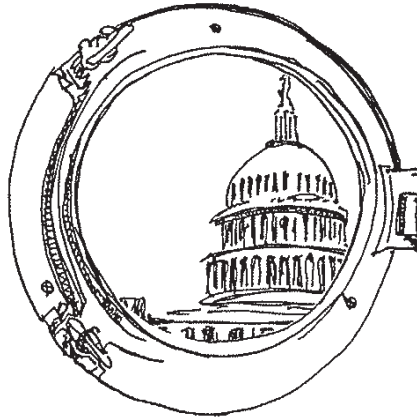


## WINDOW ON WASHINGTON



### Summer Lovin' in the Capitol

By Bryant E. Gardner

As Congress prepares to pack-up and go home for the long, hot D.C. summer, both the House and Senate have put forward their respective drafts of the Coast Guard Authorization Act of 2015,<sup>1</sup> including a host of important provisions impacting the Coast Guard, Federal Maritime Commission, and the U.S. maritime industry writ large. Consistent with the Republican domination of Congress, the proposals reflect an interest in promoting greater efficiency of operations, reduced regulatory burden, smaller government, and greater reliance upon private industry. However, in other areas, the proposals seek to bolster significantly Coast Guard infrastructure and assets. Although the House and Senate proposals overlap in many ways, they differ on important points as set forth below. Thus far, the legislation has been relatively non-controversial, although it remains to be seen whether more controversial provisions will be “air-dropped” into the provisions at conference or during eleventh-hour negotiations prior to enactment.

*Coast Guard Changes—Semper Gumby.* Both the House and Senate bills aim to “modernize” Coast Guard leadership and align its structure with other

armed services. Among other changes, the proposals would give the Vice Commandant the flag rank of Admiral consistent with the rank provided counterparts in other services, reconstitute the Chief of Staff position which was discontinued in 2011, and authorize the appointment of senior Coast Guard officers to critical national security assignments within the Executive Branch, such as the Joint Chiefs of Staff.<sup>2</sup> The Senate bill includes professional development requirements intended to educate Coast Guard leadership on the workings of Congress and to combat “toxic leadership” by adopting “multirater assessments” of senior officers and Senior Executive Service personnel, to include opinions from members senior to the reviewee, and the peers and subordinates of reviewee.<sup>3</sup> Also included in the Senate bill is a provision requiring investigations of Coast Guard flag officers and Senior Executive Service to be conducted in consultation with the Department of Defense Inspector General and consonant with Defense Department policy.<sup>4</sup>

<sup>1</sup> H.R. 1987, 114th Cong. (2015); S. 1611, 114th Cong. (2015).

<sup>2</sup> H.R. 1987 §§ 201-202; H.R. Rep. No. 114-115, at 29 (2015); S. 1611 §§ 201-202.

<sup>3</sup> S. 1611 § 203.

<sup>4</sup> S. 1611 § 216.

In contrast to its treatment of most agencies, Congress has long chastened the Coast Guard for not requesting *enough* money to fulfill its wide-ranging duties, and the Coast Guard for its part has typically said it can do more with less under its marching orders from the Office of Management and Budget (“OMB”) of the White House. In this vein, the House Report notes that Administration requests have fallen woefully short of the funds which the Coast Guard and Government Accountability Office previously determined are necessary to meet the demands imposed upon the service.<sup>5</sup> However, both the House and Senate bills fund the service at \$8.7 billion—unchanged from current levels.<sup>6</sup>

Harkening back to the Integrated Deepwater System Program acquisition fiasco, both bills would impose further reforms upon the Coast Guard acquisitions process, including the collection and reporting of performance data regarding asset utilization and increased acquisition planning subject to stricter congressional oversight.<sup>7</sup> In order to facilitate longer-term planning, the bills would establish a two-year authorization through fiscal year 2017, in lieu of annual authorization. Moreover, the proposal encourages the Coast Guard to leverage commercially available off-the-shelf technologies to solve mission performance problems through improved communications and a “digital boat profile pilot program” intended to help coordinate efficient maintenance.<sup>8</sup>

