

# BENEDICT'S MARITIME BULLETIN

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## THE NORTHWEST PASSAGE AND THE US-CANADA DISPUTE ON ITS LEGAL STATUS

By Ilker K. Basaran \*

### Introduction

Since the cold war, there has been and continues to be a disagreement between Canada and the U.S. on the status of the Northwest Passage (NWP). Canada claims that the waters of the Arctic Archipelago are internal, historic waters; however, the U.S. contests this claim and accepts the sea route as an international strait. Through careful diplomacy, the two states set aside this difference with an "agree to disagree" arrangement and continued their usual friendly relationship. However, with the Trump presidency and non-compromising "America First" approach, this old dispute resurfaced, and Canada's sovereignty rights have been "publicly" questioned.

### Definition of the NWP

The NWP is the name given to a set of maritime routes between the Atlantic transportation corridor channeled through islands occupying broad expanses of water and along the mainland coast, covering about 80 degrees of ocean and land territories.<sup>1</sup> The archipelago is one of the largest in the world and consists of a labyrinth of islands

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<sup>1</sup> Østreng et al.; "Shipping in Arctic Waters: A Comparison of the Northeast, Northwest and Trans Polar Passages," Springer Heidelberg, (2013), p.13.

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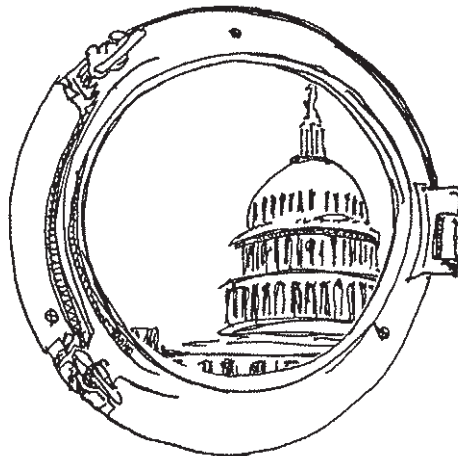
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## WINDOW ON WASHINGTON



### ICE, WIND, AND FIRE

Bryant E. Gardner\*

#### *Revisiting the Arctic*

Over the last decade, the U.S. Federal Government has become keenly aware of the need to develop maritime infrastructure in the U.S. Arctic. Temperatures rising faster than elsewhere in the world have correlated to decreased sea ice, longer summer navigational seasons, opportunities for new commercial navigation across the Northern Sea Route and the Northwest Passage, energy and mineral extraction opportunities, and more frequent presence by America's peer or near-peer competitors—particularly Russia and China. The United States Committee on the Maritime Transportation System, composed of representatives from numerous Federal agencies and required by statute, estimates a 500% increase in Bering Strait traffic by 2025.<sup>1</sup> So far, however, the Government has been hesitant to invest in costly infrastructure necessary to safely access

Arctic waters. This stems in part from a “chicken and egg” scenario in which users are unwilling to venture to the Arctic without infrastructure support, and Governments are unwilling to invest in infrastructure without sufficient user traffic to justify the investment. Climate change politics have at times intruded into the debate and distracted from a clear-eyed response to changing conditions. When former Commandant of the Coast Guard Admiral Thad Allen (ret.) was once asked for his opinion on global warming while testifying before Congress, he deftly responded that there was water where there didn't used to be and he was responsible for it.<sup>2</sup>

The shortcomings of America's Arctic capabilities are far and many, the most famous and tangible of which is icebreaking capability. The United States currently has one functional heavy polar ice breaker, the CGC POLAR STAR commissioned in 1976, and one medium icebreaker, the CGC HEALY commissioned in 2000. In April 2019, the Coast Guard announced award of a contract to build the first new

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<sup>1</sup> *Maritime Infrastructure in the Arctic, Hearing Before the H. Comm. on Transp. & Infrastructure, Subcomm. on Coast Guard and Maritime Transp.* 116<sup>th</sup> Cong. (May 8, 2019) (testimony of Adm. Charles B. Ray, Coast Guard Vice Commandant) (hereinafter “Ray Testimony”).

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<sup>2</sup> *Maritime Infrastructure in the Arctic, Hearing Before the H. Comm. on Transp. & Infrastructure, Subcomm. on Coast Guard and Maritime Transp.* 116<sup>th</sup> Cong. (May 8, 2019) (testimony of Adm. Thad Allen, U.S.C.G. (ret.)).

heavy icebreaker in over 45 years, with delivery planned in 2024. The Coast Guard estimates it needs at least six new icebreakers to be able to sufficiently project presence in the Arctic and execute the annual breakout of the National Science Foundation Station at McMurdo in Antarctica.<sup>3</sup> Although it is the only Federal surface presence in the Arctic region, the service has not had a year-round presence north of the Aleutians since 2008.<sup>4</sup>

