

BENEDICT'S MARITIME BULLETIN

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OFFSHORE ENERGY JONES ACT UPDATE

Charlie Papavizas*

Introduction

The United States has a set of federal laws popularly referred to as the “Jones Act” which impact the development of U.S. offshore energy by restricting many operations in U.S. waters to qualified U.S.-flag vessels. Where the Jones Act does not apply, operations in U.S. waters can be conducted lawfully by foreign vessels. The boundary between what is restricted and what is permitted continues to develop as the U.S. Congress has adjusted the relevant law over time and as U.S. Customs and Border Protection, which issues Jones Act interpretive rulings, continues to adapt to new technologies and methods. The emergence of the U.S. offshore renewable energy industry has in particular spurred new guidance and controversy regarding federal offshore jurisdiction and especially the application of the Jones Act.

Historical Background

The first U.S. Congress meeting in 1789 enacted several laws preferring U.S. citizen-owned vessels in both U.S. foreign and domestic trade.¹ Congress considered reserving U.S. domestic trade outright to U.S. citizen-owned vessels but decided instead to impose a substantially greater duty on foreign vessels engaged in the U.S. domestic trade than U.S. citizen-owned vessels. This was enacted even before the U.S. adopted a law providing for vessel registration.

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¹ E.g., Act of July 20, 1789, ch. 3, 1 Stat. 27.

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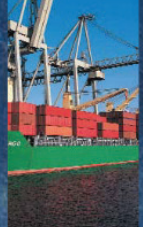
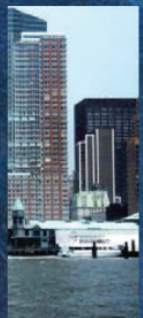
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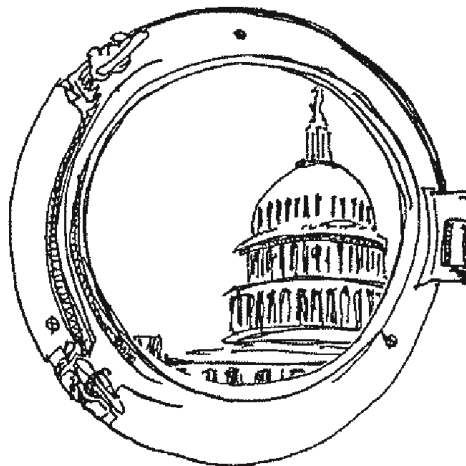
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WINDOW ON WASHINGTON



Sailing Close to the Wind

By Bryant E. Gardner*

The United States is facing a shortage of qualified mariners. This presents a national and economic security crisis that must be addressed by Washington policymakers to put America's power projection capability and supply chain security on an even keel. With a small internationally-trading merchant fleet and a dwindling supply of seafarers, the nation is beholden to foreign interests for international trade and faces uncertain challenges manning and sustaining national defense sealift capability to faraway theaters such as the Indo-Pacific Command ("INDOPACOM").

A 2019 study by the independent Center for Strategic and Budgetary Assessments ("CSBA"), an independent think tank specializing in U.S. defense policy, concluded, "The current and programmed defense maritime logistics force of the United States is inadequate to support the current U.S. national defense strategy and major military operations against China or Russia."¹ The authors found a shortage of 200,000 square feet and

1,900 mariners, leaving force projection at only 65% of required capacity:

The U.S. commercial fleet—from which DoD draws ships and mariners—is either barely stable or continues to shrink. At present, the United States is running a dangerous experiment: can a country be the preeminent naval power without being a strong overall maritime power? Without action, this will force DoD to rely on foreign commercial markets for sealift and other special maritime logistics at a time when China has increasingly dominant positions in these markets and may wield its economic influence against the United States.²

During a March 2023 congressional hearing, U.S. Maritime Administrator Ann Phillips testified that MARAD estimates that as of 2017, there was a shortage of approximately 1,800 licensed and unlicensed mariners needed to operate MARAD's Ready Reserve Force mothball fleet alone, and that the shortage

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¹ Timothy A. Walton, Ryan Boon, and Harrison Schramm, Center for Strategic and Budgetary Assessments, *Sustaining the Fight: Resilient Maritime Logistics for a New Era* at ii (April 23, 2019) ("CSBA Study").

