

BENEDICT'S MARITIME BULLETIN

The Quarterly Bulletin of Benedict on Admiralty

Vol. 16, No. 1 • First Quarter 2018

Joshua S. Force, Editor-in-Chief
Robert J. Zapf, Managing Editor

Inside This Issue

WINDOW ON WASHINGTON SEMPER GUMBY

By Bryant E. Gardner 1

MANAGING EDITOR'S INTRODUCTORY NOTE

Robert J. Zapf 3

DISCOVERY AND DISCLOSURE IN AMERICAN MARITIME ARBITRATIONS

By Anthony J. Pruzinsky 9

ANOTHER VOYAGE ON PUNITIVE DAMAGES IN MARITIME LAW

By Kevin M. McGlone 24

ROBINS DRY DOCK RULE- STILL A CLEAR-CUT DOCTRINE OF MARITIME LAW?

By Destinee Finnin Ramos 29

REPORTING FROM ON TOP OF THE WORLD: WE NEED TO TALK ABOUT INDIGENOUS PEOPLES IN ARCTIC SHIPPING

By Ilker K. Basaran 33

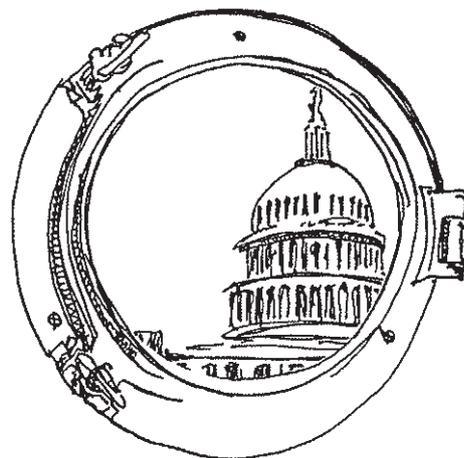
RECENT DEVELOPMENTS 38

TABLE OF CASES 49

BENEDICT'S MARITIME BULLETIN EDITORIAL BOARD..... 52

Contributing Authors to this Issue 54

WINDOW ON WASHINGTON

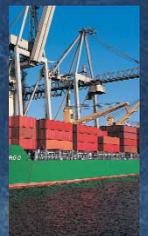


SEMPER GUMBY

By Bryant E. Gardner

The Coast Guard is unique. It is a multi-mission maritime service, with defense, law enforcement, safety, navigational, rescue, environmental response, vessel documentation, intelligence, disaster recovery and response, and numerous other functions. It is a military service, yet it resides within the Department of Homeland Security. And in many cases, such as in parts of Alaska and the Arctic, or in the Caribbean Sea, it may be the only Federal presence of real significance capable of responding to the call. Yet, its many essential roles are often misunderstood and underappreciated by the American public and some lawmakers, and consequently it

(Continued on page 4)



EDITORIAL BOARD

Dr. Frank L. Wiswall, Jr.
Robert J. Zapf

Bruce A. King

Dr. James C. Kraska

Dr. Norman A. Martinez-
Gutiérrez

Francis X. Nolan, III

Anthony J. Pruzinsky

**REPORTERS/
ASSOCIATE EDITORS**

Lizabeth L. Burrell

Edward V. Cattell, Jr.

Matthew A. Marion

Marc Marling

Howard M. McCormack

Michael B. McCauley

Graydon S. Staring

JoAnne Zawitoski

COLUMNISTS

Bryant E. Gardner

EDITORIAL STAFF

James Codella

Practice Area Director

Cathy Seidenberg

Legal Editor

A NOTE ON CITATION:

The correct citation form for this publication is:
16 BENEDICT'S MAR. BULL. [page #] (First Quarter 2018)

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal or other expert assistance is required, the services of a competent professional should be sought.

From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.



MANAGING EDITOR'S INTRODUCTORY NOTE

Because of the importance of the subject matter, in this edition, we begin with Bryant Gardner's "Window on Washington" column. In it, Bryant describes the urgent and imminent crisis faced by the United States Coast Guard in trying to effectively carry out the many missions with which it has been tasked. The Coast Guard is a military organization, but housed in the Department of Homeland Security. It has been tasked with defense, law enforcement, safety, navigational, rescue, environmental response, vessel documentation, intelligence, disaster recovery and response, and numerous other functions. Despite its critical role in these areas, Congress has routinely failed to supply the necessary funding to give the Coast Guard even a fighting chance to succeed in all that it has been directed to accomplish. As Bryant points out, "The Coast Guard is an essential service for the maritime industry and the nation, fulfilling many functions on every coast and overseas. However, the service stands at a cross-roads and is badly in need of additional funding and capital renewal both shoreside and afloat."

