

BENEDICT'S MARITIME BULLETIN

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Joshua S. Force, Editor-in-Chief
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JONES ACT CONSIDERATIONS FOR THE DEVELOPMENT OF OFFSHORE WIND FARMS

By: Charlie Papavizas*

I. Jones Act Basics

A. History

The United States has restricted its domestic maritime commerce in merchandise since 1789. In its third Act, even before it enacted a system of vessel registration or established any department of the Government, the first U.S. Congress enacted “An Act Imposing Duties on Tonnage” which preferred American-owned vessels to foreign vessels in U.S. domestic trade.¹

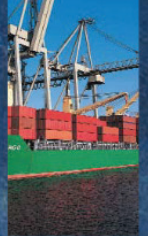
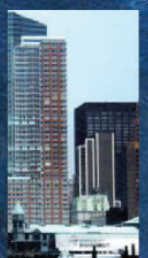
In 1817 the U.S. adopted an outright reservation to American-owned vessels which is the more direct predecessor to current U.S. cabotage laws reserving U.S. domestic trade to qualified U.S.-flag vessels.² That law prohibited the transportation of “merchandise” which

* Constantine (Charlie) Papavizas is a partner in the international law firm of Winston & Strawn LLP resident in Washington, D.C. and is the chair of its maritime practice group. Mr. Papavizas represents ship owners, operators and managers, shipyards, energy companies, marine construction companies, financial institutions and a variety of other interests in the world-wide maritime and energy industries. Mr. Papavizas has authored a number of articles on a variety of topics including the Jones Act and on offshore wind and has been quoted in a number of publications on a variety of shipping topics. This paper was originally presented at the November 4, 2021 Fall Meeting of The Maritime Law Association's Our Oceans Committee. It has been updated as of December 29, 2021 and formatted to match the style of the *Bulletin*.

¹ 1 Stat. 27 (1789).

² 3 Stat. 351 (1817).

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MANAGING EDITOR'S INTRODUCTORY NOTE

Our first article in this edition is by Charlie Papavizas on Jones Act issues relating to the development of the offshore wind industry. Charlie gives an historical review of the Jones Act and its development and then explains how the rules and regulations affect this new energy industry.

We next present an article by J. Andrew Black on the widening circuit court split on the application of *Wilburn Boat* to marine insurance policies, "specifically, when, where, and under what conditions the breach of an express warranty will void the entire marine insurance policy (and therefore excuse the insurer from coverage) whether or not the breach is connected to the loss itself." The latest decision by the Eleventh Circuit in *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 996 F.3d 1161 (11th Cir. 2021) ends with the somewhat forlorn hope that the Supreme Court will take up the issue and resolve the divergence.

George Chalos and Briton Sparkman give us a detailed analysis of the Third Circuit's decision in *Nederland Shipping Corporation v. United States of America*, 2021 U.S. App. LEXIS 33920 (3d Cir. Nov. 16, 2021), a case of first impression concluding that a security agreement is an admiralty contract within the admiralty jurisdiction.

Next, in his regular column Window on Washington, Bryant Gardner reports on 2021's Infrastructure Investment and Jobs Act and the National Defense Authorization Act for Fiscal Year 2022. He also reports on the Ocean Shipping Reform Act, which seeks to reshape regulation of the liner industry in the U.S.-international trades and has passed in the House of Representatives and may actually pass in the Senate in 2022. He concludes "Legislation passed by the Congress in 2021 contains many opportunities for renewal and support of the maritime industry, especially those segments which can leverage decarbonization initiatives and infrastructure packages, such as ferries and ports." He also advises that "carriers and shippers alike should keep a close eye on OSRA and its eventual implementation by the Federal Maritime Commission should it pass into law in 2022."

