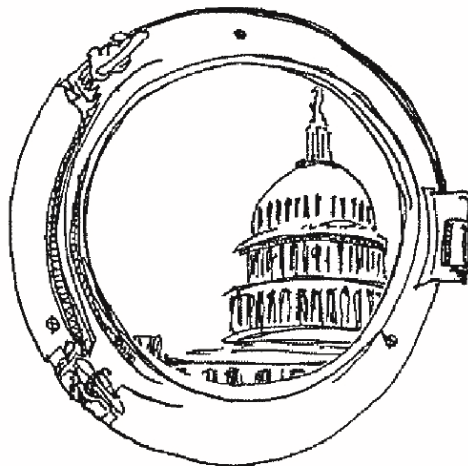


WINDOW ON WASHINGTON



Steaming Toward the Lame Duck

By Bryant E. Gardner*

The dog days of summer are here in the nation's capital, and Congress is steadily working to assemble its two most consequential pieces of legislation for the maritime industry—the National Defense Authorization Act (NDAA),¹ and the Coast Guard Authorization Act.² In recent years, the NDAA has been the legislative vehicle for the Coast Guard Authorization Act, the Maritime Administration (MARAD) Authorization Act, or both. If what is past is prologue, passage of these two bills will occur during the lame duck 118th Congress,

as the year draws to a close. Currently, the House has released its text of the bills, and the Senate has begun deliberations ahead of the August recess.

The Coast Guard Bill

The House passed its version of the Coast Guard Authorization Act in May 2024, overcoming objections that prevented it from reaching the House floor last year after being favorably reported out of Committee. Much of last year's debate surrounded a section of the legislation that would have required offshore vessels to be crewed by members of the same nationality as the vessel's flag, and limited the number of visas offshore developers may obtain for workers. The Coast Guard bill, passed by the House in 2024, includes the provision requiring that crews working on the outer Continental Shelf be U.S. citizens, aliens lawfully admitted for permanent residence, or citizens of the vessel's flag state.³ Aliens and flag-state citizens may not exceed two and one-half times the number of individuals required to crew the vessel. Existing exemptions under the Outer Continental Shelf Lands Act are not affected during the 120-day period following enactment of the Coast Guard Act. Violations would be subjected to a penalty of \$10,000 per day for each covered facility.

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¹ Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, H.R. 8070, 118th Cong. (2024) (hereinafter "NDAA").

² Coast Guard Authorization Act of 2024, H.R. 7659, 118th Cong. (2024) (hereinafter "Coast Guard Act").

³ *Id.* § 346.

The bill also expands the current requirement for a U.S.-flag registry endorsement for vessels engaged in anchor-handling activities or mooring equipment of mobile offshore drilling units (MODUs). The U.S.-flag requirement would be expanded to include such activities for any “other energy production transmission facility, or vessel engaged in the launch, recovery, or support of commercial space transportation or space exploration activities,” for which an “energy production or transmission facility” means “a floating offshore facility that is—(A) not a vessel; (B) securely and substantially moored to the seabed; and (C) equipped with wind turbines which are used for the generation or transmission of non-mineral energy resources.”⁴ The practical effect should be to require U.S.-flag vessels for the setting, relocation, or recovery of anchors or mooring equipment for offshore wind turbines. Since only a registry endorsement is required, the U.S.-build requirement for a Jones Act vessel will not apply.

The Coast Guard Act includes a provision aimed at tightening industry oversight of perceived Jones Act cabotage rules avoidance in offshore operations.⁵ Under current practice, offshore developers and operators will often apply to Customs and Border Protection (CBP) for a ruling to determine if proposed foreign-flag or mixed-flag operations comply with Jones Act. The bill would require the operator of a foreign vessel to file with the CBP a notification describing proposed activities on the outer Continental Shelf employing foreign-flag vessels and any ruling letters issued by CBP that have approved use of a foreign vessel in substantially similar operations, in advance of conducting such operations. CBP would then have to publish that notice in the Customs Bulletin and Decisions within 14 days of receipt. Presumably, this public notice will provide the Jones Act community, and CBP, an additional tool to challenge the foreign-flag operations as violative of the Jones Act and without the cover of the cited ruling letters. In the same vein, the bill requires publication of penalties and pre-penalty notices within 14 days of issuance, including the party subject to the penalty, amount of penalty or fine, and summary of the alleged misconduct justifying the penalty.⁶