I urge every reader to contact his or her Congressional representatives, House and Senate, and point out the necessity of providing the necessary funding to allow this proud and capable service to perform as Congress has directed.

We follow with another informative article by Editorial Board Member Tony Pruzinsky on discovery and disclosure availability and methods of obtaining in American maritime arbitrations. This is a very useful guide to all practitioners in this area.

Our next article, by Kevin McGlone (one of our Recent Developments case summary contributors), analyzes the decision of the Louisiana Supreme Court in *Warren v. Shelter Mutual Insurance Co.* on the recovery of punitive damages by non-seafarers injured or killed in state territorial waters, and the standard for determining whether such awards are excessive. As Kevin points out, the decision leaves many questions that future courts will struggle with until the United States Supreme Court clarifies the law.

We follow with an article by Destinee Finnin Ramos discussing the Robins Dry Dock rule, and whether it should remain or be presumed to be such a clear-cut doctrine of the general maritime law. She concludes that one could argue that a rebuttable presumption barring recovery of economic damages in the absence of physical damage to a proprietary interest would be a more modern and practical approach leading to more equitable results.

Ilker Basaran, who has written a number of informative articles on the Polar Code, raises a new and interesting issue, not considered under the Polar Code, to wit, the impact of new polar navigation routes on indigenous peoples. He concludes that it is time to start discussing ways to integrate indigenous people into decision making processes affecting Arctic navigation, and recognize their true value.

We finish with our Recent Developments case summaries to keep you informed on developments in various aspects of maritime law.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

WINDOW ON WASHINGTON

SEMPER GUMBY

By Bryant E. Gardner

(Continued from page 1)

finds itself at times stretched too thin and undercapitalized, with ageing and insufficient assets.

Hurricane Related Stress & Shoreside Infrastructure

In times of disaster, the Coast Guard is tasked not only with saving lives and conducting water rescues—it also must secure and reconstitute ports and waterways, critical maritime infrastructure, conduct environmental response operations, and support other agencies. During Hurricanes Harvey, Irma, and Maria in 2017, the Coast Guard put its assets into overdrive, saving over 11,300 lives and 1,500 pets, while restoring the ports and waterways, correcting 1,269 damaged aids to navigation, handling 290 pollution incidents, and directing the removal of 3,600 sunken or damaged vessels.¹ Across the response operations, the Coast Guard deployed over 3,000 service members and 200 assets from locations as far away as Alaska and Hawaii—putting further strain on operations outside of the disaster areas, including drug interdiction, fisheries enforcement, migrant interdiction, training, and other missions.

The hurricanes exacted a brutal toll on already underfunded Coast Guard coastal infrastructure, and the initial assessment is that nearly \$1 billion will be required to cover hurricane-related operations and infrastructure damages against an existing \$1.6 billion shore infrastructure funding backlog for over 95 projects including piers, sectors, stations, aviation facilities, training centers, and housing facilities.² In 2016, Hurricane Matthew caused substantial damages to Coast Guard facilities in Savannah, Cape Canaveral, and other locations, resulting

in a \$77 million repair requirement not yet met, such that many of these units are operating out of portable trailers.³ Since being granted direct sale authority for excess real property, the Coast Guard has been able to divest over 205 assets and reduce facilities inventory by 250,000 square feet, with proceeds of \$24 million into the housing fund,⁴ but significant direct additional appropriations will be needed to restore capability.

Budgeting Challenges

Coast Guard budgets are uniquely disadvantaged among the military services. Under the Budget Control Act,⁵ discretionary appropriations are divided into defense and non-defense expenditures, and capped at limits placed upon each of those categories. Unlike other services, the Coast Guard is funded 96% by non-defense dollars, even though 40% of its major cutters are serving today under the operational command of the Defense Department.⁶ Consequently, contingency funding and defense increases have not benefitted the Coast Guard in the way they have benefitted other services, the Coast Guard is required to compete for ever more scarce non-defense dollars, and reductions in the Coast Guard's funding required the elimination

¹ *Coast Guard Readiness: Hearing Before the Subcomm. on Oceans, Atmosphere, Fisheries, & Coast Guard, S. Comm. on Commerce, Science, & Transp.*, 115th Cong. (Nov. 16, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

² *Id.*; *Coast Guard and Maritime Infrastructure: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (Oct. 3, 2017) (statement of Rear Adm. William Kelly, Assistant Commandant for Human Resources, U.S. Coast Guard).