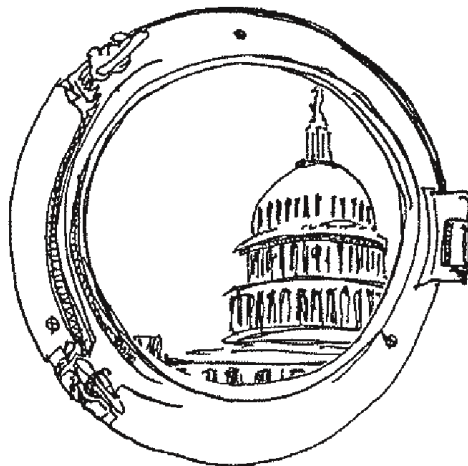
We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

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



Getting the Leg' Out

By Bryant E. Gardner*

Congress pushed out several key pieces of legislation at the close of 2021, including the massive Infrastructure Investment and Jobs Act, and the National Defense Authorization Act for Fiscal Year 2022, both of which have numerous provisions impacting the maritime industry including grants and development opportunities. Furthermore, the Ocean Shipping Reform Act, which seeks to reshape regulation of the liner industry in the U.S.-international trades, has passed the House of Representatives and appears well on its way to law.

Infrastructure Act

On November 15, 2021, President Biden signed into law the \$1 trillion bipartisan infrastructure bill, officially the Infrastructure Investment and Jobs Act (the "Act").¹ Although the Act focuses primarily on roads, bridges, transit, and rail, it also includes some nuggets for maritime interests, including ports, marine highways

and ferries, and shipbuilding interests. Consistent with the overall theme of the Act, these provisions are generally tied to carbon reduction and green jobs initiatives.

Ports Get the Long Green to Go Green

The existing Port Infrastructure Development Program administered by the U.S. Maritime Administration ("MARAD") received a hefty \$2.25 billion plus-up in new appropriations under the Act, to remain available until 2036 in \$450 million tranches.² Under existing rules, competitive grants are available to applicants for the purpose of improving safety, efficiency, or reliability of the movement of goods through ports and intermodal connections to ports, or environmental mitigation measures. Changes to the program under the Act expand eligible projects to include projects that improve the resilience of ports to address sea-level rise, flooding, extreme weather events, earthquakes, tsunami inundation, and projects that reduce or eliminate port-related pollutants and greenhouse gas emissions, including projects for: port electrification or electrification master planning; harbor craft or equipment replacements and retrofits; port or terminal micro-grids; idling reduction infrastructure;

* 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.

¹ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, Nov. 15, 2021 (hereinafter the "Act" and parts thereof referred to in notes as "Section" or "Division").

² Division J, Title VIII.

cargo handling equipment and related infrastructure; worker training to support electrification technology; installation of port bunkering facilities from ocean-going vessels for fuels; electric vehicle charge or hydrogen refueling infrastructure for trucks and locomotives servicing the port; and other port-related activities including charting infrastructure, electric rubber tire gantry cranes, and anti-idling technologies. The changes and plus-ups for the program are expected to be a boon for the offshore wind industry as it seeks to establish beach-head facilities to construct and service new wind farm development.

Additionally, the Act stands up and funds at \$150 million a new program to study and provide grants to reduce truck-idling emissions at ports, including through port electrification, improvements in efficiency of operations, and new emerging technologies.³ The Act also establishes a new Carbon Reduction Program funded through the Highway Trust Fund, to fund initiatives that will reduce transportation emissions at port facilities, including through the advancement of port electrification, and efforts to reduce the environmental and community impacts of freight movement.⁴

