

BENEDICT'S MARITIME BULLETIN

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NAVIGATING THE LIMITS OF A FEDERAL COURT'S *IN REM* JURISDICTION

By: Lisa Reeves

Unlike most navigable waterways in the United States, the Delaware River is not confined within a single state. The Delaware River borders Pennsylvania, New Jersey, and Delaware, all of which host marine terminals along their shores. Commercial ships transiting the Atlantic enter the river through the Delaware Bay, a large body of water (between Delaware and New Jersey), into the commercial ship channel which runs 80 miles upriver to Philadelphia and beyond. Just north of Wilmington, Delaware, the eastern shore of the river is Pennsylvania.

This article explores the limits of a District Court's continued jurisdiction over a vessel arrested or attached in the district, in the event the vessel needs to shift to a berth or anchorage outside of the arresting court's geographic boundaries, for safety or commercial reasons.

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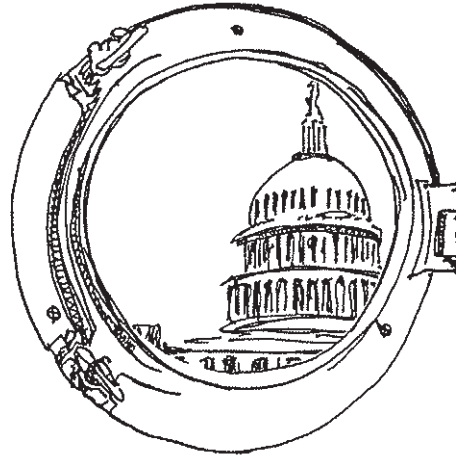
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WINDOW ON WASHINGTON



A BROAD REACH

By: Bryant E. Gardner

Many in the U.S. maritime industry remain hopeful that the Trump Administration will unveil programs aimed at protecting and promoting both the U.S.-flag fleet and the mariner base, crucial to trade and the United States' ability to provide national defense sealift capability when needed in times of war and national emergency. At times, the White House has intimated it would build maritime infrastructure as part of a broader national initiative, increase the U.S. fleet through the strengthening of promotional programs, and reduce regulatory burdens which may hamstring the maritime industry's ability to compete.

The Department of Defense (DOD) and the U.S. Maritime Administration (MARAD) inside the Department of Transportation have also fueled the drive towards revitalization and strengthening of the U.S. Merchant Marine. Testimony by the Commander of the United States Transportation Command (TRANSCOM) and the MARAD Administrator has underscored concerns that the internationally trading fleet has declined by approximately 25% in the last five years, and the mariner base has eroded to the point that the United

States may no longer be able to satisfy DOD sealift requirements.¹

The National Defense Authorization Act for Fiscal Year 2017² directed MARAD to convene a "Maritime Workforce Working Group" (MWWG) to examine and assess the size of the pool of United States citizen mariners necessary to support the U.S.-flag fleet in times of national emergency."³ The Act directs that the MWWG be composed of representatives from MARAD, the U.S. Merchant Marine Academy, the U.S. Coast Guard, the U.S. Navy Military Sealift Command (MSC), the U.S.

¹ *Hearing Before the House Armed Services Committee, Subcommittee on Seapower and Projection Forces*, 114th Cong. (March 22, 2016) (statement of Paul N. Jaenichen, U.S. Maritime Administrator); *Hearing before the House Agriculture Committee, Subcommittee on Livestock and Foreign Agriculture and House Transportation Committee, Subcommittee on Coast Guard and Maritime Transportation*, 114th Cong. (Nov. 17, 2015) (statements of Paul N. Jaenichen, United States Maritime Administrator, and David J. Berteau, Assistant Secretary of Defense, Logistics and Material Readiness, Department of Defense).

² Pub. L. No. 114-328, § 3517, 130 Stat. 2000 (2016).

³ *Id.*

Navy, the State maritime academies, labor representing licensed and unlicensed mariners, Jones Act (domestic trade) ship owners, and registry fleet (international trade) U.S. ship owners.⁴ The Act also directs MARAD to make four specific inquiries:

1. Identify the number of United States citizen mariners

2. assess the impact on the United States merchant marine and United States Merchant Marine Academy if graduates from State maritime academies and the United States Merchant Marine Academy were assigned to, or required to fulfill, certain maritime positions based on the overall needs of the United States merchant marine;
3. assess the Coast Guard Merchant Mariner Licensing and Documentation System and its accessibility and value to the Maritime Administration for the purposes of evaluating the pool of United States citizen mariners; and
4. make recommendations to enhance the availability and quality of interagency data, including data from the United States Transportation Command, the Coast Guard, the Navy, and the Bureau of Transportation Statistics, for use by the Maritime Administration for evaluating the pool of United States citizen mariners.⁵

On July 10, 2017, MARAD published a Notice and Request for Comment seeking public input on the issues outlined above.⁶ Although some of the enumerated items were not conducive to industry comment, the Notice did spur thoughtful comments from industry.

