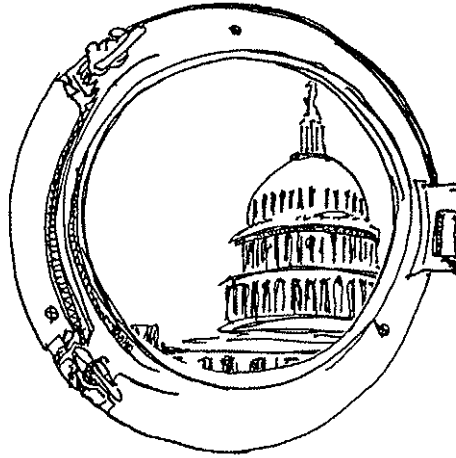


WINDOW ON WASHINGTON



HEARING THEM OUT

By Bryant E. Gardner

Spring is in the air, and congressional hearing season is here. Although it seems likely that hopeful appeals for the return of “regular order” in which appropriations bills make their way up from committee into law “the way they are supposed to” will again founder upon the rocks and shoals of a sharply divided Congress, key maritime committees are nevertheless making their way forward with hearings on important maritime issues and budgets for maritime agencies.

On March 8, 2016, the Senate Committee on Commerce, Science, and Transportation’s Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security held a hearing to examine the role of the Federal Government and the state of the U.S. maritime industry.¹ During the hearing, Chair Deb Fischer (R-NE) and

Ranking Member Cory Booker (D-NJ) brought different but complementary perspectives to the questioning of the witnesses and priorities for discussion. In her opening statement, the Chair highlighted the need to address congestion in our ports and intermodal network in order to keep up with freight tonnage expected to grow 40% in the next 30 years, problems with sexual assault at the U.S. Merchant Marine Academy, and the U.S. Maritime Administration’s (“MARAD”) mismanagement of hiring practices and program implementation. Senator Booker opened by highlighting the dire state of the U.S.-flag Merchant Marine trading internationally, and the need to take further steps to address crumbling infrastructure to reduce freight congestion.

Administration witnesses testifying at the Senate hearing included U.S. Maritime Administrator Paul N. “Chip” Jaenichen, Federal Maritime Commission Chairman Mario Cordero, Superintendent of the U.S. Merchant Marine Academy Rear Admiral James Hellis, and Assistant Inspector General for the U.S. Department of Transportation Mitch Behm. In his opening testimony, Administrator Jaenichen contrasted the growth in

¹ Written witness testimony and video of the hearing is available at the Senate Committee on Commerce, Science, and Transportation website, <http://www.commerce.senate.gov/public/index.cfm/hearings?ID=C76DD7C3-A482-4702-9405-50784BFB0E3C> (last visited April 21, 2016).

the domestic cabotage trade fleet subject to the Jones Act² with the rapid decline in the international U.S.-flag fleet, which has fallen from 106 vessels to a historic low of 78, a loss of over a quarter of the fleet. The result, according to the Administrator, is that we as a nation will be severely challenged to meet the national defense sealift readiness requirements established by the Department of Defense. Pursuant to longstanding U.S. maritime strategy, the U.S.-flag merchant fleet provides the needed sealift for war and national emergency at a fraction of the cost of government-owned assets, providing carriage for over 95% of the materiel deployed in the Iraq and Afghanistan wars pursuant to the Voluntary Intermodal Sealift Agreement program. Responding to questioning from Senator Booker, Mr. Jaenichen indicated he needs about 45 more ships under U.S. flag to "be where I would be comfortable." Moreover, the Administrator reported that the industry faces a "perfect storm" because there has been a dramatic shortfall in government-impelled cargo due to the MAP-21 Act reductions in cargo preference requirements from 75% to 50%³ for international food aid and a shrinking military footprint overseas, and additionally because new Standards for Training Certification and Watchkeeping ("STCW") requirements will likely result in the decertification of less active mariners.

Mr. Behm reported on his office's recent findings regarding weaknesses in MARAD's management controls, workforce development, and program implementation, including failure to implement fully plans from MARAD's 2012 workforce analysis. Although Mr. Behm indicated that MARAD has improved in some program areas, such as TIGER Grant oversight and the historic preservation program, gaps remain in MARAD controls, particularly in ship disposal and vessel transfer, posing risks

of waste, fraud, abuse, and operational lapses. Additionally, he committed that the Inspector General's office is monitoring MARAD's progress in implementing the Merchant Marine Academy's sexual assault prevention programs. Under questioning from Senator Fischer, Mr. Behm reported that both MARAD and the school have been very proactive in addressing the issues highlighted by his office, and that they have committed to tight timelines for addressing the shortcomings, with particular emphasis on the sexual harassment issue.