The House and Senate proposals both require the Coast Guard to once and for all make a determination within 270 days of whether to decommission the POLAR SEA, one of the service’s only two polar class heavy ice breakers, currently deactivated pending a decision on whether to refurbish her or procure replacement capability.<sup>9</sup> The legislation also directs the Coast Guard to work with the National Academy of Sciences to examine the cost impacts of various alternatives for meeting the requirements previously met by the POLAR SEA, including reactivation of the vessel, acquisition of a new vessel through the Coast Guard’s usual acquisition process, and various private

partnership alternatives including private ownership and operation of the icebreaker.<sup>10</sup>

*Mariner Documentation.* The House measure includes provisions which would reduce the regulatory burdens upon credentialed merchant mariners by harmonizing the expiration dates of merchant mariner credentials, mariner medical certificates, and radar observer endorsements for new and renewed credentials.<sup>11</sup> Additionally, the legislation would require the Coast Guard to certify local physicians to make medical fitness determinations of merchant mariners, rather than having mariners’ doctors fill out a form and submit it to the Coast Guard for review and certification.<sup>12</sup> Lastly, the Senate legislation includes a provision exempting merchant mariner license exams (and answers) from disclosure under the Freedom of Information Act until retired from the credentialing process, but requires the development of sample exams for release to the public.<sup>13</sup>

*Recreational Vessel Documentation.* The House also aims to reduce the regulatory burden upon recreational vessel owners. Although Certificates of Documentation are not required for recreational vessels, many owners elect to document them to facilitate passage into foreign ports, and to preclude them from compliance with state vessel documentation requirements. However, current Federal documentation is not available electronically and must be renewed annually. To reduce the regulatory burden, the proposal would make the Certificates of Documentation valid for five years.<sup>14</sup>

*Party fouls.* Currently, the Coast Guard establishes marine safety zones and security measures in connection with private and non-federal events impacting navigable waterways, funding such measures through the service’s general appropriations.<sup>15</sup> The House proposal would

<sup>5</sup> H.R. Rep. No. 114-115 at 21-22.

<sup>6</sup> H.R. 1987 § 101; S. 1611 § 101.

<sup>7</sup> H.R. 1987 §§ 204, 206, & 213 (Government Accountability Office report required 1 year from date of enactment); S. 1611 §§ 210-211.

<sup>8</sup> H.R. 1987 §§ 211 & 214.

<sup>9</sup> H.R. 1987 § 208; S. 1611 § 212.

<sup>10</sup> H.R. 1987 § 508.

<sup>11</sup> H.R. 1987 § 305.

<sup>12</sup> H.R. 1987 § 310.

<sup>13</sup> S. 1611 § 306.

<sup>14</sup> H.R. 1987 § 312. Separately, the legislation requires the submission of a Government Accountability Report regarding potential improvements to the vessel documentation duties undertaken by the U.S. Coast Guard National Vessel Documentation Center in Falling Waters, West Virginia. *Id.* § 503.

<sup>15</sup> See, e.g. Safety Zone, Portland Dragon Boat Races, Portland, OR, 80 Fed. Reg. 27,565 (May 14, 2015); Safety Zone; Rock and Roll Hall of Fame and Museum Fireworks Display; Lake Erie, Cleveland, OH, 80 Fed. Reg. 18,313 (Apr. 6, 2015).

direct the Coast Guard to recover the costs associated with such events from private parties, although state and local governments would be exempted from the requirement.<sup>16</sup> According to the Committee, "While Coast Guard presence is important to ensure public safety, the event itself often does not provide a public benefit."<sup>17</sup>

*Sport Fishing.* Senator Thune (R-S.D.), Chairman of the Senate Commerce, Science, & Transportation Committee, introduced in March 2015 the Sport Fishing and Recreational Boating Safety Act, S. 834. That bill, which has been incorporated into the Senate's Coast Guard bill, extends through 2023 the operation of the sport fishing trust fund program providing funding for coastal wetland, boating safety, and boating infrastructure programs using a tax upon sport fishing tackle and equipment.<sup>18</sup> The Act also shifts slightly the allocation of funding available for coastal wetlands protection in lieu of boating safety, caps funds available for pollution prevention, and imposes new congressional reporting requirements.