Marine Highways on the Go

The existing Nationally Significant Freight and Highway Projects grant program⁵ has now become the Nationally Significant Multimodal Freight and Highway Projects grant program, and the Act expands the program to include projects for marine highway corridors designated by MARAD pursuant to 46 U.S.C. § 55601(c).⁶ The Act appropriates \$3.2 billion for the program.⁷ The America's Marine Highway Program seeks to promote the use of Jones Act qualified vessels for interstate transportation along key transportation routes as an alternative to overcrowded road and rail alternatives.⁸ Grants may be utilized for the development of vessels, shoreside infrastructure, shipper utilization, and state and local governments' marine highways

strategies. To tap into the Nationally Significant Multimodal Freight and Highway funding, the marine highways project must be functionally connected to the National Highway Freight Network and likely to reduce on-road mobile source emissions. Eligible applicants include state and local governments, port and similar public authorities, Federal land management agencies, tribes, and multistate corridor organizations. Additionally, the Act adds marine highways to projects eligible for funding pursuant to the National Highway Freight Program⁹ and the Congestion Mitigation and Air Quality Improvement Program,¹⁰ providing additional transportation and highway revenue streams for marine highways.¹¹

Ferries Get a Push

The Act appropriates \$1 billion for a newly authorized rural ferries grant program running through fiscal year 2026.¹² Administered by the Department of Transportation, the program will operate by providing funding to states to support ferry services that operated a regular schedule at any time during the five-year period ending March 1, 2020, serving at least two rural areas of less than 50,000 people located more than 50 sailing miles apart. Program participation requirements and criteria will be developed by the Department.

Under separate provisions the Act expands from 80% to 85% the Federal share of funding projects to replace or retrofit a diesel fuel ferry vessel that provides substantial emissions reductions, sunseting on September 30, 2025.¹³ This provision is not limited to rural ferry service.

Finally, the Act stands up a new \$50 million pilot program to provide grants for electric or low-emitting ferries, and the electrification of or other reduction of emissions on existing ferries.¹⁴ At least one program must be for a ferry service that serves the state with the largest number of Marine Highway System miles, and at least one grant must be for a bi-state ferry service with an aging fleet.¹⁵

³ Section 11402; Division J, Title VIII.

⁴ Section 11403. The Act also includes the Local and Regional Project Assistance Program to fund, among other priorities, inland port infrastructure, with program grants to be no less than \$1 million in rural areas, no less than \$5 million in urban areas, and no more than \$25 million. Section 21202.

⁵ 23 U.S.C. § 117.

⁶ Section 11110.

⁷ Division J, Title VIII.

⁸ 46 U.S.C. § 55601; *see also* <https://www.maritime.dot.gov/grants/marine-highways/marine-highway>.

⁹ 23 U.S.C. § 167.

¹⁰ 23 U.S.C. § 149.

¹¹ Sections 11114 & 11115.

¹² Section 71103; Division J, Title VIII.

¹³ Section 11117.

¹⁴ Section 71102.

¹⁵ *Id.*

Shipbuilders Too

The Act establishes a \$750 million Advanced Energy Manufacturing and Recycling Grant Program for the period of fiscal years 2022 through 2026, providing grants to small and minority manufacturing entities for the development of electric or fuel cell maritime vessels and related charging and refueling infrastructure.¹⁶ Wind and solar energy projects, including offshore applications, are also eligible for grants. Qualifying entities must have less than \$100 million in gross annual sales, fewer than 500 employees, and annual energy bills of \$100,000 to \$2,500,000, with priority for minority-owned businesses. Funded projects must be completed not later than three years after receipt of grant funding, or return unobligated funds.

The Act expands upon existing authorities under the Energy Policy Act of 2005¹⁷ to establish the Clean Hydrogen Research and Development Program, providing new grant authority to fund the development of hydrogen or hydrogen-carrier fuels for the convenient and economic refueling of maritime vessels, and vessel technologies including engine and emissions control systems, energy storage, electric propulsion, hybrid systems, and other advanced maritime vessel technologies.¹⁸ Furthermore, the Act authorizes a new \$8 billion Regional Clean Hydrogen Hubs program to support the establishment of at least four regional hydrogen hub networks of producers, consumers, and connective infrastructure.¹⁹ The Department of Energy must select the hubs to ensure diversity of feedstock, end use applications, and regions.

