

FISCAL YEAR 2007 COAST GUARD AUTHORIZING LEGISLATION

(109-81)

HEARING

BEFORE THE
SUBCOMMITTEE ON
COAST GUARD AND MARITIME TRANSPORTATION
OF THE
COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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FISCAL YEAR 2007 COAST GUARD AUTHORIZING LEGISLATION

Tuesday, June 20, 2006

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COAST
GUARD AND MARITIME TRANSPORTATION, COMMITTEE
ON TRANSPORTATION AND INFRASTRUCTURE, WASHING-
TON, D.C.

The subcommittee met, pursuant to call, at 2:35 p.m., in Room 2167, Rayburn House Office Building, Hon. Frank A. LoBiondo [Chairman of the subcommittee] Presiding.

Mr. LOBIONDO. The Subcommittee on Coast Guard and Maritime Transportation will come to order. Today the subcommittee is meeting to review the discussion draft of the Coast Guard Authorization Act of 2006, but we are very pleased that the Chairman of the full committee, Chairman Young, is here; and I am going to defer an opening statement to allow Chairman Young to have this time.

Mr. Chairman.

Mr. YOUNG. I thank you and I do apologize to my good Coast Guard people who are sitting at the table, but I have an opening statement and I will have to leave.

I want to thank you, Mr. Chairman for having this important hearing of the Reauthorization Act of 2006. And for those in the room, we will finish 2005 sometime, hopefully, this week or next week. This is a constant battle but we will get it done. But I think it is vitally important we go forward with 2006. This bill does provide a funding level that will give the Coast Guard the resources it needs to carry out what we have charged them with, not only in its traditional missions but its new homeland security missions.

As we saw last summer, the Coast Guard provides vital services. We all know that. I am extremely pleased with what they have been able to do in Alaska, and I am very pleased to say that we will continue that effort.

The second panel—and this is one thing I am very interested in discussing, whether to set limits on the currently open-ended penalty for incorrect payment of seamen's wages.

I would like to say one thing that the witnesses will be testifying, and I know what they will be testifying to because actually I read part of it. This wage statute was first passed in 1790. It was last admitted in 1915. In 1790 it was only 12 years after Captain Cook explored much of my home State for the first time. In 1790 the voyages could last for years; and once a vessel was gone from port, remedies against the owner were impossible to enforce. Therefore,

a severe and immediate and flexible penalty was more than warranted.

In 1915, only 3 years after the Titanic sank in the frigid North Atlantic, sending 1,523 passengers and crew to their deaths, given the communications technology available in the second half of the 18th century, it was years after Captain Cook's voyages ended that the world learned of his discoveries. Only after the publications of his journals did they find out.

For those in the room who are under 30, it may be a shock today that Captain Cook neither blogged nor glogged nor Podcast from his flagship, the Endeavor. Likewise, had communication technologies available today been available in 1912, rescue vessels would have likely arrived to save virtually those all that perished on the Titanic.

So my question to the witnesses would be: In light of the communication revolution that has occurred in the total global climate—I say "total" because even India has better communication than we do in many areas, as well as Indonesia and, as well as of course, China—the ability to track vessels and their corporate owners and the ease of travel around the world, I think it is possible to update a law that was first passed before Nelson defeated Napoleon at Trafalgar to reflect the technology available to today's seaman.

So for the second panel I hope that you address that issue because, Mr. Chairman, it is crucially important that although some will say this is to protect the seamen—and I understand that, I want to protect the seamen because I am a licensed mariner and I will continue to do that—but there is a possibility that this law should be revived and studied and, to the extent revived, to allow I believe a proper solution to a very serious problem.

I have done a little research and I think we have one case where there was a technical error of payment to a seamen of \$20, but it compounded over approximately 10 years and for some reason it was not disclosed, and it ended up being a \$400,000 or better penalty against the owners, which they never realized was \$20. And for you trial lawyers in the room, shame on you. This was not the intent of the law. It was to protect the vessels, owners, and the seamen, not to be used as a tool by a group of trial lawyers to make money. And that is how it is being used today.

Mr. Chairman, I am advising you that it is my intent that I am trying to make sure that this is adjusted and made more reliable in today's modern communications so that we will have a "yes" in an attempt to protect the seamen, but not be taken advantage of or advantage of the owner of vessel.

Mr. Chairman, I yield back the balance of my time.

Mr. LOBIONDO. Thank you, Chairman Young.