The major labor organizations, including the Seafarers International Union, American Maritime Officers, Marine Engineers' Beneficial Association, International Organization of Master, Mates & Pilots, Sailors' Union of the Pacific, and the Marine Firemen's Union, submitted a joint comment. U.S.-flag vessel operators Crowley Maritime Corporation, Maersk Line Limited, Tote, American Roll-On Roll-Off Carrier (ARC), and

American Overseas Marine (AMSEA) submitted separate comments. The State maritime academies also submitted a joint comment. The commenters seized upon the opportunity to highlight the recent decline in the fleet and to comment upon potential remedies which might help restore the mariner base, in addition to addressing directly the areas highlighted by the Act and the Notice. Few comments directly addressed Items 3 and 4, *supra*, which seem more appropriate for the agencies to address. However, Crowley's comment does point out that, regarding Item 3, the Coast Guard system is an inherently flawed tool for tracking currently available mariners because it does not distinguish between active and inactive mariners, or training or security clearances needed to work on sealift vessels. For Item 1, several carriers identified the number of mariners they employ.

Maritime Security Program. Labor reported that it is essential to maintain and consistently fund the Maritime Security Program, a program under which 60 militarily useful vessels sailing under the U.S. flag receive an annual stipend in exchange for their committed availability to the Government in times of war or national emergency.⁷ As part of this, the organizations recommended that Congress and the Administration make clear their support for the program in order to inject stability into the program, which is subject to annual appropriations and therefore may be subject to funding shortfalls or congressional budgetary and borrowing authority brinkmanship. ARC, Maersk, and Crowley also identified the importance of a strong Maritime Security Program. However, Maersk went a step further, and encouraged the development of "multi-year appropriations necessary for planning and capital investments that will ensure the U.S. Military and the entire U.S. maritime community have access to the most modern, capable, efficient, and safe oceangoing vessel and global intermodal networks."⁸ Additionally, Tote, Crowley, AMSEA, and American Maritime Officers separately suggested an increase of the Maritime Security Program fleet size, with three of these comments calling for a 100 vessel fleet. Notably, none of these vessel operators is currently contracted under the Maritime Security Program and Maersk, the largest

⁴ *Id.*

⁵ *Id.*

⁶ U.S. Maritime Administration, *Maritime Workforce Working Group Request for Public Input*, Dkt. No. MARAD-2017-0117, 82 Fed. Reg. 31,800 (July 10, 2017).

⁷ 46 U.S.C. Ch. 531.

⁸ Comment of Maersk Line, Limited (July 31, 2017), <https://www.regulations.gov/document?D=MARAD-2017-0117-0012>, Dkt. MARAD 2017-0117 (last visited October 23, 2017).

participant in the Maritime Security Program, did not call for expansion of the fleet. One reason may be that an expansion of the fleet would dilute the pool of government-impelled cargoes available to the vessels currently in the Program, and may require an increase in the per-vessel stipend in order to maintain commercial viability.

Government Cargo Preference. Labor and carriers also suggested strengthening ship-American or cargo preference rules requiring the shipment of government-impelled cargoes on U.S.-flag vessels. In connection with Item 2, *supra*, Crowley expressed some confusion with the question, but noted that requiring maritime academy graduates to fulfill certain positions will be moot to the extent there is insufficient cargo to sustain a commercially viable fleet. Similarly, ARC noted "More cargo will lead to more ships, which will in turn result in more mariners. This will largely determine whether State Academy or United States Merchant Marine Academy graduates should be assigned to or required to fulfill certain positions."⁹ The labor organizations and Maersk suggested that the Administration issue a directive to ensure that 100% of government-impelled cargo move on U.S.-flag ships, while Tote went a step further and suggested that the statute be amended to require 100% U.S.-flag carriage for civilian cargoes similar to the rule that currently exists for military cargoes, when such ships are available. Tote and AMSEA each suggested sustained or increased funding for the P.L. 480 Food for Peace international food aid program, an important source of flag preference cargoes. Commenters also suggested that MARAD be further empowered to better enforce existing cargo preference requirements.

Commercial Cargo Preference. Another group of proposals would attach flag requirements to certain commercial cargoes. The Crowley and labor comments endorsed the concept of entering into bilateral agreements with trading partners whereby a certain portion of trade between the contracting nations would be reserved for vessels flagged under their two registries. The labor comment expressly encourages Congress to give the Administration whatever additional authority

may be required for such agreements. A related proposal in the Tote, AMSEA, and labor comments would reserve a certain portion of U.S. energy exports, such as crude oil or liquefied natural gas, for U.S.-flag vessels, tracking earlier bills proposed by Congressman John Garamendi (D-CA).