The Act also expands the Department of Energy's existing Innovative Energy Loan Guarantee Program to include maritime vessels.²⁰ The amendment unlocks up to \$25 billion in loan guarantees for new energy efficient vessels built in American shipyards, potentially infusing significant capital into the industry. Loans are provided at the interest rate equal to the cost of funds to the Department of the Treasury for obligations of comparable maturity with a term equal to the lesser of the projected project or twenty-five years, subject to deferral of up to five years from the first operations of the project funded.²¹

¹⁶ Section 40209.

¹⁷ 42 U.S.C. § 16154.

¹⁸ Section 40313.

¹⁹ Section 40314.

²⁰ Section 40401.

²¹ 42 U.S.C. § 17013.

Mama Mia MIAO

Continuing the Biden Administration's new Made in America Office ("MIAO"),²² which promotes various Buy American initiatives and programs, the Act requires a report from MIAO to the congressional committees of jurisdiction within 90 days of enactment of the Act.²³ The Act expressly requires that the report cover application of "laws requiring domestic preference for maritime transport, including the Merchant Marine Act, 1920 (Public Law 66-261), commonly known as the 'Jones Act'",²⁴ presumably also including the various other cabotage acts addressing dredging,²⁵ passenger vessels,²⁶ and towing,²⁷ and also the military²⁸ and civilian²⁹ cargo preference acts requiring the shipment of government-impelled cargoes on U.S.-flag vessels.

NDAA Ain't Nada

For a while in early December 2021, it looked like the National Defense Authorization Act ("NDAA") might not make it into law this year. However, competing congressional constituencies put aside their differences, stripped out the controversial provisions, and pushed through an update to the key defense laws sufficient to keep the Defense Department in the green.

The NDAA provides full funding for the Maritime Security Program and the Tanker Security Program, which provide stipends of \$5.3 million and \$6 million to militarily useful and tanker vessels, respectively, in exchange for their availability to the United States in times of war and national emergency.³⁰ The proposed legislation also amends the Tanker Security Program to prohibit long-term charters of participating vessels for continuous periods of 180 days or more to the United States Government.³¹ Currently, the United States charters U.S.-flag vessels at rates premium to open registries vessels consistent with the higher operating costs of U.S.-flag vessels. The change is intended to

²² See Ensuring the Future is Made in All of America by All of America's Workers, Exec. Order No. 14,005, 86 Fed. Reg. 7475 (2021); <http://www.madeinamerica.gov>.

²³ Section 70923(e).

²⁴ 46 U.S.C. § 55102.

²⁵ 46 U.S.C. § 55109.

²⁶ 46 U.S.C. § 55103.

²⁷ 46 U.S.C. § 55111.

²⁸ 10 U.S.C. § 2631.

²⁹ 46 U.S.C. §§ 55304 & 55305.

³⁰ Joint Explanatory Statement to Accompany the National Defense Authorization Act for Fiscal Year 2022, Funding Tables Function 054; NDAA § 3501(a)(6) & (8).

³¹ NDAA § 3515.

ensure that the Program funds new, additional, and commercially viable tanker vessels and new seafarer billets, as opposed to a pass-through of the stipend to reduce the rates at which U.S.-flag vessels are currently chartered to the Military Sealift Command, Defense Logistics Agency, and other Federal agencies without the addition of new vessels or billets. Additionally, the measure authorizes \$316 million for the National Security Multi-Mission Vessel Program to recapitalize the maritime academy school ships with a multi-use sealift vessel.³²

The NDAA further authorizes \$750 million for the Port and Intermodal Improvement Program.³³ However, the legislation prohibits the use of funds to purchase fully automated cargo handling equipment that is remotely operated or monitored without human intervention that would result in a net loss of ports jobs. The defense measure also includes updates to MARAD's ports grants program to prioritize funding for decarbonization projects, consistent with the Infrastructure Act changes discussed above.³⁴

Ocean Shipping Reform Act

On December 8, 2021, the House voted to pass the Ocean Shipping Reform Act of 2021 ("OSRA"),³⁵ which if it passes the Senate will be the first major overhaul of the Shipping Act of 1984 in 20 years. OSRA aims to shift the balance of power away from liner operating common carriers in favor of the American shipping public, fueled by widespread discontent among American shippers during the COVID pandemic.

