the number of jobs that would be created for each year in 2015-2025 if LNG exported from the U.S. were required to be carried in U.S. flag vessels.⁶ The reporting requirement was a compromise, following withdrawal of an amendment proposed by Congressman Garamendi which would have phased in a requirement that all LNG exports be on U.S.-built, U.S.-crewed ships under the U.S. flag. “Natural gas is a strategic national asset that has helped spur a revival of American manufacturing. When done thoughtfully, limited exports provide an excellent opportunity for creating American jobs in building and manning LNG ships,” said Congressman Garamendi, “What is needed is a law that requires that LNG is exported on U.S. built ships, flagged in America and crewed by American sailors.”⁷

Following up on Maritime Administrator Paul “Chip” Jaenichen’s National Maritime Strategy symposia in 2014, the Act also directs the development of a National Maritime Strategy aimed at revitalizing the deep water internationally trading U.S. flag fleet.⁸ The Act directs the Coast Guard and Maritime Administration to identify regulations that reduce the competitiveness of U.S.-flag vessels in the foreign trades, and address the impact of reduced cargo flow due to reductions in United States Armed Forces personnel overseas. Additionally, it calls for recommendations to make U.S.-flag vessels more

competitive in the international trades, ensure compliance with cargo preference laws,⁹ increase third-party (class) inspection and certification, and increase short sea shipping and shipbuilding in the U.S. Lastly, the Act requires the Coast Guard to enter into an arrangement with the National Academy of Sciences to conduct an assessment of regulation of U.S.-flag vessels, including a review of departures from International Maritime Organization Standards employed by most open registries.¹⁰

Abandoned Seafarers Fund. Over the last 10 years, the Coast Guard and Department of Justice have developed an aptitude for the so-called “magic pipe” cases prosecuting environmental crimes in connection with vessel operational waste discharges using the False Statements Act, the Act to Prevent Pollution from Ships (“APPS”) (the domestic MARPOL enactment), and a host of other criminal and environmental laws. In connection with these cases, the authorities have often found it necessary or convenient to retain in the U.S., as witnesses or defendants, alien crewmembers serving aboard foreign-flag vessels who might otherwise not be available to U.S. law enforcement. However, obtaining and funding their support during sometimes extended periods of investigation has been at times a thorny issue, and the authorities have tended to rely upon voluntary agreements of support by vessel owners or operators, or other work-arounds. Therefore, since 2007 the Coast Guard has pushed for the establishment of a seafarer’s fund to support seafarer witnesses and secure Coast Guard access to them during investigations.

Section 320 of the CGMTA incorporates new provisions of law designed to fund and accommodate such seafarers while they remain in the United States, incorporating provisions from competing House and Senate proposals. The new law sets up a new \$5 million Treasury account called the “Abandoned Seafarers Fund” to provide support for seafarers involved in an investigation or who have been abandoned in the United States by a vessel owner or operator, or to reimburse a vessel owner or operator that advanced seafarer support funds during an investigation but who was not ultimately convicted. Funds expended from the Abandoned Seafarers Fund are recoverable from the

³ Coast Guard and Maritime Transportation Act of 2006, Pub. L. No. 109-241, § 304(a), 120 Stat. 516, 527 (2006) (codified in part at 33 U.S.C. § 1503(i)).

⁴ See generally Bryant E. Gardner, “Fracking Maritime Policy,” 11 BENEDICT’S MAR. BULL. 141 (Third Quarter 2013).

⁵ CGMTA § 307.

⁶ *Id.* § 308.

⁷ In Coast Guard Bill Markup, Ranking Member Garamendi Fights for U.S. Jobs, Revival of Maritime Industry & Cruise Ship Passenger Bill of Rights, available at <http://www.garamendi.org> (last visited Dec. 23, 2014).

⁸ CGMTA § 603.

⁹ Cargo preference laws require that, when the U.S. Government ships or finances shipments of cargo, at least a portion of that cargo is carried by U.S.-flag vessels.