³ *Coast Guard Requirements, Priorities, and Future Acquisition Plans, Hearing Before the Subcomm. on Homeland Sec., H. Comm. on Appropriations*, 115th Cong. (May 18, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

⁴ *Coast Guard and Maritime Infrastructure: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (Oct. 3, 2017) (statement of Rear Adm. Melvin Bouboulis, Assistant Commandant for Engineering and Logistics, U.S. Coast Guard).

⁵ Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 250 (2011).

⁶ *Coast Guard Readiness: Hearing Before the Subcomm. on Oceans, Atmosphere, Fisheries, & Coast Guard, S. Comm. on Commerce, Science, & Transp.*, 115th Cong. (Nov. 16, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

of 1,500 positions between fiscal years 2013 and 2015.⁷ Moreover, under the Budget Control Act, the Coast Guard has experienced a 10% decrease in its overall buying power in the last five to seven years, for assets and people.⁸

According to the Commandant of the Coast Guard, Admiral Zukunft, the Coast Guard will require growth of 5% annually in the service's operations and maintenance account, and a floor minimum of \$2 billion recurring in its acquisition account to maintain and restore readiness, in part to help execute procurements predictably in an era of chronic continuing resolutions.⁹ Approximately \$300 million of that would be allocated to shoreside facilities.¹⁰ Additionally, the service hopes to add 5,000 active duty members and restore 1,100 reserve billets over the next five years.¹¹ A 50% increase in the Coast Guard's acquisition and construction

account—which is roughly what the Navy has received in recent years—would equate to funding of \$1.8 billion.¹² As the Commandant described the situation: “So what you’re looking at is, you know, life below the floor of the Budget Control Act. . . which is why I’m looking at a 5 percent annualized growth to this account to dig out of what is literally a basement and we’ve been handed a shovel.”¹³

Coast Guard funding has always featured strange dynamics. The Coast Guard is underfunded and needs resources desperately. The American people, and the Congress, love the Coast Guard by most accounts, even if they do not appreciate the full breadth of its mission scope. Yet, the Coast Guard seems to be perennially challenged by successive Administration budgets. By way of illustration, the Trump Administration initially proposed to cut the Coast Guard's funding by \$1.3 billion, although that proposal was dropped under strong protest from the Congress and Homeland Secretary Kelly.¹⁴ And even though the Commandant testified that a \$2 billion acquisition account balance is needed to restore capability, at a July hearing the Coast Guard produced a five-year acquisition outline to the Coast Guard Subcommittee of the House Transportation and Infrastructure Committee, reflecting requirements hundreds of millions of dollars less than that, citing “fiscal guidance, and we are a service that has lived within fiscal guidance, and fiscal guidance is not getting the mission done for us.”¹⁵ “Fiscal guidance” means the Office of Management and Budget (“OMB”), the largest office within the Executive Office of the President, which tells the agencies what they can request from Congress, and expects them to toe the line on budget requests, even if they do not align with agency needs. Part of the dynamic is that Administration budgets may short-change the Coast Guard in favor of other priorities, expecting that congressional affection for the service may result in appropriate

⁷ *Coast Guard and Maritime Infrastructure: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (Oct. 3, 2017) (statement of Rep. Hunter, Member, House Comm. on Transp. & Infrastructure). The Commandant has also stated that a recategorization of more of the Coast Guard's funding as defense-discretionary funding would help the service compete better in the budgeting process. *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

⁸ *Coast Guard and Maritime Infrastructure: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (Oct. 3, 2017) (statement of Rear Adm. Melvin Bouboulis, Assistant Commandant for Engineering and Logistics, U.S. Coast Guard).