Originally introduced by Reps. John Garamendi (D-CA) and Dusty Johnson (R-SD), the bill attracted a wide array of cosponsors on both sides of the aisle, including many allies of the maritime industry. The measure passed the House with broad bipartisan support under a suspension of the rules by a margin of 364-60, with 212 Democrats and 152 Republicans voting for passage. Members voting in favor of the bill included the Chairmen and Ranking Members of each of the Committees on Transportation, Armed Services, Appropriations, and Agriculture. A Senate companion bill will likely drop before publication and, if House support is any measure, hit the President's desk during the first half of 2022.

The U.S. agriculture community's dissatisfaction with container export service has been particularly acute, and it was that group of stakeholders who initially led the charge for OSRA, later joined by powerful retailing and domestic manufacturing constituencies. During congressional hearings on the supply chain crisis, witnesses reported shortages of containers for the export of agricultural commodities from the U.S. heartland, caused by ocean carriers' decisions to send empty containers westbound to capture more sky-high rates on Chinese imports instead of deploying those containers to the interior for loading farm exports at much lower rates. Underscoring the role of agricultural shippers in the debate, on December 17, 2021, Secretary of Agriculture Vilsack, joined by Secretary of Transportation Buttigieg, sent a letter to the major box carriers, stating:

Shippers of U.S. grown agricultural commodities and goods have seen reduced service, everchanging return dates, and unfair fees as containers have short-circuited the usual pathways and been rushed to be exported empty. This imbalance is not sustainable and contributes to the logjam of empty containers clogging ports. The poor service and refusal to serve customers when the empty containers are clearly available is unacceptable and, if not resolved quickly, may require further examination and action by the Federal Maritime Commission.³⁶

Upon passage of the bill by the House, USA Rice and other farm stakeholders championed OSRA for its prohibition of "unreasonably declining export cargo bookings" and new curbs on liners' ability to impose demurrage and detention charges for failure to timely pickup or return containers. Large U.S.-based importers, retailers, and manufacturers reliant upon foreign source

³² NDAA § 3501(a)(3).

³³ NDAA § 3501(a)(12).

³⁴ NDAA § 3513; 46 U.S.C. § 54301.

³⁵ H.R. 4996, 117th Cong.

³⁶ Letter from Secretary of Agriculture Tom Vilsack and Secretary of Transportation Pete Buttigieg to Ed Aldridge, President, CMA CGM America LLC; Tenny Hsieh, President, Wan Hai Lines America; Feng Bo, President, COSCO North America; Kee Hoon Park, CEO, SM Line; Benjamin Tsai, President, Evergreen Shipping Agency; Uffe Ostergaard, President, Hapag-Lloyd AG North America; Jeremy Nixon, President, Ocean Network Express; George Goldman, President, Zim American Integrated Shipping Services; Paul Devine, President, OOCL (USA) Inc.; Doug Morgante, Vice President, Maersk Inc.; Fabio Santucci, President and CEO, MSC Mediterranean Shipping Company USA; Cheng-Mount Cheng, Chairman and CEO, Yang Ming Transport Company.

components have been particularly vocal regarding their frustration with detention and demurrage charges, and with the lack of reliable access to imports during the pandemic.

Liner interests, led by their Washington, D.C.-based association, the World Shipping Council, have sought to explain the multi-faceted complexity of the supply chain challenges, the role of trucking and intermodal equipment shortages, and the fundamental, pandemic-driven economic shifts in causing the dislocation. However well-reasoned they may be, the liner companies face significant political headwinds. When the last of the American liner operators such as Sea-Land, APL, and Lykes sold-out to foreign interests in the late 1990s following the Reagan-era wind-down of 1936 Merchant Marine Act support programs, they lost much of their political foothold in the United States. Moreover, reformers have portrayed liner companies as pandering to China's state-led import surge at the expense of the American family farmer seeking to get crops to market,

making it hard for even traditional maritime allies in Congress to support the carriers publicly on this issue.