Federal Maritime Commission Chairman Cordero noted industry trends including low shipping rates in the face of excess vessel capacity, increasing consolidation among carriers, and an all-time record number of complex operating agreements among carriers and marine terminal operators filed with the Commission putting strain on Commission resources. Additionally, Mr. Cordero indicated that the Commission is keeping an eye on freight congestion in ports especially, and the impact of Safety of Life at Sea treaty amendments coming into force regarding container weights and mass in conjunction with the Coast Guard as lead agency.

Superintendent Hellis highlighted recent steps to improve the academy at King's Point, including an aggressive capital improvements campaign, reaccreditation of the school's programs by the Middle States Commission on Higher Education, leadership development, and steps to address recent problems stemming from sexual assault allegations at the academy. Among other initiatives, the academy has ramped-up training of midshipmen, and participates in an inter-academy working group to share best practices with the other service academies.

Senator Maria Cantwell (D-WA) questioned Administrator Jaenichen about what specifically his agency is doing to promote West Coast ports through the National Strategic Freight and Highway Grant Program. Mr. Jaenichen reported that his Department has published notice of the availability of funding opportunities for \$800 million in the first tranche of "Fixing America's Surface Transportation" or "FAST" Act⁴ funding, coined "FASTLANE Grants" and intended to fund

² The Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988 (1920), popularly referred to as the "Jones Act," requires that vessels engaged in the movement of merchandise between two points in the United States be carried on vessels built in the United States and owned, controlled, and crewed by U.S. citizens.

³ The Cargo Preference Act of 1954, codified as amended at 46 U.S.C. § 55303, requires that 50% of civilian cargoes be carried by U.S.-flag vessels. Food aid cargoes were subject to a requirement of 75% U.S.-flag participation until repealed by the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub. L. No. 112-141, 126 Stat. 405 (2012).

⁴ Fixing America's Surface Transportation ("FAST") Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

critical freight and highway projects to fortify the multimodal freight system pursuant to the Act's Nationally Significant Freight and Highway Projects program.⁵ For its part, MARAD is working to ensure the inclusion of ports, and particularly small ports, in the FASTLANE Grant program without emphasis on East versus West Coast ports. Responding to Senator Klobuchar (D-MN), Mr. Jaenichen reported that the Department of Transportation has been able to direct \$524 million to ports through the seven rounds of "Transportation Investment Generating Economic Recovery" or "TIGER" Grants since 2009.⁶ Through these programs and other initiatives, MARAD has focused on reducing congestion caused by the advent of ever-larger "mega-container ships" using the grants and other MARAD programs to further integrate the marine transportation system into surface transportation planning.

Along similar lines, the members of the Committee and witnesses exchanged views regarding the impact of the larger vessels on East and Gulf Coast Ports following opening of the expanded Panama Canal, likely to occur next year. Mr. Jaenichen opined that containerized cargo flows will remain primarily through West Coast ports, but that there may be some increases along the Gulf Coast, noting that until the Bayonne Bridge aircraft problem is solved, only one terminal in the Port of New York and New Jersey can accommodate the larger vessels. The Administrator also speculated that the widened canal will impact energy movements, pointing out that 6% of LNG vessels can fit through the canal now but 86% will be able to transit the canal once the locks are completed. Drawing from his background as a Commissioner with the Port of Long Beach, Federal Maritime Commissioner Cordero related that his agency's 2014 study on port congestion found that the new larger container vessels often strain the availability of labor and the ability of

trucks to move the containers out of the port, resulting in 2-3 hour truck lines. Administrator Jaenichen added that multi-partner shipping alliances operating to fill the new mega-ships, chassis availability, and limited gate hours, generally required pursuant to agreements with the surrounding communities, also contribute to congestion, long truck lines, and resultant lost income for truckers serving these large vessels, and offered that MARAD is working closely with industry stakeholders and through the TIGER and FASTLANE Grant programs to address proactively the port congestion problem.

A week later, the House Committee on Transportation and Infrastructure's Subcommittee on Coast Guard and Maritime Transportation held a hearing to examine the President's Fiscal Year 2017 budget request for the Coast Guard and maritime transportation.⁷ Opening the hearing, Subcommittee Chairman Duncan Hunter (R-CA) characterized the Administration's annual proposed budget cuts to the Coast Guard as a "reckless game" and a "yearly game of chicken that is not conducive to recapitalizing the Coast Guard's fleet or in sustaining its missions." Additionally, Representative Hunter rejected the Administration's proposal to convert the Food for Peace international food aid program, which provides much of the cargo base essential for sustaining the U.S. Merchant Marine trading internationally, into a cash and voucher program eliminating the shipment of U.S.-grown food aid overseas in the American owned, operated, and crewed ships that provide national defense sealift readiness in times of war and national emergency. Ranking Member John Garamendi (D-CA) echoed these sentiments, stating that now is not the time to cut over \$800 million from the Coast Guard, and expressing disappointment that the Administration's proposal to gut the Food for Peace program comes back year after year, despite inaction in Congress. Additionally, Representative Garamendi criticized the Administration's proposal for its failure to fund the MARAD Title XI program providing guarantees for projects at small shipyards.