*Fishy Business.* The House bill, H.R. 1987, renews that chamber's perennial proposal to exempt fishing permits from the reach of maritime or mortgage liens by operation of the jurisprudential doctrine treating them as "appurtenances" or intangibles of a vessel subject to the lien.<sup>19</sup> Although the provision has been stripped out in the Senate previously, the Republican majority in the Senate for the 114th Congress may finally allow enactment of the proposal into law. Therefore, practitioners representing lenders to the fishing industry should examine financing arrangements to determine whether additional security with respect to fishing permits and quotas may be warranted. The House

legislation also requires the establishment of an "alternative compliance program" for fishing vessels and fish tenders of more than 50 but less than 79 feet, built after July 1, 2013,<sup>20</sup> and the Senate legislation includes an alternative proposal applicable to such vessels up to 190 feet in length built after January 1, 2016, which meet certain design, certification, and recordkeeping requirements.<sup>21</sup> Moreover, the Senate proposal includes language which would set aside \$59 million of U.S. Maritime Administration "Title XI" loan guarantee funds for use in connection with "historical uses" which include purchases of and repair or upgrades to existing fishing vessels without increasing harvest capacity, purchase of existing fishing vessels, refinancing of debt, reduction of existing fishing vessel capacity, or the expansion or construction of "fishery facilities"—in other words, anything that does not increase competition and catch capacity among the existing fleet.<sup>22</sup>

*Cargo Preference.* The House-passed version of the Coast Guard Authorization Act also includes provisions that would strengthen the U.S. Maritime Administration's authority to enforce cargo preference for U.S.-flag vessels when dealing with shipper agencies of the Federal government.<sup>23</sup> The U.S.-flag industry secured increased cargo preference enforcement legislation in 2008 with the assistance of the late Senator Daniel Inouye (D-HI), but the Maritime Administration has yet to establish implementing regulations and has taken the position that the 2008 legislation cannot get into force without such regulations. Therefore, the industry pushed to make the legislation self-implementing and to further strengthen existing law to clarify the Maritime Administration's supremacy in matters of cargo preference. Furthermore, the legislation requires additional transparency in order to permit stakeholders and the relevant congressional committees of jurisdiction to monitor the agency's handling of cargo preference. Although industry consensus appears to be that the current Maritime Administrator, Paul N. "Chip" Jaenichen, is working hard to help stem the erosion of the blue water U.S.-flag fleet, the legislation would help support his effort and serve as a bulwark against future

<sup>16</sup> H.R. 1987 § 306.

<sup>17</sup> H.R. Rep. No. 114-115, at 32 (2015).

<sup>18</sup> S. 1611, Title V; 26 U.S.C. § 9504; 16 U.S.C. Ch. 10B.

<sup>19</sup> H.R. 1987 § 301. See also Bryant E. Gardner, *Trimming the Tree on Capitol Hill*, 13 BENEDICT'S MAR. BULL. 14 (1st Quarter 2015); Bryant E. Gardner, *Fishing for Change*, 10 BENEDICT'S MAR. BULL. 18 (1st Quarter 2012); 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).

<sup>20</sup> H.R. 1987 § 507. For a discussion of the Coast Guard's alternative compliance program, see U.S. Coast Guard, Commercial Vessel Inspection Alternatives and Delegated Functions, <http://www.uscg.mil/hq/cg5/acp/>.

<sup>21</sup> S. 1611 § 312.

<sup>22</sup> S. 1611 § 311.

<sup>23</sup> H.R. 1987 § 303.

uncertainty—particularly in light of rapid decreases in Federal Government food aid, military, and Export-Import Bank preference cargoes which have sustained the fleet.<sup>24</sup>

*LNG Tankers.* The Coast Guard and Maritime Transportation Act of 2006 required the Secretary of Transportation to establish a program to promote the transportation of liquefied natural gas (“LNG”) in U.S.-flag tankers.<sup>25</sup> The House bill requires that the Secretary develop guidelines to implement the provision within 180 days of enactment, including specific actions to ensure the future availability of qualified U.S. credentialed mariners and incentives to encourage U.S. mariner training on foreign-flag LNG carriers and appropriate training curricula by the maritime schools.<sup>26</sup>