The Fantail

Legislation passed by the Congress in 2021 contains many opportunities for renewal and support of the maritime industry, especially those segments which can leverage decarbonization initiatives and infrastructure packages, such as ferries and ports. U.S. shipyards also have new opportunities to develop forward-leaning, green technology using new Federal funding. Sailing into 2022, the U.S. maritime industry should track closely the implementation of the many new infrastructure and stimulus opportunities to maximize available Federal resources and develop a 21st century competitive infrastructure. Finally, carriers and shippers alike should keep a close eye on OSRA and its eventual implementation by the Federal Maritime Commission should it pass into law in 2022.

Contributors

BP	Brad Pace Kennedys Brad.Pace@kennedyslaw.com
DO	Daniela O'Regan Holbrook & Murphy DOregan@HolbrookMurphy.com
FB	Forrest Booth Kennedys Forrest.Booth@kennedyslaw.com
GS	Gordon Smith Kennedys Gordon.Smith@kennedyslaw.com
JAY	Jeffrey A. Yarbrough Moseley, Prichard, Parrish, Knight & Jones JYarbrough@mppkj.com
JAP	Joni Alexis Poitier Moseley, Prichard, Parrish, Knight & Jones JPoitier@mppkj.com
KMM	Kevin M. McGlone Sher Garner Cahill Richter Klein & Hilbert, L.L.C. KMcGlone@shergarner.com
NL	Nancy Lewis Kennedys Nancy.Lewis@kennedyslaw.com
OA	Oscar Alvarez Kennedys Oscar.Alvarez@kennedyslaw.com
SMM	Shea Michael Moser Moseley, Pritchard, Parrish, Knight & Jones SMoser@mppkj.com

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Contact Information

Joshua S. Force
(Editor-in-Chief)
Sher Garner Cahill Richter Klein & Hilbert, L.L.C.
New Orleans, LA
jforce@SHERGARNER.com

Robert J. Zapf
(Managing Editor)
Rancho Mirage, CA
RJZapf1@verizon.net

Bruce A. King
(Past Chairperson Marine
Financing Committee)
Maritime Law Association
bkingseattle@msn.com

Dr. James C. Kraska
Howard S. Levie Professor of International Law
The Stockton Center for the Study of International Law
United States Naval War College
686 Cushing Road
Newport, Rhode Island 02841-1207
James.Kraska@usnwc.edu

Dr. Norman A. Martinez-Gutiérrez
(International Maritime Law; Scholarly Notes and Papers)
IMO International Maritime Law Institute
P.O. Box 31, Msida MSD 01 MALTA
Norman.Martinez@imli.org

Francis X. Nolan, III
(Former President, Maritime Law Association)
Vedder Price P.C.
1633 Broadway, 47th Floor
New York, NY 10019
fnolan@vedderprice.com

Anthony J. Pruzinsky
Hill Rivkins LLP
45 Broadway, Suite 1500
New York, NY 10006-3793
APruzinsky@hillrivkins.com

CONTRIBUTING AUTHORS TO THIS ISSUE**Contact Information**

*Charlie Papavizas
Winston & Strawn LLP
Washington, DC
cpapaviz@winston.com*

*James Andrew Black
Farrell Smith O'Connell Aarsheim Aprans LLP
ablack@fsofirm.com*

*George M. Chalos
Chalos & Co, P.C.
New York, NY
gmc@chaloslaw.com*

*Briton P. Sparkman
Chalos & Co, P.C.
Houston, TX
bsparkman@chaloslaw.com*

Window on Washington

*Bryant E. Gardner
Winston & Strawn LLP
Washington, DC
bgardner@winston.com*

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