Navigational aids in the Arctic, both physical and digital, are insufficient. Although half of American Arctic waters are classified as navigationally significant (approximately 242,000 square miles), only about 4300 square miles, or less than 2%, have been surveyed with modern multibeam technology. Waters have been surveyed mostly with obsolete technology, some of it dating to the 17<sup>th</sup> century, and ice losses have resulted in increased erosion and shifting shorelines presenting further challenges to reliance upon dated surveys.<sup>5</sup> In some places, elevations relative to sea level can be off more than a meter in the Arctic, whereas centimeter-level accuracy is the norm in the rest of the country.<sup>6</sup> And the National Oceanic and Atmospheric Administration's two 48-year old survey vessels are not capable of catching up.<sup>7</sup> Similarly, communications are limited by the lack of infrastructure, both surface infrastructure and dedicated satellite coverage. While the Coast Guard is making progress negotiating a memorandum of understanding with the Defense Department to access reliable satellite communications north of the 85<sup>th</sup> parallel, it remains constrained by line of sight HF communications, as does industry.<sup>8</sup> Currently, there is only one deep water port in the U.S. Arctic—Port Clarence—although the U.S. Army Corps of Engineers is focused upon deepening and other channel solutions for the port at Nome, which is only 22 feet deep.<sup>9</sup>

When *Window on Washington* last examined this topic in 2013, it appeared that petroleum exploration and development would lead the way into the Arctic. That was then and this is now. The growth of new onshore sources of oil in the lower 48 associated with hydraulic fracturing and other innovative techniques have put cost pressure on offshore development, and that is particularly true in the Arctic where the environment makes operations more challenging and costlier. After a series of announcements suspending Arctic exploration in 2015, the hiatus now appears indefinite. Instead, interest in developing an Arctic presence is now increasingly focused upon catching up with and countering Chinese and Russian activities in the region.

Both Russia and China have declared the Arctic a strategic priority and have begun investing and operating there accordingly. Twenty percent of Russia's landmass is north of the Arctic circle, and it is advancing the growth of its Northern Sea Route, funded by a \$500,000 per vessel transit tariff.<sup>10</sup> The Northern Sea Route reached a new record with 9.7 million tons of goods transported last year, and Russia forecasts a ten-fold increase by 2030.<sup>11</sup> Furthermore, the Russian government is rebuilding and expanding Arctic military installations that had previously fallen into disuse, including air bases and ports, and investing in Arctic tailored weapons systems, domain awareness tools, troop deployments, and search and rescue assets.<sup>12</sup> Russia also has the world's largest icebreaker fleet of approximately 50 vessels, including four operational nuclear-powered heavy polar class ice breakers. Russia has the ability to operate in the Arctic year-round and to surge when needed. China, although it lacks territory in the Arctic, has declared itself a "near Arctic" nation and has developed installations in Svalbard, Norway, and Iceland, and has launched two icebreakers that it operates aggressively in Arctic waters conducting research and exploration into Arctic resources and opportunities for their exploitation.<sup>13</sup>

<sup>3</sup> Ray Testimony.

<sup>4</sup> *Maritime Infrastructure in the Arctic, Hearing Before the H. Comm. on Transp. & Infrastructure, Subcomm. on Coast Guard and Maritime Transp.* 116<sup>th</sup> Cong. (May 8, 2019) (Statement of Ranking Member Bob Gibbs (R-OH)).

<sup>5</sup> U.S. Committee on the Marine Transportation System, *A Ten-Year Prioritization of Infrastructure Needs in the U.S. Arctic* 37 (April 15, 2016).

<sup>6</sup> *Id.* at 32.

<sup>7</sup> *Id.* at 38.

<sup>8</sup> Ray Testimony.

<sup>9</sup> Ray Testimony.

<sup>10</sup> *Maritime Infrastructure in the Arctic, Hearing Before the H. Comm. on Transp. & Infrastructure, Subcomm. on Coast Guard and Maritime Transp.* 116<sup>th</sup> Cong. (May 8, 2019) (testimony of Mead Treadwell, Co-Chair, Polar Institute, Woodrow Wilson Center) (hereinafter "Treadwell Testimony").

<sup>11</sup> Ray Testimony.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

So what is the path forward? Recent studies by the Council of Foreign Relations,<sup>14</sup> the Committee on the Maritime Transportation System, and hearings among Government and non-governmental experts testifying before Congress in May 2019 reflect a broad consensus. First, America needs to develop its icebreaker capacity, at least to the six-vessel minimum established by the Coast Guard, and that appears to be underway with one contract in motion and preliminary work authorized for the next two. Second, the experts agree that the United States needs to spend more time engaging meaningfully to develop cooperative approaches with other Arctic nations and to ratify the United Nations Convention on the Law of the Sea to ensure America's seat at the table and protect its share of Arctic seabed and other resources. Third, the country needs to develop infrastructure, including safe harbor ports, a deepwater port, navigational aids, search and rescue capability, energy supply, and telecommunications. Yet, budgets are tight and some have voiced concern that U.S. taxpayers should not be footing the bill to get Pacific rim manufactures to European consumers.