¹⁰ CGMTA § 605.

responsible vessel owners and operators, and the account may also be funded by fines recovered from APPS violators. Owners and operators failing to comply with demands to reimburse the Fund for costs incurred will be subject to *in rem* vessel arrest and revocation of vessel departure clearances required by 46 U.S.C. § 60105. Although the Senate provision would have imposed a 25% surcharge on any shipowner or operator who does not voluntarily provide seafarer support costs during the pendency of an investigation, that provision did not survive into the final enactment.

Small Shipyards Assistance. The House bill included a provision enacted in the final law which extends the popular small shipyards assistance program through 2017.¹¹ Under the program, MARAD is authorized to provide up to \$25 million in grants for capital improvements and \$5 million in training grants annually at qualifying shipyards, with Federal funds capped at 75% of the total cost of the project being funded.¹² The legislation directs MARAD to take into account the “economic circumstances and conditions of maritime communities;” which projects will be effective in fostering “efficiency, competitive operations, and quality ship construction repair, and reconfiguration;” and the likelihood that projects will foster employee skills and productivity when awarding the grants.¹³

OSV Class Inspection & Regulatory Review. Another House provision which survived into the final law reduces the regulatory burden upon U.S.-flag offshore supply vessels by permitting them to rely upon third party classification society inspections in lieu of U.S. Coast Guard inspections.¹⁴ More specifically, the delegation, which requires a request of the owner or operator, would permit the society to conduct “any vessel inspection and examination function carried out by the [Coast Guard], including the issuance of certificates of inspection and all other related documents.” The provision also requires a report within two years of enactment detailing the number of vessels for which the delegation was made, resultant savings to the Coast Guard, and any impacts upon the operational safety of vessels for which such delegations were made. Additionally, the Act requires the Coast Guard to report

to the congressional committees having jurisdiction any proposed safety and environmental management system requirements for offshore supply vessels, including cost estimates and the purported justifications for such requirements, and further prohibits the imposition of such new regulatory requirements earlier than six months following such report.¹⁵

Articalia. The Act also includes a new provision reforming the system of payments and compensation among nations for international ice patrols in the North Atlantic.¹⁶ Existing legislation permitted the President to (a) enter into agreements with other maritime nations to operate an ice patrol in the North Atlantic for purposes of observing ice conditions and rendering assistance to vessels operating there, and (b) agree upon payments among such nations as compensation for maintaining such services.¹⁷ The new provision, which originated in the House, provides that any such payments will be returned to the Coast Guard's operating budget, and further provides that data collected by the Coast Guard ice patrol shall not be disseminated to foreign-flag vessels from nations which have not contributed to the cost of maintaining the service, effective 2017. The amendment would therefore force the ice patrol operational cost onto the shoulders of flag states, and away from the United States and other neighboring area maritime nations in the North Atlantic. Under the original House proposal, the Coast Guard would have been prohibited from providing the service if during the prior fiscal year it did not receive payments sufficient to compensate it for the share of the service supplied to non-U.S.-flag vessels.¹⁸ The Act also includes provisions encouraging international cooperation with respect to the development of Arctic navigational aids, spill response, Arctic maritime domain awareness, and Arctic forward operating facilities.¹⁹ Lastly, the Act also wades back into the Great Icebreaker Debate,²⁰ shepherding the maintenance of the Coast Guard's dwindling

¹¹ CGMTA § 303.

¹² 46 U.S.C. § 54101.

¹³ *Id.* § 54101(b).

¹⁴ CGMTA § 315.

¹⁵ CGMTA § 322.

¹⁶ CGMTA § 314.

¹⁷ 46 U.S.C. § 80301.

¹⁸ H.R. 4005, 113th Cong. § 302 (2014).

¹⁹ CGMTA §§ 501-504.