In a victory for seafaring unions battling a shortage of qualified mariners, the bill would shorten the sea-service time required for the issuance of mariner's credentials.⁷ The provision also increases the amount

of nautical school coursework that may be substituted for sea-service time. Additionally, the bill updates provisions added last year, requiring a minimum of two licensed engineers on subchapter M articulated tug-barges equipped for unmanned machinery spaces or issued a minimum safe manning certificate authorizing equivalent or less manning levels engaged on voyages of more than 600 miles, and one licensed engineer on voyages of less than 600 miles.⁸ The bill adds new penalties for the grossly negligent operation of a vessel that results in serious bodily injury, making such conduct punishable as a class E felony subject to a penalty of up to \$35,000.⁹ It would also add new grounds for suspension of a merchant mariner's document if there is probable cause to believe that the individual has violated company policy and is a security risk that poses a threat to other individuals on the vessel—likely aimed at tamping down on sexual assault and sexual harassment on board.¹⁰

The Act would ease some inspection requirements. The bill expands Coast Guard authority to waive annual inspection requirements and substitute a risk-based inspection system for tank vessels. This discretionary authority already exists for LNG vessels.¹¹ The bill also amends current law to allow delegation of authority to inspect mobile offshore drilling units working on the U.S. Outer Continental Shelf to certain foreign classification societies, even if the home nation of that classification society does not allow delegate inspection authority for MODUs operating in the water of the home nation.¹²

The lifting of the U.S. crude oil export ban has had many unexpected effects. One has been renewed interest in deepwater ports, floating loading and discharge points at sea capable of accommodating the largest crude carriers unable to berth shoreside. Many members of Congress, especially Gulf producing states, have expressed growing frustration with the lengthy permitting process for the authorization of such ports under the Deepwater Port Act of 1974 (DWPA).¹³ The Coast Guard bill ends

⁴ *Id.* § 341.

⁵ *Id.* §§ 301 & 302.

⁶ *Id.* § 303.

⁷ *Id.* § 311.

⁸ *Id.* § 330.

⁹ *Id.* § 321.

¹⁰ *Id.* § 322.

¹¹ *Id.* § 324.

¹² *Id.* § 347.

¹³ 33 U.S.C. Ch. 29. *See, e.g.*, Press Release, U.S. Senate Committee on Commerce, Science, and Transportation, Sen. Cruz Questions Delays Holding Up Energy Export Projects in Letter to Maritime Administration (Feb. 13, 2023), <https://www.commerce.senate.gov/index.php/2023/2/sen-cruz-questions-delays-holding-up-energy-export-projects-in-letter-to-maritime-administration>.

the Coast Guard's role in processing DWPA permits, effectively consolidating that responsibility within the US Maritime Administration (MARAD).¹⁴

In 2023, CNN reported on an extensive cover-up operation by the Coast Guard, dubbed Operation Fouled Anchor, allegedly placing the prestige of the service ahead of the wellbeing of sexual assault and sexual harassment victims at the Coast Guard Academy.¹⁵ Among other things, the report found that the Coast Guard required involved personnel to sign non-disclosure agreements, and that Coast Guard leadership failed to share investigation findings with Congress and the public, prompting one senator to characterize suppression of the findings as "probably the most shameful, disgraceful incident of cover-up of sexual assault that I have seen in the United States military ever."¹⁶ These report led to further congressional inquiry, notably by the U.S. Senate Permanent Subcommittee on Investigations, which is chaired by Senator Richard Blumenthal (D-CT), whose state hosts the Coast Guard Academy, and Senate Commerce Committee Chair Maria Cantwell (D-WA).¹⁷ Title V of the House-passed bill includes provisions aimed at reforming the Coast Guard's sexual assault practices. The bill requires a Government Accountability Office (GAO) report on sexual harassment at the Academy and recommendations to address such misconduct, and a report from the Coast Guard on its implementation of those recommendations.¹⁸ The bill also provides for transfer of a cadet who has been a victim of sexual

assault to another military service academy or ROTC program while maintaining that cadet's ability to obtain a Coast Guard commission upon graduation.¹⁹ Additionally, the bill provides the Coast Guard direct hire authority for certain sexual assault and sexual harassment counselling, care, and prevention personnel; and strengthens the Coast Guard's sexual assault reporting, offense review, and discharge punishment processes.²⁰