⁹ *Coast Guard Readiness: Hearing Before the Subcomm. on Oceans, Atmosphere, Fisheries, & Coast Guard, S. Comm. on Commerce, Science, & Transp.*, 115th Cong. (Nov. 16, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard); *Coast Guard and Maritime Infrastructure: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (Oct. 3, 2017) (statement of Rear Adm. Melvin Bouboulis, Assistant Commandant for Engineering and Logistics, U.S. Coast Guard).

¹⁰ *Coast Guard Requirements, Priorities, and Future Acquisition Plans, Hearing Before the Subcomm. on Homeland Sec., H. Comm. on Appropriations*, 115th Cong. (May 18, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

¹¹ *Coast Guard and Maritime Infrastructure: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (Oct. 3, 2017) (statement of Rear Adm. William Kelly, Assistant Commandant for Human Resources).

¹² *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Ronald O'Rourke, Specialist in Naval Affairs, Congressional Research Service).

¹³ *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

¹⁴ *Id.*

¹⁵ *Id.*

funding anyway (in which case the Administration can blame spending excess on the Congress). But, at the end of the day, it appears that this process, such as it is, is not serving the Coast Guard well, and new resources are needed within a reliable sustained funding mechanism, particularly in light of the extraordinary hurricane-related expenses. And, in House hearings this year, Subcommittee Chairman Rep. Duncan Hunter (R-CA) implored the Coast Guard to take a page from the Department of Defense's book and stand their ground against OMB in order to ensure their demands are not watered down before reaching congressional ears.¹⁶

The Government Accountability Office ("GAO") has issued a handful of reports on the Coast Guard's budgeting and procurement process.¹⁷ In particular, GAO has highlighted the need for the Coast Guard to develop a 20-year fleet modernization plan setting forth a long-term renewal strategy. GAO contends that the Coast Guard needs to clearly establish and articulate its needs over the next 20 years before frank discussions can be had about what kinds of trade-offs may be required to meet fiscal constraints. The Coast Guard initially produced a detailed Mission Needs Statement in 2005, resulting in the ill-fated Deepwater program in 2007, which was expected to renew the service's assets over 25 years at a cost of \$24.2 billion.¹⁸ The Coast Guard then issued a modified Mission Needs Statement in 2016, but without specific detail regarding the assets needed to meet statutory mission requirements. As a

¹⁶ *Coast Guard Sea, Land, and Air Capabilities: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (June 7, 2017) (statement of Rep. Hunter Member, House Comm. on Transp. & Infrastructure).

¹⁷ Government Accountability Office, *Coast Guard Acquisitions: Better Information on Performance and Funding Needed to Address Shortfalls*, GAO-14-450 (June 5, 2014). See also Government Accountability Office, *Coast Guard Cutters: Depot Maintenance Is Affecting Operational Availability and Cost Estimates Should Reflect Actual Expenditures*, GAO-17-218 (Mar. 2, 2017); Government Accountability Office, *National Security Cutter: Enhanced Oversight Needed to Ensure Problems Discovered during Testing and Operations Are Addressed*, GAO-16-148 (Jan. 12, 2016); Government Accountability Office, *Coast Guard Aircraft: Transfer of Fixed-Wing C-27J Aircraft is Complex and Further Fleet Purchases Should Coincide with Study Results*, GAO-15-325 (Mar. 26, 2015).

¹⁸ *Coast Guard Sea, Land, and Air Capabilities: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (June 7, 2017) (statement of Marie Mak, Director of Acquisition and Sourcing Management, Government Accountability Office).

result, the 2016 version did not result in a new program of record for the service.

The Coast Guard has been challenged to produce the 20-year plan within the deadlines established by Congress, and the most likely reason is that the Coast Guard is trying to establish a 20-year plan that falls somewhere between what the service requires to meet its statutory missions and the "fiscal guidance" established by OMB and the Budget Control Act. GAO found that the Coast Guard's projected acquisition funding levels for 2017 through 2021 exceed the funding levels provided to the Coast Guard during the prior five-year period, underscoring the need for an uptick in appropriations if projected targets are to be met.¹⁹ To the point, GAO concludes that "the Coast Guard has been in reactive mode, delaying and reducing its capabilities through the annual budget process by moving acquisition plans into future years, and does not have a plan to realistically set forth affordable priorities."²⁰