I ask unanimous consent that Mrs. Kelly be allowed to sit as part of this committee for this hearing today. So ordered.

Again, the subcommittee is here to review a discussion draft of the Coast Guard Authorization Act of 2006.

This hearing will give all the members of the subcommittee an opportunity to consider the authorized funding levels and the legislative language that is included in this draft bill. The draft bill would authorize nearly \$8.3 billion in funding for the Coast

Guard's fiscal year 2007. This authorization includes funding to support each of the Coast Guard's important missions.

For purposes of the discussion, the draft bill would authorize \$1.1 billion for the Coast Guard's integrated deepwater program. Deepwater will result in the complete recapitalization of the Coast Guard's vessels, aircraft, and associated communications and control systems. Because the Coast Guard has been tasked with increased responsibilities following September 11, the service's legacy fleet of vessels and aircraft are deteriorating at an alarming rate. As I have in previous years, I intend to support an increase in the authorized funding level for the deepwater program as this bill moves forward. Additional funding is necessary to accelerate the production of new deepwater assets and to sustain the service's existing legacy assets.

I cannot overestimate my concern with the pace of the deepwater program. Each day the men and women of the Coast Guard are faced with the possibility of a major asset failure that puts the safety of the personnel and the success of their missions in jeopardy. I am particularly concerned about the service's 110-foot patrol boat class which continues to suffer from hull breaches and unexpected maintenance needs. First, the Coast Guard planned to convert the remaining 100-foot patrol boats by lengthening the hulls and improving the electronic and communication systems that have become outdated. Following construction, however, the Coast Guard realized that the 123-foot converted boats were plagued with design programs and, as a result, the conversion program has been terminated.

To address the increasing gap in patrol boat readiness, the Coast Guard then proposed to accelerate construction of the Fast Response Cutter. Just a few months ago, however, the Coast Guard postponed construction and acquisition of the Fast Response Cutter due to concerns about the vessel's proposed design.

I am deeply concerned by these problems and, as a result, I would urge the Coast Guard to move quickly to identify an available design to replace the 110-foot patrol boat class. We must complete this program with all deliberate speed. I urge my colleagues to support funding levels that will not only allow the Coast Guard to acquire the assets they need, but would allow the program to be accelerated and brought on line over the next 15 years rather than the 25 years of the revised plan.

In addition to the authorization of the fiscal year 2007 funding, the draft bill proposes to make several amendments to current law. For example, the bill contains a proposal that would amend the Maritime Drug Law Enforcement Act to establish a civil penalty for individuals who possess personal use quantities of narcotics on a vessel or at a maritime facility. Drug use on vessels can have a deadly consequence, and this provision will give the Coast Guard another tool to help keep our waterways safe.

This hearing on the draft bill is the first step in the process to develop a bill that takes a balanced approach to providing the resources and authorities necessary to support each of the Coast Guard's many and varied missions.

I want to take this time to again commend the men and women of the Coast Guard for their hard work and self-sacrifice. I want

to thank the witnesses for being here this afternoon. We look forward to their testimony.

Now I turn to Mr. Filner.

Mr. FILNER. Thank you, Mr. Chairman, and thank you for this hearing today. I know you are trying to mark up the legislation this week, and the full committee soon after that. So we have a lot of things to work out.

The seamen's wage penalty statute—because, as the Chairman stated, it was enacted in the very first Congress in 1790. I asked the staff if the Chairman was here for that.

Mr. LOBIONDO. I think Mr. Oberstar was.

Mr. FILNER. LoBiondo, you are getting better over the years.

Mr. LOBIONDO. Work with me.

Mr. FILNER. It is my understanding that in 2003, Royal Caribbean Cruises—oh, right on schedule.

Mr. LOBIONDO. We were just praising you, Mr. Oberstar.

Mr. OBERSTAR. I thought so.

Mr. FILNER. Your ears were burning. We wanted to get some personal testimony on the first Congress as it passed the seamen's wage penalty statute, so I know you will do that for us.

Mr. OBERSTAR. I was probably there.

Mr. FILNER. It is my understanding that in 2003 Royal Caribbean Cruises reached a settlement agreement for unpaid overtime wage claims for over \$18 million, and a few years later Norwegian Cruise Lines reached a settlement agreement for similar unpaid wage claims for approximately \$25 million. Now it seems that the cruise lines are seeking to have the Wage Penalty Act changed to decrease the chances of them ever being penalized if they fail to pay the wages due without sufficient cause.