*Cruise Ship Seafarer Protections.* Another House proposal which previously failed to make it through the Senate in the last Congress would have restricted foreign seafarers from filing claims in the United States for maintenance and cure for damages or expenses related to personal injury, illness, or death.<sup>27</sup> The House Report indicates that new section 510 clarifies that a foreign citizen mariner may file a personal injury lawsuit in only four circumstances: (1) if the accident occurred in U.S. waters; (2) if the accident occurred on a U.S.-flag vessel; (3) no matter where the accident occurred, if the claimant was a permanent resident alien of the U.S. at the time of the accident, or (3) no matter where the accident occurred, if the claimant does not have a right to bring suit in his country of residence or the flag state of the vessel from which the claim arose.<sup>28</sup> During the full committee hearing on April 30, 2015, ranking member John Garamendi (D-CA) of the Subcommittee on Coast Guard and Maritime

Transportation, expressed his concern about the amendment, which was offered by Rep. Corrine Brown (D-FL) and adopted by voice vote. And in the “Additional Views” appended to the House Report, Rep. Garamendi and Rep. Jerry Nadler (D-NY) refer to the provision as “an unwarranted en bloc amendment offered on behalf of the international cruise line industry that would arbitrarily restrict the scope and applicability of these vital seafarer protections.”

*Whistleblower Protection.* The Senate legislation includes language to strengthen whistleblower protections available to mariners. Under existing law, mariners are protected from any retaliation in the event of a report made in good faith to the Coast Guard or other appropriate Federal agency.<sup>29</sup> The legislation would expand this protection to protect the whistleblower even for reports to the vessel owner, operator, or the seaman’s employer, providing increased firepower to the Justice Department in its seemingly endless “magic pipe” prosecutions stemming from the mismanagement and criminal discharge of engine room and other operational wastes, related conspiracy, and false statement violations.<sup>30</sup>

*Smuggler’s Blues.* The Senate has also included tough new amendments to Chapter 705 of Title 46 which aim to clamp-down on maritime drug smuggling. The provisions impose criminal sanctions for the destruction of evidence relating to the manufacture or transportation of drugs and bulk cash on vessels subject to the jurisdiction of the United States, or by persons subject to the jurisdiction of the United States.<sup>31</sup> Additionally the proposals set forth *prima facie* evidence of violations, including the alteration or operation of vessels to evade detection or facilitate smuggling, e.g., additional fuel tanks and stores.<sup>32</sup>

*FMC Reforms.* Both the House and Senate bills would also make several adjustments at the Federal Maritime Commission. The legislation would require that the Commission’s Chairman obtain approval of the other Commissioners before making hiring decisions and

<sup>24</sup> The House Report notes that the number of U.S.-flag vessels sailing in the international trades has fallen from 850 to less than 100 and the U.S. has lost over 300 shipyards in the last 35 years. H.R. Rep. No. 114-115, at 23 (2015).

<sup>25</sup> Pub. L. No. 109-241 § 304(a), 120 Stat. 516, 527 (2006).

<sup>26</sup> H.R. 1987 § 313.

<sup>27</sup> H.R. 4005, 113th Cong. § 307 (2014). Section 509 of the bill makes additional changes that cap penalty wages, available to mariners in cases where employers withhold pay, to an amount equal to ten times the wages owed, irrespective of whether the penalty wages are sought as part of a class action lawsuit.

<sup>28</sup> H.R. Rep. No. 114-115 at 36.

<sup>29</sup> 46 U.S.C. § 2114.

<sup>30</sup> S. 1611, 114th Cong. § 301 (2015).

<sup>31</sup> S. 1611 § 302.

<sup>32</sup> *Id.*

budget recommendations.<sup>33</sup> The House bill would also prohibit the Commission from making awards, commendations, or honors to non-Federal entities, bringing an end to the Commission's tradition of recognizing private companies with Earth Day Awards.<sup>34</sup>

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<sup>33</sup> H.R. 1987, 114th Cong. § 402 (2015).

<sup>34</sup> H.R. 1987 § 403.