Icebreakers & Cutter Renewal Effort

The long festering issue of Coast Guard heavy icebreaker capability also remains a hot topic. The U.S. currently has only one heavy icebreaker in service, and it was built in the 1970s.²¹ In contrast, Russia has invested in 40 heavy icebreakers, with 13 more on the way, some nuclear powered and two armed with cruise missiles. Russia has claimed the Northern Sea Route as its internal waters, and lays claims to Arctic Ocean seabed resources. China, also, is developing icebreaker capability, with apparent designs on seabed resource extraction. Without Coast Guard icebreaker capability, the U.S. will be at a loss to monitor Arctic region activity, let alone counter it through the exercise of sovereign presence in the region.²²

¹⁹ Government Accountability Office, *Coast Guard Acquisitions: Better Information on Performance and Funding Needed to Address Shortfalls*, GAO-14-450 (June 5, 2014).

²⁰ *Id.* See also Government Accountability Office, *Coast Guard Acquisitions: Limited Strategic Planning Efforts Pose Risk for Future Acquisitions*, GAO-17-747T (July 25, 2017).

²¹ The POLAR STAR remains in operation; the POLAR SEA suffered engine failure in 2010 rendering it inactive.

²² *Coast Guard Readiness: Hearing Before the Subcomm. on Oceans, Atmosphere, Fisheries, & Coast Guard, S. Comm. on Commerce, Science, & Transp.*, 115th Cong. (Nov. 16, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

The recent National Defense Authorization Act authorizes the Coast Guard to procure up to six polar-class icebreakers, subject to the availability of appropriations.²³ And the National Academy of Sciences has recommended the building of four heavy polar icebreakers, to be acquired in a block-buy, owned and operated by the Coast Guard.²⁴ However, the Coast Guard may be hamstrung by the service's inability to commit to a block-buy of multiple vessels—particularly important because U.S. yards have not built an icebreaker in 40 years and will need to invest in up-front technology and ships are cheaper to produce in a series.²⁵ By way of example, the Congressional Research Service has indicated that the application of multi-year contracting and block-buy contracting for the Offshore Patrol Cutter (“OPC”) might reduce that program's cost by \$1 billion, which is roughly the cost of one heavy polar icebreaker or 35 inland waterway tenders.²⁶ And using block-buy for the heavy icebreaker would reduce the cost of a three-ship procurement by upwards of \$200 million.²⁷

During a Senate hearing in November 2017, the Commandant expressed a desire to contract for the first heavy icebreaker with the goal of getting it in the water by 2023, coupled with a block purchase for two additional heavy icebreakers.²⁸ The Coast Guard has partnered with the Navy to leverage the Navy's shipbuilding expertise through an integrated program office formalized in

January 2017. However, appropriations remain uncertain, and attempts to fund icebreakers out of Navy shipbuilding accounts were turned back in National Defense Authorization Act discussions, although \$150 million was appropriated to the Navy for the icebreaker advance procurement. The President's 2017 budget requested \$147.6 million to begin funding the first heavy icebreaker, which has initial cost estimates of \$1 billion.²⁹ The Coast Guard has also been looking at leasing a heavy ice breaker. GAO has expressed concerns with the block-buy approach, and with the feasibility of integrating the Navy into the Coast Guard's icebreaker procurement process because of conflicting acquisition processes between the Navy and Homeland Security Departments.³⁰

GAO has indicated concern that the service's proposed acquisition of new heavy icebreakers poses risks. In particular, the acquisition conflicts with the building of the OPC, which the Coast Guard has said is its top priority and will take half to two-thirds of the service's acquisition budget starting in 2018 through final delivery in 2034.³¹ The Coast Guard has indicated that it awarded the detail design and construction for the OPC, which is designed to replace the Medium Endurance Cutter and will comprise 70% of the Coast Guard's offshore presence when completed. The OPCs are particularly pressing because the Coast Guard is facing a gap in the capability provided by the Medium Endurance Cutters as they begin to reach (or in some cases far exceed) the end of their service lives before the OPCs come on line.³² The Coast Guard is also in the process of completing the building-out of its Fast Response Cutter (“FRC”) fleet, designed to replace Island Class Patrol

²³ National Defense Authorization Act for Fiscal Year 2018, S. 1519, 115th Cong. § 1048 (July 10, 2017).

²⁴ *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Rear Adm. Richard D. West (Ret.), Chair, National Academy of Sciences Committee on Polar Icebreaker Assessment).