Congressional frustration with low Coast Guard budget requests remains, especially with respect to recapitalization of its cutter fleet. Typically, the Administration low-balls Coast Guard funding requests, expecting Congress to plus it up, making room for other Administration budget priorities. At a House hearing in June 2024,²¹ GAO testified that the Coast Guard requested \$1.6 billion to recapitalize, when in reality it needs as much as \$4 billion. Although the Coast Guard Act includes \$3.5 billion for procurement, that is only the authorized amount, and House appropriators provided only \$2 billion in the fiscal year 2025 spending bill.²² This is in the context of big plans to recapitalize the Coast Guard's Offshore Patrol Cutters and icebreakers, which GAO testified are collectively \$13 billion over budget and four to five years behind schedule.²³ Faithful readers of *Window on Washington* will recall that Congress has been pushing icebreaker capability for years, yet it is not clear that funding levels will be sufficient. The Coast Guard bill requires the Coast Guard to put forward a strategy for a Great Lakes icebreaker²⁴ and regular updates on the Polar Security Cutter acquisition program.²⁵ Real progress will require not only detailed planning and strategy, but also significant appropriations from Congress.

National Defense Authorization Act

In June 2024, the House GOP passed an NDAA with numerous "culture war" provisions, over the objections of Democrats. While the bill is likely to see significant changes to those provisions before it clears the Democrat-controlled Senate, the provisions of

¹⁴ Coast Guard Act § 350.

¹⁵ Melanie Hinken et al., CNN, Former Coast Guard head covered up secret investigation into sexual assaults at the Coast Guard Academy (Aug. 8, 2023), <https://www.cnn.com/2023/08/08/politics/coast-guard-sexual-assault-coverup-invs/index.html>.

¹⁶ *Id.* (quoting Senator Blumenthal (D-CT)).

¹⁷ Office of Senator Blumenthal, Academy's Mishandling of Sexual Assault Allegations (Feb. 14, 2024), <https://www.blumenthal.senate.gov/newsroom/press/release/in-light-of-new-documents-the-permanent-subcommittee-on-investigations-presses-the-coast-guard-for-answers-on-the-academy-s-mishandling-of-sexual-assault-investigations>; Press Release, U.S. Senate Committee on Commerce, Science, and Transportation, Cantwell, Baldwin Want More Answers, Accountability from Coast Guard Following Disclosure of "Operation Fouled Anchor" and Decades-Long, Hidden Reports of Sexual Assault (June 20, 2023), <https://www.commerce.senate.gov/2023/6/cantwell-baldwin-want-more-answers-accountability-from-coast-guard-following-disclosure-of-operation-fouled-anchor-and-decades-long-hidden-reports-of-sexual-assault>.

¹⁸ Coast Guard Act § 502.

¹⁹ *Id.* § 505.

²⁰ *Id.* §§ 507-513.

²¹ Hearing before the House Transportation and Infrastructure Comm., Subcomm. on Coast Guard and Maritime Transportation (June 12, 2024).

²² H.R. 4367, Tit. II, 118th Cong. (2024).

²³ Hearing before the House Transportation and Infrastructure Comm., Subcomm. on Coast Guard and Maritime Transportation (June 12, 2024).

²⁴ Coast Guard Act § 208.

²⁵ *Id.* § 211.

significant impact for the maritime industry, including the MARAD reauthorization,²⁶ are traditionally more bipartisan and therefore more likely to survive the Senate's mark-up of the legislation.