⁵ USDOT Requests Applications for \$800 Million New FASTLANE Grant Program, <https://www.transportation.gov/FASTLANEgrants> (last visited April 21, 2016). The program is authorized at \$4.5 billion through 2020.

⁶ TIGER Discretionary Grants, <https://www.transportation.gov/tiger> (last visited April 21, 2016). Transportation Investment Generating Economic Recovery ("TIGER") is a supplementary discretionary grant program included in the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (2009).

⁷ Written witness testimony and video of the hearing is available at the House Committee on Transportation and Infrastructure website, <http://transportation.house.gov/calendar/eventsingle.aspx?EventID=399880> (last visited April 21, 2016).

The witness panel appearing before the House subcommittee included U.S. Coast Guard Commandant Admiral Paul Zukunft, MARAD Administrator Jaenichen, and Federal Maritime Commission Chairman Cordero. Admiral Zukunft began his testimony by thanking the members for the largest appropriation in Coast Guard history in fiscal year 2016, and reported upon the progress the Coast Guard has made in recapitalizing its assets and the uptick in drug and smuggling interdiction operations. Compelled to support the Administration's budget, the Commandant indicated that the 2017 proposal "continues to reflect this vital investment in your 21st Century Coast Guard," noting the \$150 million earmarked to accelerate acquisition of a new heavy Polar Icebreaker, and also funding for procurement of the first Offshore Patrol Cutter intended to recapitalize the Medium Endurance Cutters, some of which are over 55 years old. Additionally, Representative Hunter questioned the Commandant about the feasibility of scanning 100% percent of containers to catch smugglers of weapons of mass destruction and other contraband, which Admiral Zukunft deflected as an impossible gridlock scenario with current technology. Furthermore, the Admiral indicated that there is little room in the budget for the purchase of another Great Lakes ice breaker, leaving reliance upon the existing 140-foot ice breaker, the MACKINAW, and memoranda of agreement with Canada for joint service.

Congressman Garrett Graves (R-LA) raised questions about the significance of the Jones Act, directing the question at the Commandant, who volunteered that "You take the Jones Act away the first thing that goes away are the shipyards. And what goes behind that is the mariners." Additionally, he reported that, without the Jones Act cabotage regime keeping commercial work in U.S. yards, the development and construction of Government assets, including those in the Coast Guard's recapitalization pipeline, would be much more difficult and expensive due to the resultant erosion of the U.S. defense industrial base. Administrator Jaenichen chimed in support, adding that there are currently 32 large vessels under construction in 40 different yards across the U.S. which would not occur without the Jones Act. The Commandant also indicated that repeal of the Jones Act would likely have a negative impact upon safety and environmental compliance in the United States, because the domestic vessels are generally held to a higher

standard of compliance than their foreign-flag counterparts. Finally, the Commandant briefly fielded questions reflecting industry concerns about new Safety of Life at Sea ("SOLAS") requirements regarding the verified gross mass of containers to aid in stability calculations, reporting that most foreign carriers are now in compliance and so far implementation appears to be proceeding smoothly.

Knowing well his audience, Administrator Jaenichen opened his testimony by clarifying that the Administration's budget request for the Maritime Security Program, which provides funding to a core fleet of 60 militarily useful U.S.-flag commercial vessels in the international trade in exchange for their availability to the Federal Government, was penciled prior to the December 2015 uptick in authorization for that program from \$3.1 million per vessel annually to approximately \$5 million. Additionally, Representative Graves questioned Mr. Jaenichen about his agency's decision to put out for bid two of the Maritime Security Program contracts held by International Shipholding Corporation from Representative Graves' home state of Louisiana. The Administrator reported that the contracts have not been filled with operating vessels since September of 2015, despite program requirements that vessels remain in operation under the contracts, and that MARAD has been working with and imploring International Shipholding to fill the vacancies. Further, he indicated that his agency would shortly make a decision about the final disposition of the contracts.

Ranking Member Garamendi sharply criticized Mr. Jaenichen for the Administration's budget proposal to eliminate the food aid cargo base upon which the internationally trading U.S.-flag fleet relies. Mr. Jaenichen reported that there has been a 40% drop in food aid cargo and a 75% drop in Department of Defense cargo since 2012, with a resultant 26% loss in the fleet, with more ships and mariners on the block if the Administration's proposal to convert the food aid program to cash goes forward. Under questioning from Representative Garamendi, the Administrator conceded that, from a sealift readiness standpoint we are currently in the "amber zone" but that moving forward with the food aid proposal could move us into the "red zone," particularly with respect to concerns regarding the number of mariners available to fully man the government

reserve sealift assets such as the MARAD National Defense Reserve Fleet.