So I am looking forward to today's hearing. It is unfortunate that the cruise line industry is not participating in these hearings so that the subcommittee can get the information it needs before deciding on whether or not to change this statute.

Thank you, Mr. Chairman for scheduling this hearing. I look forward to working with you.

Mr. LOBIONDO. Thank you.

Mr. Simmons.

Mr. SIMMONS. Thank you, Mr. Chairman. I have reviewed the document that we are discussing here today. I am particularly interested in the provision on the possible movement of the Coast Guard Band and the 180-day notice which I think is very appropriate. I know that members of the band live very happily in my district, and the idea that we move the band to some other location would be a matter of concern to them. So I think it is important that we provide those individuals with that protection.

I am also very interested in section 401 which authorizes \$3 million to improve the boarding team communications. That has been an issue that has been under review by the Coast Guard R&D Center. They have some very interesting new protections, new technology which helps protect our "coasties" as they board vessels. And I think that is a very positive development.

Mr. Chairman, I do intend tomorrow to offer an amendment on the issue that has occupied the attention of the Coast Guard Academy, the issue of sexual harassment and violence. What I intend

to do is offer an amendment that would require the Coast Guard Academy to adhere to the same requirements that apply to other service academies.

I would be interested if our witness has any comments on that, but I feel it is appropriate that the service academies have a uniform approach to this important issue, which is why I would be interested in conforming the Coast Guard Academy to the other service academies on this subject. That being said, Mr. Chairman, I yield back the balance of my time.

Mr. LOBIONDO. Thank you Mr. Simmons.

Mr. Oberstar, thank you for joining us.

Mr. OBERSTAR. Well, it is always a pleasure to be with you, Mr. Chairman. And I appreciate the cooperation of the full committee chairman, Mr. Young, and you in scheduling this hearing after the issue—one of the key issues, but the fundamental issue of this markup hearing today and the markup to follow is that of seamen's wages. And at the time, I said we had not had hearings on the matter, we ought to explore the issue in full open committee hearing. We will have that opportunity today; although I note—with Mr. Filner—with regret that the cruise lines are not here since they are the principal focus of concern.

There are a number of issues that I will want to explore with witnesses. First is a proposal to change the penalty as it applies to foreign flag cruise ships operating out of U.S. Ports, requiring the seafarer to prove that the employer did not have sufficient cause to pay him. I think that could be a very serious, even insurmountable obstacle.

To notify an employer of errors in the paycheck within 180 days—180 days might seem to be a reasonable amount of time, but when you have language barriers, when you have displacement circumstances, and the person does not have all the facts at hand, it becomes very difficult to obtain the information with which the seafarer must make his case.

Allowing—sort of allowing in quotes, the seamen to pay for his own health insurance. Courts have held that the vessel owner is liable to pay for maintenance and cure in the quaint ancient term of art.

Authorizing pay to be electronically deposited. That is something we can discuss on how that will be accomplished and what way will it be done. I think that is a matter that probably can be worked out. But of concern to me is that the proposal to let the vessel owner have 4 days after the seaman is discharged to pay what he has earned, even though the person may well be in some god-forsaken country far from our shores and far from that vessel by the time those 4 days are up.

How do you obtain justice? It virtually eliminates the possibility of class action suit in this discussion draft, and it allows ship-owners who intentionally defraud a seaman of his wages to avoid paying them, even if the seaman does not catch up with that fraud within 30 days after discharge.

Now it can be argued, as some have, that this set of laws under which ships operate today was written in an earlier era. Well, it was written 220 years ago. But many of the circumstances have not changed greatly from the time of sailing vessels and wooden

hulls. So I just want to see what justification there is for these changes, and, more importantly, what the consequences are for the person, for the individual. Even though circumstances have changed greatly, ships are fast, iron hulls, steel hulls and electronics and all the rest, you still have operators who are not playing it straight. And in the end, I know from my recollection of miners working in the underground iron ore mines, they were exploited until we had a union. And only with the union were we able to get justice.

And before we change a law that has operated for a very long time in the favor of the worker who makes the vessel possible, we have to be very, very sure that we are doing the right thing for the one who puts himself at risk.

Thank you, Mr. Chairman.

Mr. LOBIONDO. Thank you, Mr. Oberstar.

Mr. Diaz-Balart, do you have any opening statement?

Mr. DIAZ-BALART. No, thank you.

Mr. LOBIONDO. Mr. Fortuño.

Mr. FORTUÑO. No.