The MARAD bill authorizes spending for numerous maritime industry promotional programs including:

- \$191 million for the U.S. Merchant Marine Academy, composed of operations funding, \$64 million for capital improvements;
- \$58 million for the state maritime academies, including \$4.8 million for the Student Incentive Payment Program;
- Full funding for the Maritime Security Program (MSP), ensuring a fleet of militarily useful commercially operated, privately owned vessels;
- \$75 million for the National Security Multi-Mission Vessel program, which recapitalizes the maritime school training ships and related shoreside infrastructure;
- \$15 million for MARAD's Marine Highways program pursuant to 46 U.S.C. § 55601; and
- \$500 million for the Port Infrastructure Development Program, providing grants for ports improvements.²⁷

The MARAD bill within the NDAA enshrines in statute the "commercial first" sealift policy, requiring that "in building, acquiring, maintaining, coordinating and operating sealift capability in time of peace, crisis, and war" the Secretaries of Transportation and Defense shall give priority to commercial U.S.-flag vessels, followed by government-owned and operated vessels, and then vessels documented by treaty allies.²⁸ The bill increases the MSP stipend and extends program authorization through 2040, with new stipends ranging from \$6.5 million per vessel in fiscal year 2025 to \$7.8 million per vessel in fiscal year 2040.²⁹ Additionally, the legislation provides for the design and construction of up to ten new sealift vessels to be used to recapitalize the National Defense Reserve Fleet (NDRF), subject to appropriations.³⁰ Lastly, the proposal authorizes \$15 million for a marketing program intended to address

labor shortages in the seafaring and shipbuilding sectors.³¹

The NDAA also requires an assessment of the country's maritime readiness, including shipbuilding, the shipping industry, and maritime infrastructure, raising concerns about the decline of the industry—particular in the international trades and related deep sea vessel construction—and the extent to which the country is lagging behind China in an era of rising peer or near-peer competition.³² The requirement echoes numerous prior congressional demands for MARAD or the Defense Department to develop a meaningful national maritime strategy. Among other provisions, the bill calls for a briefing by the Secretary of Transportation (MARAD) in coordination with the Homeland Security, to brief Congress on "options for establishing privileges" for the U.S.-flag fleet trading internationally, including "recommendations for potential incentives, for civil, commercial, and government entities, including treaty allies . . . to ship goods on the United States-flag fleet."³³ The report requirement comes amid a chorus of publicly funded and private industry proposals to address the lagging international-trading U.S.-flag fleet, including studies from the Hudson Institute,³⁴ Boyd Institute,³⁵ Centers for Naval Analysis,³⁶ and a bipartisan, bicameral legislative proposal to broadly reform the industry.³⁷

Restoring the U.S.-flag fleet sailing internationally will require bold change, and significant Federal involvement in order to overcome cost advantages inherent to flags of convenience operating in low-tax jurisdictions with low-cost, internationally-sourced seafarers.

³¹ *Id.* § 3536.

³² *Id.* § 3512.

³³ *Id.*

³⁴ Michael Roberts, *Rewriting the Future of America's Maritime Industry to Compete with China* (Oct. 6, 2023), <https://www.hudson.org/national-security-defense/rewriting-future-america-maritime-industry-compete-china-michael-roberts>.

³⁵ Boyd Institute, *America's maritime policies need a reboot* (Feb. 12, 2024), <https://boydinstitute.org/p/reboot-american-maritime-policies>.

³⁶ MARAD, *MARAD Selects the Center for Naval Analysis to Examine the Future of the U.S. Maritime Industry* (Sept. 12, 2023), <https://www.maritime.dot.gov/newsroom/marad-selects-center-naval-analyses-examine-future-us-maritime-industry>.

³⁷ Press Release, Senator Mark Kelly, Senators Kelly and Rubio, Representatives Waltz and Garamendi Release National Maritime Strategy Report (May 8, 2024), <https://www.kelly.senate.gov/newsroom/press-releases/senators-kelly-and-rubio-representatives-waltz-and-garamendi-release-national-maritime-strategy-report/>.

²⁶ NDAA Tit. XXXV.

²⁷ *Id.* § 3501.

²⁸ *Id.* § 3512.

²⁹ *Id.* § 3502.

³⁰ *Id.* § 3533.

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