One possible path forward toward Arctic infrastructure is the "Shipping and Environmental Leadership" or "SEAL" Act, which would create an "Arctic Seaway Development Corporation" modeled on the St. Lawrence Seaway Development Corporation to develop a dedicated source of funding for maritime infrastructure in the Arctic.<sup>15</sup> Recognizing that the Russians have unilaterally established a funding and tolling mechanism to improve the Northern Sea Route, that receding ice may produce ice-free winters in the Arctic by the 2030s, increasing Bering Strait traffic, the potential for Arctic shipping to reduce Europe-Asia transits by 40% and a week's time, and the need for infrastructure, the Corporation would be funded by "reasonable" vessel tolls and administered through an international, cooperative, U.S.-led approach. The Board of the corporation would include the U.S. Secretaries of Transportation, State, and Homeland Security, the National Oceanic and Atmospheric Administrator, and four Alaska appointees including a representative of the State government, a representative of the Alaska

business community, a representative of the Alaska coastal and subsistence communities, and a representative of Alaska labor. In addition to collecting revenue through tolls, the Corporation would be able to get started immediately with bonds drawn upon the U.S. Treasury. The Secretary of State would be charged with facilitating international engagement through the Arctic council and the Corporation would have the discretion to waive fees and tolls as necessary to secure international cooperation.

The mandate of the Arctic Seaway Development Corporation would be broad. The Act tasks it with developing infrastructure to include places of refuge, aids to navigation and charting, deep water port facilities, vessel traffic management systems, commercial bunkering facilities, search and rescue services, and of course, icebreaker services. Additionally, the Corporation would be responsible for maintaining relationships with East and West Coast ports serving the Arctic trade and "establishing strong ties among United States residents of the Arctic region, Arctic shippers, and the maritime insurance industry by creating a system of maritime transportation in the Arctic that prevents loss of life, vessels, and cargo, and increases reliability of shipping in the Arctic."<sup>16</sup> While the SEAL Act seems a reasonable way to break the "chicken and egg" impasse to developing Arctic infrastructure, the willingness of other Arctic nations to cooperate and accept U.S. leadership remains unknown and could present a stumbling block to successful implementation, should the bills get legs on Capitol Hill later this year.

### *Developing Tomorrow's U.S. Offshore Wind Workforce*

With the Democratic takeover of the House of Representatives in January 2019, issues such as renewable energy and jobs programs figure more prominently on the congressional agenda. At the outset of the 116<sup>th</sup> Congress, for example, the new majority established the House Select Committee on Climate Crisis, preceded by the House Select Committee on Energy Independence and Global Warming which was not renewed by the Republicans when they regained control of the House in the 112<sup>th</sup> Congress. Testifying before the Committee in June 2019, the President of the American Wind Energy Association reported that wind's costs have fallen by 69% since 2009, making it the cheapest

<sup>14</sup> Council on Foreign Relations, Arctic Imperatives: Reinforcing U.S. Strategy on America's Fourth Coast (2016).

<sup>15</sup> S. 1177, 116<sup>th</sup> Cong (Introduced April 11, 2019, by Sen. Murkowski (R-AK) and cosponsored by Sen. Sullivan (R-AK) and Sen. King (I-ME)); H.R. 3020, 116<sup>th</sup> Cong. (Introduced May 23, 2019, by Rep. Young (R-AK)).

<sup>16</sup> *Id.* § 6(7).

source of new generating capacity in many parts of the country.<sup>17</sup> And experts have opined that a key advantage of offshore wind is that it tends not to spark the NIMBY opposition encountered by many visible onshore facilities, while still being situated close to major population centers and energy consumers.

Offshore wind development appears to be on a roll. Offshore wind leases are selling at auction for bigger numbers to more established, sophisticated energy concerns, including experienced European developers and partnerships with multinational energy companies. There are currently 12 active commercial leases for offshore wind in the U.S., capable of supporting 15 gigawatts if fully built out.<sup>18</sup> To date, much of the impetus for offshore development has come from coastal states, particularly in the North East, setting renewable energy targets, but many in Congress are interested and looking for ways to get involved, especially among the Mid-Atlantic and North Eastern delegations, with particular focus in Massachusetts.