² *Id.* See also *id.* at 83 (Department of Defense ("DOD") and Maritime Administration ("MARAD") have identified a shortfall of 1,929 mariners needed over any protracted conflict).

has likely worsened since the onset of COVID.³ In a subsequent May 2023 hearing, Administrator Phillips noted that “[t]his optimistic scenario assumes that all qualified mariners would be both available and willing to sail as needed,”⁴ and MARAD has indicated that the shortage will likely get worse.⁵ Aggravating the challenge, MARAD continues to struggle with good data on the number of mariners available to provide essential sealift.⁶ “[A]scertaining the size of the mariner pool that could be activated requires not only knowing the number of mariners with valid credentials, but the number from among that pool who would be available and willing to serve, including in a contested environment.”⁷ Congressman Mike Waltz (R-FL), Chairman of the Subcommittee on Readiness, House Armed Services Committee, characterized the problem as “incredibly alarming,” “a red star cluster,” and “a red blinking light.”⁸

³ Written Statement of Ann C. Phillips, U.S. Maritime Administrator, Before the Committee on Armed Services, Subcommittee on Readiness and Subcommittee on Seapower and Projection Forces, U.S. House of Representatives, Hearing on Posture and Readiness of the Mobility Enterprise at 3-4 (March 28, 2023).

⁴ Written Statement of Ann C. Phillips, U.S. Maritime Administrator, Before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing on Shortage of U.S. Mariners and Recruitment and Retention in the United States Coast Guard at 1 (May 11, 2023).

⁵ Statement of Rep. Daniel Webster, Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing on Shortage of U.S. Mariners and Recruitment and Retention in the United States Coast Guard at 3 (May 11, 2023).

⁶ Statement of Ann C. Phillips, U.S. Maritime Administrator Hearing Before the Committee on Armed Services, Subcommittee on Readiness and Subcommittee on Seapower and Projection Forces, U.S. House of Representatives, Hearing on Posture and Readiness of the Mobility Enterprise at 18 (March 28, 2023).

⁷ Statement of Ann C. Phillips, U.S. Maritime Administrator, Before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing on Shortage of U.S. Mariners and Recruitment and Retention in the United States Coast Guard at 14 (May 11, 2023).

⁸ Statement of Rep. Mike Waltz, Hearing Before the Committee on Armed Services, Subcommittee on Readiness and Subcommittee on Seapower and Projection Forces, U.S. House of Representatives, Hearing on Posture and Readiness of the Mobility Enterprise at 18 (March 28, 2023).

What can be done today to address the mariner shortage?

First, grow the U.S.-flag fleet. Identifying a shortage in liquid bulk capacity needed to support a conflict in the INDOPACOM, CSBA recommends the development and expansion of the Tanker Security Program providing an annual stipend to U.S.-flag tanker operators, expanded tax and financial incentives for U.S.-flag operators including tax relief for U.S. mariners, and personal injury and liability reforms to make U.S.-flag vessels more commercially competitive.⁹ CSBA also recommends increasing DOD purchases of fuel from U.S. refineries shipped under U.S.-flag cargo preference, and imposing cargo preference for exports of U.S.-produced crude oil and liquefied natural gas, which it estimates would add 2,800 mariners under a 10% to 15% cargo preference reservation for U.S.-flag vessels.¹⁰ Additionally, CSBA proposes U.S. Government construction of dual-use sealift vessels fit for both commercial and military service, and the chartering of these vessels to commercial operators for a nominal fee in exchange for assured contingency access.¹¹ Lastly, CSBA proposes that MARAD more aggressively pursue maritime industry recruitment and mariner retention, and additional incentives for the retention of mariner certificates, coupled with better tracking of the pool of qualified and recently qualified mariners.¹²

CSBA recommends that MARAD and Navy take ownership of the issue: “Just as carefully as they assess naval logistics or sealift ship assets, Navy and MARAD logistics planners should assess and steward mariner readiness and capacity. Similarly, the United States should view the availability of militarily useful sealift and logistics auxiliaries as a strategic capability and shift away from the assumption that market activity alone, unsteadily supported by the U.S. Government, will be sufficient to maintain this community.”¹³

MARAD Administrator Phillips has likewise pointed to the new Tanker Security Program,¹⁴ which provides a \$6 million per-vessel stipend to attract 20 tank vessels to the U.S. flag, as one possible solution, which she

⁹ CSBA Study at 81.