²⁰ See Bryant E. Gardner, “Pirates, Adventures in the Arctic, and More: A Peak at the 11th Hour Maritime Legislation of the 112th Congress,” 10 BENEDICT'S MAR. BULL. 170 (Fourth Quarter 2012).

ice breaking capability and directing the development of a plan to get the service back on track.²¹

Off the Hook. CGMTA also extends through 2017 the moratorium upon the Environmental Protection Agency's imposition of permitting requirements with respect to discharges incident to the normal operation of small vessels (under 79 feet) and fishing vessels.²² Notably, the House bill would have made the exemption permanent.²³ Although the EPA had published its Small Vessel General Permit on September 10, 2014 with an effective date of December 19, 2014 in anticipation of the December 18, 2014 expiration of the existing moratorium, the Act relieves small and fishing vessel operators from compliance with the program, although ballast water discharges still require permit coverage.²⁴

Cruise Ship Safety. Senator Jay Rockefeller (D-WV), Chairman of the Senate Committee on Commerce, Science, and Transportation, has championed cruise ship consumer safety in the wake of several high-profile incidents. These include sexual assault and the February 2013 fire aboard the CARNIVAL TRIUMPH that left passengers stranded for days aboard the 2,754 passenger ship, adrift and without power, resulting in a rapid deterioration of conditions on board. Although the Chairman faced stiff resistance from the cruise industry, and the dispute threatened to derail the Coast Guard bill (which historically relies upon a unanimous consent procedure and therefore must be relatively non-controversial), Section 321 of the Act does impose new disclosure requirements making available to cruise consumers information regarding on-board incidents. Specifically, all complaints of crimes—even if not proven and regardless of the investigative status of the incident—must be disclosed, and the information must be sortable by cruise line, which must be identified by name. The provision was one of several included in the

Cruise Passenger Protection Act which cruise safety advocates had sought to tack onto the CGMTA.

Changes on North Capitol Street. The CGMTA also included two small but significant changes impacting the Federal Maritime Commission and the administration of the Shipping Act of 1984. Historically, complainants in the FMC were *entitled* to recover attorneys' fees where reparations are otherwise awarded.²⁵ Section 402 of the Act now makes the award of attorneys' fees discretionary, uncouples the award of attorneys' fees from the award of reparations, and further provides that they may be awarded to either prevailing party. Thus, a complainant seeking only a cease and desist order might now be able to recover fees, but if unsuccessful, the respondent may be able to recover fees. The provision is said to have been developed by port interests who have been looking at ways to curtail the increasing prevalence of Shipping Act complaints lodged against them by tenants and other users. Additionally, the Act includes new provisions limiting the terms of Commissioners. Although terms are currently limited to five years with each term beginning one year apart, Commissioners are permitted to serve an unlimited number of terms and to continue serving until a successor is appointed. The Act now limits Commissioners to two five-year terms, and prohibits them from serving more than one year following the end of the Commissioner's term pending appointment of a replacement. Finally, the Act imposes new statutory limitations upon a Commissioner's financial interest in entities regulated by the Commission, or upon other business, vocation, or employment during service to the Commission.

CLOSE CALLS

As is often the case, a number of substantive provisions were stripped out of the bill during negotiations between the House and Senate at the eleventh hour, including provisions that would have restored key cargo taken away from the U.S.-flag national defense sealift base in 2012 and curtailed access to the U.S. justice system by foreign seafarers.

Cargo Preference Restoration & Enforcement. The House bill included language which would have helped clarify existing authorities establishing MARAD as the supreme authority with respect to the implementation and enforcement of U.S.-flag cargo

²¹ CGMTA §§ 505-506.

²² CGMTA § 602.

²³ H.R. 4005 § 501.

²⁴ See Environmental Protection Agency, Small Vessel General Permit, *available at* <http://water.epa.gov/polwaste/npdes/vessels/Small-Vessel-General-Permit.cfm> (last visited Dec. 23, 2014); Environmental Protection Agency, Final National Pollution Discharge Elimination System (NPDES) Small Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels Less Than 79 Feet, 79 Fed. Reg. 53,702 (Sept. 10, 2014).

²⁵ 46 U.S.C. § 41305(b).

preferences imposed upon Federal shipper agencies.²⁶ The House bill also would have restored civilian cargo preferences to 75% of cargo shipped, which was reduced to 50% U.S.-flag carriage in the 2012 Highway Bill known as "MAP-21."²⁷ However, the provisions were stripped by Senate interests allied with shipper agencies interested in padding their transportation budgets by employing open registry vessels in lieu of the U.S. taxpayers sailing aboard U.S. Merchant Marine sealift assets.²⁸