In June 2019, Senator Ed Markey (D-MA) in the Senate and Bill Keating in the House (D-MA) introduced slightly different versions of the "Offshore Wind Jobs and Opportunity Act."<sup>19</sup> The Act would authorize up to \$25 million annually in job training grants for the offshore wind sector, with no single grant to exceed \$2.5 million and 25% of funds reserved for community colleges. Priority for awards would be given to partnerships between institutes of higher education and labor, entities that have entered into agreements with offshore wind industry employers, applicants in economically disadvantaged areas, and applicants focusing on designated classes including veterans, workers displaced from non-renewable energy, etc.<sup>20</sup> Under the Senate bill, grants would need to be awarded with "reasonable geographic distribution," but without the requirement to award grants equally among different regions of the

country. The House bill would require the Secretary of Interior to establish guidelines for the grant program in consultation with industry within 240 days, whereas the Senate bill allows one year.

On June 11, 2019, the House Natural Resources Committee, Subcommittee on Energy and Natural Resources, held a hearing on the Act, featuring witnesses from academia, the BlueGreen Alliance (a labor-environmental alliance), and the offshore wind industry.<sup>21</sup> Witnesses highlighted offshore wind's soaring potential, indicating that with just 1% of the nation's offshore capacity, we could power 6.5 million homes, and the United States is expected to harness 18.6 gigawatts of offshore wind power within the next decade.<sup>22</sup> Translating this into economic activity for the region, the witness from the University of Delaware's Special Initiative on Offshore Wind (SLOW) indicated that this would result in the procurement, installation, and manufacturing of 1,700 wind turbines, 1,750 foundations, 16 substations, and 5,000 miles of cable.<sup>23</sup> For reference, just 8 gigawatts of power generation has been estimated to create and support almost 40,000 full-time U.S. jobs by 2028, or 500,000 job years over the 25-year life-span of the wind farms.<sup>24</sup>

Currently, there appears to be some perceived ambiguity as to whether U.S. cabotage law, usually referred to as the Jones Act, will be construed to apply to offshore wind installations. On June 3, 2019, the Offshore Marine Service Association, which has historically advocated for Jones Act application to the offshore petroleum development industry, announced the formation of a Wind Committee focusing specifically upon the application of cabotage to wind farms. Historically, with offshore hydrocarbon extraction, specialty installation

<sup>17</sup> *Ramping Up Renewables, Hearing Before the House Select Climate Crisis Committee* (June 13, 2019) (Testimony of Tom Kiernan, President and CEO of the American Wind Energy Association).

<sup>18</sup> American Wind Energy Association, <https://www.awea.org/policy-and-issues/u-s-offshore-wind>.

<sup>19</sup> S. 1769, 116<sup>th</sup> Cong. (2019); H.R. 3068, 116<sup>th</sup> Cong. (2019). Senators Collins (R-ME) and Carper (D-DE) and Representatives Kennedy (D-MA), Lowenthal (D-CA), Norcross (D-NJ), and McEachin (D-VA) cosponsored the bills at introduction.

<sup>20</sup> The House and Senate bills differ slightly on the classes of individuals to be granted priority status.

<sup>21</sup> *Building a 21<sup>st</sup> Century American Offshore Wind Workforce: Hearing on H.R. 3068 Before the House Natural Resources Comm., Subcomm. on Energy & Mineral Res.*, 116<sup>th</sup> Cong. (June 11, 2019).

<sup>22</sup> *Building a 21<sup>st</sup> Century American Offshore Wind Workforce: Hearing on H.R. 3068 Before the House Natural Resources Comm., Subcomm. on Energy & Mineral Res.*, 116<sup>th</sup> Cong. (June 11, 2019) (Testimony of Michael Williams, Interim Co-Executive Director, BlueGreen Alliance).

<sup>23</sup> *Building a 21<sup>st</sup> Century American Offshore Wind Workforce: Hearing on H.R. 3068 Before the House Natural Resources Comm., Subcomm. on Energy & Mineral Res.*, 116<sup>th</sup> Cong. (June 11, 2019) (Testimony of Stephanie McClellan, Director, Special Initiative on Offshore Wind, University of Delaware College of Earth, Ocean and Environment).

<sup>24</sup> *Id.*

vessels built overseas and operated under foreign flags have performed construction and installation operations, supported by coastwise qualified U.S.-flag supply vessels for the movement of merchandise between offshore installations, deemed coastwise points under provisions of the Outer Continental Shelf Lands Act,<sup>25</sup> and shoreside terminals. And, it seems, most operators are cautiously assuming that offshore wind may be held to the same rules. This year's National Defense

Authorization Act bill includes a requirement that the Secretaries of Transportation, Energy, and Interior prepare a report on the need for vessels to install, operate, and maintain offshore energy infrastructure, including offshore wind energy.<sup>26</sup> If it turns out that wind related offshore installations are not coastwise points requiring the use of U.S.-flag vessels, there will be some fireworks worth watching.

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<sup>25</sup> 43 U.S.C. § 1333.

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<sup>26</sup> S. 1790, 116<sup>th</sup> Cong. (2019).