MARAD and MSC Organic Assets. The labor organizations, AMSEA, and Tote also suggested changes to the crewing and operation of MARAD's Ready Reserve Force (RRF) vessels and MSC vessels. These vessels are owned by the Government but are technically managed by U.S. operators such as Crowley, Tote, and AMSEA, who in turn crew the vessels with civilian mariners. These vessels are kept in mothball "Reduced Operating Status" (ROS) when not in use and compose DOD's "organic" sealift, in contrast to the privately owned U.S.-flag vessels operated in commercial service and supported by the Maritime Security Program and cargo preference requirements. In its comment, AMSEA suggested restructuring the way in which these vessels are kept in ROS. They suggested crewing selected vessels that are in a lesser state of readiness with small maintenance crews; or alternatively removing the restriction on vacation levels of current ROS crews from one and a half days accrued monthly to the same levels of a fully operating vessel. AMSEA indicates that this change would increase the number of mariners due to the necessity of employing two full ROS crews per vessel rotating every four months as opposed to one crew with floating reliefs. Similarly, the labor comment suggested that MARAD increase readiness activations of the RRF and evolve to a system which includes full crews on RRF vessels as well as a true 2:1 manpower ratio for each billet. Lastly, Tote suggested that the MSC expand the range of vessels which are technically managed by private contractors employing civilian mariners, which it estimated could add 1,000 mariners while saving money for the Navy.

Jetsom. Commenters also tendered a potpourri of other suggestions for strengthening the mariner base. The labor comment suggested that Congress and the Administration affirm their support for the U.S. cabotage law, usually referred to as the Jones Act. ARC encouraged MARAD, the Coast Guard, and DOD to expedite the "military to mariner" program, which helps move veterans into credentialed mariner positions. Moreover, the labor groups suggested that Congress increase infrastructure investment for maritime trade, and end the double taxation of domestic waterborne

⁹ Comment of American Roll-On Roll-Off Carrier Group (July 31, 2017), <https://www.regulations.gov/document?D=MARAD-2017-0117-0010>, Dkt. MARAD 2017-0117 (*last visited October 23, 2017*).

commerce under the Harbor Maintenance Tax.¹⁰ Finally, the State maritime academies used the opportunity to comment that their ability to produce sufficient mariners is threatened by their ageing training ships, which are currently the center of an effort on the Hill to recapitalize with new multi-mission vessels useful for activation in times of war or national emergency.

The requirements of the National Defense Authorization Act reflect growing alarm among legislators and the DOD regarding the mariner shortage and national defense sealift adequacy. Almost of all of the proposals set forth in the comments would come with a price tag attached, at a time when budgets are tight and the Budget Control Act¹¹ remains in full force and effect. Therefore, as is so often the case, the first step is a report. In the past, the Government Accountability Office and staff on Capitol Hill have expressed some concern with the firmness of data from MARAD regarding mariner numbers. Therefore, the Congress apparently wants to get a solid handle on the number of mariners currently available, and how those numbers stack up against DOD requirements in order to gauge the medicine required, if any. The findings will be important because they may determine whether any of these initiatives, or other new creative initiatives originating within Government, get the green light and related funding. The situation deserves close watching because there will be opportunities for the industry if a shortfall is found and if resources are brought to bear on the problem—otherwise continued atrophy may lie ahead.

Storms in Puerto Rico

As most are aware by now, following the tragic landfall of Hurricane Maria in Puerto Rico the Trump Administration faced extraordinary pressure to waive the coastwise laws of the United States, typically referred to as the Jones Act,¹² as they apply to the Commonwealth of Puerto Rico. The Administration initially expressed resistance to any waiver of the Act, but then on September 28, 2017, the Department of Homeland Security issued a 10-day waiver of the Act for Puerto Rico citing the need to assist the Commonwealth's

recovery from the storm's damage.¹³ By statute, the Jones Act may only be waived in very limited circumstances required by national defense.¹⁴ There are two avenues for achieving the waiver: Section 501(a) requests by the Secretary of Defense, in which case Homeland Security "shall waive compliance with those laws," and Section 501(b) requests by the head of an agency, which requires determinations by the U.S. Maritime Administration regarding the availability of U.S.-flag vessels, notice to the Secretary of Transportation and the head of the requesting agency, and public notice. The 501(a) request by the Defense Department is generally the "hotline" to a waiver, and that was the process invoked for the Hurricane Maria waiver. Consequently, none of the 501(b) checks and balances regarding the need for the waiver were performed. While the statutory exemption is explicitly limited to national defense in both cases, in practice waivers have been granted with increasing frequency to permit relief from hurricanes, including Katrina, Rita, Sandy, and Irma, although the Maria waiver is the first such short-term waiver which has been expanded to cover all merchandise, not just fuel.