Cruise Ship Seafarer Protections Upheld. Section 307 of the House bill, H.R. 4005, would have restricted foreign seafarers serving on passenger vessels from filing claims in the United States for "maintenance and cure" for damages or expenses related to personal injury, illness, or death. Section 308 would have eliminated class action provisions applicable to a suit for penalty wages due for the withholding seamen's wages. Objecting to the provisions before the House and offering amendments to strip them out of the bill, ranking member Garamendi stated "These two sections are an affront to seafarers everywhere, both here in the U.S. and abroad. By denying established legal rights to foreign seafarers, Section 307 would encourage ships to hire these workers Section 308 would remove a basic protection for American mariners: a guarantee that they will be paid for their work."²⁹ Although Congressman Garamendi's amendment did not succeed in the House, the provisions did not survive into the final compromise with the then Democrat-held Senate.

Pertinent Appurtenances Survive Another Day. Section 301 of the House bill reprised the proposal to exempt fishing permits from the grip of maritime liens, previously discussed in *Window on Washington*.³⁰ As written, the provision would have legislatively

overturned the admiralty rule holding that fishing rights are "appurtenances" of vessels to which a maritime lien or mortgage will attach, potentially unwinding deals or seriously undermining the security that lenders counted upon when they extended credit to fishing operators, especially where the vessel's value lies primarily in her fishing rights.³¹ Although the provision did not survive the Senate, it serves as a stern reminder to maritime practitioners representing lenders that they should take a "belt and suspenders" approach, specifically naming the fishing rights as subject to the mortgage and further filing U.C.C.-1 financing statements against the permits as general intangibles. As at least one reader of *Window on Washington* has forcefully observed, there is a difference between mortgage and maritime liens. Perhaps House legislators could achieve their goal of freeing fishing permits from perceived "nuisance" liens, while maintaining the integrity of existing financings and preserving fishing industry access to capital, by clarifying that the limitation upon "appurtenances" does not curtail the reach of the mortgage lien.

II. National Defense Authorization Act of 2015

The giant \$577 billion Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("NDAA")³² signed into law on December 19, 2014 also includes several key maritime provisions. Although the law relates more broadly to military authorizations—and as a consequence is traditionally a "must pass" bill that has passed 53 years in a row making it a near sure-fire legislative vehicle—it does include several key maritime provisions impacting MARAD.

Maritime Security Program. The Maritime Security Program ("MSP") was established to ensure the availability of militarily useful U.S.-flag vessel capacity to

²⁶ 46 U.S.C. § 55305; H.R. 4005 § 316.

²⁷ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 100124, 126 Stat. 405 (2012).

²⁸ H.R. 4006 § 318.

²⁹ In Coast Guard Bill Markup, Ranking Member Garamendi Fights for U.S. Jobs, Revival of Maritime Industry & Cruise Ship Passenger Bill of Rights, available at <http://www.garamendi.org>. (last visited Dec. 23, 2014).

³⁰ H.R. 4005 § 301; see also Bryant E. Gardner, "Pirates, Adventures in the Arctic, and More: A Peak at the 11th Hour Maritime Legislation of the 112th Congress," 10 BENE-DICT'S MAR. BULL. 170 (Fourth Quarter 2012); Bryant E. Gardner, "Fishing for Change," 10 BENE-DICT'S MAR. BULL. 18 (First Quarter 2012).

³¹ See Bryant E. Gardner, "Fishing for Change," 10 BENE-DICT'S MAR. BULL. 18 (First Quarter 2012). See also Gowen, Inc. v. F/V QUALITY ONE, 244 F.3d 64, 2001 AMC 1478 (1st Cir. 2001); Bank of Am., NT & SA v. PENGWIN, 175 F.3d 1109, 1999 AMC 1905 (9th Cir. 1999); PNC Bank Delaware v. F/V MISS LAURA, 381 F.3d 183, 2004 AMC 2314 (3d Cir. 2004) (acknowledging doctrine but holding that lien on fishing rights did not survive loss of vessel and subsequent transfer of fishing rights to other vessel); Robert J. Zapf, *Appurtenances: What Are They And Are Fishing Permits Among Them?*, 79 TUL. L. REV. 1339 (June 2005).

³² Pub. L. No. 113-291, 128 Stat. 3292 (2012) ("NDAA").