¹⁰ *Id.* at 82.

¹¹ *Id.* at 92.

¹² *Id.* at 93.

¹³ *Id.* at 26.

¹⁴ 46 U.S.C. Ch. 534.

estimated will add approximately 500 mariners.¹⁵ She also pointed to additional jobs incentivized by the Cable Security Program, which added two cable laying vessels under a programmatic structure similar to the Tanker Security Program and Maritime Security Program. MARAD claims to be doubling down on existing government-impelled cargo preference requirements. Despite receiving increased enforcement authority in 2008,¹⁶ MARAD has not during the intervening fifteen years promulgated a rule which it claims is necessary to deploy the 2008 authority; consequently, Congress directed MARAD to promulgate such a rule no later than September 2023.¹⁷ MARAD advocates waiving U.S.-build requirements applicable to U.S.-flag vessels operating under the civilian cargo preference program, intended to strengthen the U.S. shipbuilding sector, to create additional mariner jobs.¹⁸ During the May 2023 hearing, House Transportation and Infrastructure Committee Ranking Member Rick Larsen (D-WA) endorsed strengthened enforcement of cargo preference rules to attract more mariners to the industry.¹⁹

Additionally, Administrator Phillips indicated that MARAD is working with the U.S. Coast Guard to streamline the mariner credentialing process. The Coast Guard issues mariner credentials, but because

its information technology systems are challenged to provide granular detail regarding sealift-qualified mariners, MARAD does not even have an accurate count of seafarers available.²⁰ The Coast Guard system was built in the 1990s and the service expects that an upcoming revamp will improve processing time and depth of knowledge about the mariner workforce, e.g., details regarding how many mariners are sailing on a medical waiver such as may be required for a pacemaker.²¹

The Administrator has also pointed to strides her agency has made addressing sexual assault and harassment to improve safety for U.S. Merchant Marine Academy midshipmen and all mariners under the U.S. flag.²² In November 2021, MARAD and the Academy paused the Sea Year training program so that they could improve sexual assault and harassment prevention, both at the Academy and at sea, introducing the Every Mariner Builds a Respectful Culture (“EMBARC”) program.²³ She reported that the FY 2023 National Defense Authorization Act (“NDAA”) requires that certain ocean-going U.S.-flag vessels include sexual assault and harassment policies in their Safety Management Systems (“SMS”), a tenet of the EMBARC program. MARAD and the Department of Transportation have also embarked upon a capital improvement plan for the Academy and recapitalized the training vessels at the state maritime academies with the National Security Multi-mission vessels, including state-of-the-art training spaces, classrooms, lab spaces, and an auditorium, each with capacity to hold 600 cadets.²⁴

¹⁵ Written Statement of Ann C. Phillips, U.S. Maritime Administrator, Before the Committee on Armed Services, Subcommittee on Readiness and Subcommittee on Seapower and Projection Forces, U.S. House of Representatives, Hearing on “Posture and Readiness of the Mobility Enterprise at 3 (March 28, 2023).

¹⁶ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417, § 3511, 122 Stat. 4356 (2008).

¹⁷ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, § 3502, 136 Stat. 2395 (2022). *See also* Government Accountability Office, Maritime Administration: Actions Needed to Enhance Cargo Preference Oversight, GAO-22-105160 (Sept. 2022) (recommending rulemaking and greater transparency regarding cargo preference compliance).

¹⁸ Written Statement of Ann C. Phillips, U.S. Maritime Administrator, Before the Committee on Armed Services, Subcommittee on Readiness and Subcommittee on Seapower and Projection Forces, U.S. House of Representatives, Hearing on “Posture and Readiness of the Mobility Enterprise at 6 (March 28, 2023).

¹⁹ Statement of Rep. Rick Larsen, Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing on Shortage of U.S. Mariners and Recruitment and Retention in the United States Coast Guard at 14 (May 11, 2023).