Chairman Hunter continued the questioning of the Maritime Administrator, asking when the Administration intends to unveil its "National Maritime Strategy" which kicked-off with two symposia in early 2014—one focused on the domestic Jones Act fleet and the other focused on the international trading fleet. As is so often the case, the agency's response is that the final product is held up in "inter-agency review" which usually means the Office of Management and Budget ("OMB"), hopefully to be available in "a couple of months."

Commissioner Cordero reported on the Commission's progress implementing the new Commissioner term limits and attorneys' fees rules and increased focus on port congestion mitigation. He also reiterated the challenges posed by the increased influence of foreign-controlled vessel-sharing alliances, consolidation among carriers,⁸ and record level carrier and marine terminal operator filings with the Commission, underscoring the strain upon Commission resources, which have not kept pace with the 5% annual growth in the container trade that the Commission must monitor. As Chairman Cordero noted "Rigorous monitoring of foreign-based ocean carriers is the preventative prescription for protecting American shippers and consumers."

The House Committee on Armed Services also held a pair of hearings in March 2016 aimed at examining the state of U.S. sealift capacity and the state of the Merchant Marine. First, the Subcommittee on Readiness held a hearing on March 15, 2016 regarding the readiness of the U.S. Transportation Command ("TRANSCOM"), which provides transportation and logistics support to the various combatant commands of the Department of Defense.⁹ General Darren McDew, Commander, TRANSCOM, indicated that the reduction of the international fleet to only 78 ships presents a

"challenge" to his command and called for further dialog about how important the U.S.-flag international commercial fleet is to the nation. Furthermore, he called for an increase in the \$3.1 million stipend provided to the MSP fleet to help soften the impact of reduced government cargoes on those 60 ships, which leaves open the question of how to keep the remaining 18 outside the program, and how to regain the dozens of other ships lost in the last few years resulting in what Administrator Jaenichen described as a borderline "red zone" scenario. General McDew also warned that history has taught us that we cannot rely upon foreign merchant fleets for sealift needs, and speculated that the 60-ship MSP fleet size does not include needed insurance in case of wartime attrition.

Second, during the March 22, 2016 hearing before the Subcommittee on Seapower and Projection Forces, Lieutenant General Stephen Lyons, TRANSCOM, U.S. Army, testified as to the importance of the commercial U.S. Merchant fleet for carrying military cargoes where needed, and in supplying mariners to crew Defense Department assets including its prepositioned ships.¹⁰ He indicated that "We think our reliance on the commercial industry for ships and mariners is a cost-effective means of providing military sealift when compared to the cost of building an equivalent government capability." However, he reported that "[W]e are in a downward trend in the number of mariners. We're very, very concerned. We're right on the margin between medium and high risk to be able to mobilize that fleet." Lastly, he indicated that the average age of vessels in the government-owned organic sealift fleet is approximately 40 years, reaching its service life in 2050, and therefore the Navy is developing a sweeping sealift recapitalization plan.

Responding to further questioning from Subcommittee Chairman Randy Forbes (R-VA) about the impact of the MAP-21 reduction of Food for Peace U.S.-flag cargo preference requirements from 75% to 50% U.S.-flag carriage, MARAD Administrator Jaenichen reported: "[W]e estimated at that time we

⁸ Specifically, Chairman Cordero referenced the CMA-CGM merger with Singapore-based carrier NOL, and the absorption of China Shipping into China Ocean Shipping Company ("COSCO").

⁹ Video of the hearing is available at the House Committee on Armed Services website, <https://armedservices.house.gov/legislation/hearings/us-transportation-command-2017-readiness-posture-0> (last visited April 21, 2016).

¹⁰ Video of the hearing is available at the House Committee on Armed Services website, <https://armedservices.house.gov/legislation/hearings/logistics-and-sealift-force-requirements-0> (last visited April 21, 2016).

would lose somewhere between nine and twelve ships. We've subsequently lost 28," citing tandem cuts in Defense Department cargoes. Finally, Mr. Jaenichen indicated that the key is "[T]he mariners themselves. They are a strategic national asset. That is what allows us to provide national security. If there were any other workforce sector that supported national security, that had experienced a 20 percent reduction in the number of people, there would be a public outcry. This is a crisis in the making and we're not talking about it." Similarly, Mr. Scott DiLisio, Director, Strategic Mobility/

Combat Logistics Division, U.S. Navy, testified that "So what we've described is a catastrophe in the making, as the quality of the mariner pool begins to shrink, as the numbers shrink, the people that are going to be on the pointy end delivering Marine Corps and Army equipment are also going to be at risk."

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