As the maelstrom surrounding the waiver unfolded, members of the Jones Act community gathered for the TradeWinds Jones Act Shipping Forum 2017 in Washington, D.C. Arriving for his morning speech, newly confirmed U.S. Maritime Administrator Admiral Mark "Buz" Buzby discussed the unfolding situation, which continues to evolve as of this writing. The Jones Act U.S.-flag carriers continue to perform admirably and to supply appropriate service to the island, but already the Port of San Juan is strained to capacity, with an "iron mountain" of containers and relief supplies built up in the Port. Fuel shipments, which come to the Commonwealth primarily from non-U.S. destinations, were by and large outside the restrictions of the Act, which only applies to movements between U.S. ports. By most accounts, there was little if any need for a waiver of the Act, since vessel capacity remains sufficient and, indeed, in excess of what the internal logistics and distribution networks of the Commonwealth are capable of accommodating.

¹⁰ The comment indicates that the Harbor Maintenance Tax, as applied, discourages coastwise U.S.-flag vessel operations because the tax may be applied to cargo upon arrival and again following transshipment and delivery to a second port.

¹¹ Pub. L. No. 112-25, 125 Stat. 240 (2011).

¹² 46 U.S.C. § 55102.

¹³ Elaine C. Duke, Acting Secretary, Department of Homeland Security, *Department of Homeland Security: Waiver of Compliance with Navigation Laws*, September 28, 2017, https://www.dhs.gov/sites/default/files/publications/17_0928_AS1_Jones-Act-Waiver.pdf (last visited October 23, 2017).

¹⁴ 46 U.S.C. § 501.

Nevertheless, calls for continued waiver, or outright repeal, of the Jones Act with respect to Puerto Rico continue to reverberate in Washington. A group of 22 Democratic Representatives, many from urban areas with significant Puerto Rican populations on the mainland, joined together behind a bill introduced by Rep. Grace Meng (D-NY) which would permit Section 501(b) waivers for "humanitarian relief efforts" in addition to national defense.¹⁵ Such a change would appear to align the statutory language with the realities of the application of Section 501 and, indeed, may corral humanitarian relief waivers into the 501(b) process and out of the 501(a) hotline waiver process. Senator John McCain (R-AZ), a longtime opponent of the Jones Act, introduced a bill to exempt Puerto Rico from the Jones Act, joined by cosponsors Senator Mike Lee (R-UT), Senator James Lankford (R-OK), and Senator Jeff Flake (R-AZ).¹⁶ Congressman Espaillat (D-NY), took to the floor of the House and called for an extension of the Puerto Rico general merchandise waiver for a year, and

for a permanent exemption from the Jones Act for fuel shipments to the island.¹⁷ Subsequently, the House Transportation and Infrastructure Committee, Subcommittee on Coast Guard and Maritime Transportation, held a hearing on October 3, 2017, wherein industry witnesses testified regarding the sufficiency of U.S.-flag service for Puerto Rico, by and large rebutting many of the charges against the Jones Act.¹⁸ The outcome of the hurricane-induced storm swirling around the Jones Act remains to be seen. However, the Jones Act community enjoys strong support in Congress and has consistently been able to weather these kinds of events without sustaining any lasting damage.

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¹⁵ H.R. 3582, 115th Cong. (2017). Cosponsors include Representatives Velazquez (D-NY), Serrano (D-NY), Soto (D-FL), Gutierrez (D-IL), McGovern (D-MA), Clay (D-MO), Lewis (D-GA), Espaillat (D-NY), Lieu (D-CA), Suozzi (D-NY), Hastings (D-FL), Hanabusa (D-HI), Norton (D-DC), Lee (D-TX), Castor (D-FL), Rush (D-IL), Raskin (D-MD), Waters (D-CA), Wasserman Schultz (D-FL), Crowley (D-NY), and Evans (D-PA).

¹⁶ S. 1894, 115th Cong. (2017).

¹⁷ 163 Cong. Reg. 158, H7677 (daily ed. Oct. 3, 2017).

¹⁸ *Building a 21st Century Infrastructure for America: Coast Guard Stakeholders' Perspectives and Jones Act Fleet Capabilities*, 115th Cong. (2017), <https://transportation.house.gov/calendar/eventsingle.aspx?EventID=401913> (last visited October 23, 2017).