²⁰ Statement of Vice Admiral Paul Thomas, Deputy Commandant for Mission Support, U.S. Coast Guard, Before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing on Shortage of U.S. Mariners and Recruitment and Retention in the United States Coast Guard at 27 (May 11, 2023).

²¹ Statement of Ann C. Phillips, U.S. Maritime Administrator, Before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing on Shortage of U.S. Mariners and Recruitment and Retention in the United States Coast Guard at 3 (May 11, 2023).

²² Written Statement of Ann C. Phillips, U.S. Maritime Administrator, Before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing on Shortage of U.S. Mariners and Recruitment and Retention in the United States Coast Guard at 3-4 (May 11, 2023).

²³ *Id.*

²⁴ *Id.* at 5.

General Jacqueline Van Ovost, Commander, U.S. Transportation Command, has also acknowledged the problem and the challenges it presents to the defense mobility enterprise. In testimony before Congress, Commander Van Ovost pointed to the importance of the Maritime Security Program, Tanker Security Program, and cargo preference laws as programs that “buy down the operational risk we’re taking.”²⁵

The Coast Guard has committed to redouble efforts to streamline mariner credentialing, including the development of information technology to replace the aging and inefficient Merchant Mariner Licensing Documentation (“MMLD”) database currently used to manage mariner information and issue merchant mariner credentials (“MMCs”) to qualified mariners.²⁶ The service is also working with Federal Advisory Committees to identify additional paths for the “military to mariner” program, facilitating transition to the merchant marine for members of the sea services. Among these initiatives, the Coast Guard has approved 110 courses providing military applicants credit for MMC requirements for skills learned on active duty, fee waivers for uniformed services applicants for marine credentials, and a new rulemaking extending the period to meet sea service requirements from five to seven years for personnel with service on the vessels of the uniformed services.²⁷ As a result, the number of MMC applicants with prior military service has doubled since 2016.²⁸ Moreover, the Coast Guard has indicated it will work to reduce bullying and sexual harassment afloat by: removing barriers to reporting, standardizing intake reports, using trained agents to review and investigation misconduct, launching education and outreach campaigns, enhancing screening of MMC applicants, and promulgating updated suspension and revocation (“S&R”) policies.²⁹

Testifying before a hearing of the House Committee on Transportation and Infrastructure in February 2023, AFL-CIO Transportation Trades Department Greg Regan suggested tightened enforcement of existing cargo preference laws to spur demand for U.S.-flag shipping and improving the onboard experience to attract workers to the U.S.-flag fleet, including increased internet access for mariners.³⁰ Additionally, Regan advocated further reforms to prevent on-board sexual harassment and investment in more shoreside opportunities for mariners when not needed in billets afloat.³¹

There is no one silver bullet to address the nation’s mariner shortage. However, the problem is real and requires immediate intervention by MARAD and DOD logistics planners in cooperation with the mariner workforce, maritime labor, and industry. The ramping-up of the Tanker Security Program provides promise, but will not close the gap unless that program is dramatically expanded. Increases to government-impelled cargo and cargo preference can also help close the gap, but successive administrations have proven unwilling to take action on this front. Ultimately, MARAD needs to get sound metrics on the size of the mariner base in cooperation with Coast Guard credentialing systems reform, and come up with a real national maritime strategy to address the issue forthwith.

²⁵ Statement of Jacqueline Van Ovost, Commander, U.S. Transportation Command, Before the Committee on Armed Services, Subcommittee on Readiness and Subcommittee on Seapower and Projection Forces, U.S. House of Representatives, Hearing on Posture and Readiness of the Mobility Enterprise at 34 (March 28, 2023).

²⁶ Written Statement of Vice Admiral Paul F. Thomas, Deputy Commandant for Mission Support, U.S. Coast Guard, Before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, Hearing on Assessing the Shortage of U.S. Mariners and Recruitment and Retention Challenges in the U.S. Coast Guard at 4-5 (May 11, 2023).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Statement of Greg Regan, President, AFL-CIO Transportation Trades Department, Before the Committee on Transportation and Infrastructure, U.S. House of Representatives, Hearing on the State of Transportation Infrastructure and Supply Chain Challenges at 105 (Feb. 1, 2023).

³¹ *Id.* at 106.

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