²⁵ *Coast Guard Readiness: Hearing Before the Subcomm. on Oceans, Atmosphere, Fisheries, & Coast Guard, S. Comm. on Commerce, Science, & Transp.*, 115th Cong. (Nov. 16, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

²⁶ *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Ronald O'Rourke, Specialist in Naval Affairs, Congressional Research Service).

²⁷ *Id.*

²⁸ *Coast Guard Readiness: Hearing Before the Subcomm. on Oceans, Atmosphere, Fisheries, & Coast Guard, S. Comm. on Commerce, Science, & Transp.*, 115th Cong. (Nov. 16, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

²⁹ *Coast Guard Sea, Land, and Air Capabilities: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (June 7, 2017) (statement of Marie Mak, Director of Acquisition and Sourcing Management, Government Accountability Office).

³⁰ *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Marie Mak, Director of Acquisition and Sourcing Management, Government Accountability Office).

³¹ *Id.*

³² *Coast Guard Sea, Land, and Air Capabilities: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (June 7, 2017) (statement of Marie Mak, Director of Acquisition and Sourcing Management, Government Accountability Office).

Boat, and has taken delivery of 23 of 58 vessels as of June 2017.³³ The National Security Cutter (“NSC”), of which the Coast Guard has received six so far, will replace the High Endurance Cutter.³⁴

Inland Waterways Tenders

During the November 2016 Senate hearing, Admiral Zukunft also discussed the state of the Coast Guard's inland waterways tenders. He indicated that the average age of that fleet is 56 years old, having been pushed to the back of the line behind the NSC recapitalization, and now the OPC recapitalization. Only 10 of the 35 cutters are less than 50 years old, and one was commissioned in 1944.³⁵ In fact, many of the vessels date to a period before the Coast Guard force included women, and therefore they do not have the space to accommodate female crews. The Coast Guard has established a \$1 million fund to begin initial design work, working with the Army Corps of Engineers, to recapitalize those assets, some of which are 72 years old and charged with enabling \$4.6 trillion of commerce to continue on Amer-

ica's waterways.³⁶ Initial estimates are that 35 tenders need replacement at a cost of approximately \$875 million, although that too could be reduced by multi-year and block-buy procurement of series.³⁷ The inland tender fleet renewal presents an opportunity for smaller yards not capable of building the larger and more complex cutters, and the initiative may be a lifeline for yards struggling in the face of a soft market for offshore supply vessels.

The Coast Guard is an essential service for the maritime industry and the nation, fulfilling many functions on every coast and overseas. However, the service stands at a cross-roads and is badly in need of additional funding and capital renewal both shoreside and afloat. Its ability to do so will require the assistance of appropriators in Congress, a willingness to stand up to OMB, and strong support from the Trump Administration in the years to come.

Bryant E. Gardner is a Partner at Winston & Strawn, LLP, Washington, D.C. B.A., summa cum laude 1996, Tulane University of Louisiana; J.D. cum laude 2000, Tulane Law School.

³³ *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Michal Haycock, Assistant Commandant, Acquisition and Chief Acquisition Officer, U.S. Coast Guard); *Coast Guard Sea, Land, and Air Capabilities: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (June 7, 2017) (statement of Marie Mak, Director of Acquisition and Sourcing Management, Government Accountability Office).

³⁴ *Coast Guard Sea, Land, and Air Capabilities: Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (June 7, 2017) (statement of Marie Mak, Director of Acquisition and Sourcing Management, Government Accountability Office). The Coast Guard also faces a need to recapitalize its helicopters, although those too will likely need to undergo service life extension to facilitate construction of the OPCs, barring substantial new appropriations.

³⁵ *Coast Guard Requirements, Priorities, and Future Acquisition Plans, Hearing Before the Subcomm. on Homeland Sec., H. Comm. on Appropriations*, 115th Cong. (May 18, 2017) (statement of Rep. Carter, Member, House Comm. on Appropriations).

³⁶ *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Marie Mak, Director of Acquisition and Sourcing Management, Government Accountability Office); *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Adm. Paul Zukunft, Commandant, U.S. Coast Guard).

³⁷ *Coast Guard Sea, Land, and Air Capabilities, Hearing Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (July 25, 2017) (statement of Ronald O'Rourke, Specialist in Naval Affairs, Congressional Research Service).