Mr. LOBIONDO. Mr. Baird.

Mr. BAIRD. I just have a very brief opening statement, but really on more of a personal matter. Two weeks ago one of my staff members lost her son in a boating accident off the coast of California, and I just want to thank the Coast Guard for their prompt response, professionalism. They cared for the family, and you folks did everything you could to save this young man, and I am extremely grateful and I want to express that on behalf of my staff and their family. Thank you.

Mr. LOBIONDO. Mrs. Kelly.

Mrs. KELLY. Thank you. We forget that so much of the mission of the Coast Guard is helping people in distress and for that all of us need to be grateful and thankful.

Chairman LoBiondo, last month before the hearing before the subcommittee, Rear Admiral Joseph Nimick, a colleague of today's distinguished witness, Admiral Baumgartner, acknowledged that the vessels currently supplied by the Coast Guard to protect the nuclear facility along the Hudson River in my district are inadequate to intercept and destroy waterborne threats. This appears to be true for all U.S. Nuclear facilities that lie along navigable waters, not just the one that lies 25 miles north of New York City.

I introduced legislation to fix this glaring gap in our Nation's security chain just last week. My bill, which is H.R. 5614, would make the Coast Guard the lead Federal agency for naval defense of U.S. Nuclear facilities on navigable waterways. As I have said in previous hearings before this subcommittee, a tugboat with no fixed armament and weekly flyover do not adequately address the threat to a nuclear facility in the middle of the Nation's top terror target.

While in New York, we maintain an added layer of protection from the New York State Naval Militia. These are brave volunteers who are under-equipped and lack the proper authority to interdict in the face of danger. My bill would require the Coast Guard to provide weaponry on board of such security vessels capable of

intercepting and destroying potential threats. The tugboat class vessels currently provided lack capable hardware.

Finally, my bill would allow the Coast Guard Commandant to work with the Energy Department to determine what facilities are at greatest risk, what those risks are, and how they can best be addressed.

Chairman LoBiondo, Admiral Baumgartner, I recognize these are new tasks and they would require increased investment on the part of Congress in the Coast Guard and in the Coast Guard capabilities. But I have long been a supporter of the deepwater program. I remain committed to obtaining the resources necessary for the Coast Guard to carry out these functions, and I and my constituents feel these are vital to the national security. I hope that as the reauthorization moves forward, I will be able to work with you, Chairman LoBiondo and Chairman Young, and others in incorporating this legislation into the reauthorization of this act.

I strongly support the Coast Guard. I am most appreciative of everything the Coast Guard does to keep us all safe in navigable waters, and I thank you, Rear Admiral Baumgartner, for coming and talking to us today.

Mr. Chairman, I yield back the balance of my time.

Mr. LOBIONDO. Thank you.

Ms. Brown, do you have an opening statement?

Ms. BROWN. Thank you. I wanted to thank the Chairman and the Ranking Member for holding today's hearing on the Coast Guard. The Coast Guard has been protecting our shores for more than 200 years and they have done an outstanding job.

The Coast Guard was the first agency—and I often point that out—to react to the terrorist attack of September 11, and was the only agency in the Bush administration to actually do their jobs during Hurricane Katrina. But we know that they also get caught up in red tape in the Department of Homeland Security, and we need to keep the Department's feet to the fire so they do not stand in the way of the Coast Guard's mission.

This year's reauthorization includes several provisions that are extremely important to the cruise industry, which has a \$13 billion impact on my home State of Florida. These important changes in the wage, penalties, and cash payment provisions bring those maritime laws into the modern era and recognize the major changes that have taken place in employee rights and modern thinking. The wage penalty change provides an element of fairness for both the cruise industry and their workers by ensuring that seamen get their full pay, while protecting their employees from unfair penalties.

The direct deposit provision provides additional banking options, saving seamen money that should be going to their families. Each payday, these employees are forced to pay Western Union hundreds of their hard-earned dollars just so they can send their paychecks back home. It also adds a new level of security by removing the temptation of a safe full of money from each cruise ship, which I believe may have been the rationale for the last November pirate attack off the coast of the Somalia. I appreciate the committee including these provisions and I hope they remain throughout the bill.

Mr. Chairman, I yield back the balance of my time and I ask my full statement be entered into the record.

Mr. LOBIONDO. Without objection.

We are now very pleased to welcome Rear Admiral William D. Baumgartner, Judge Advocate General for the United States Coast Guard. Admiral, please proceed.

**TESTIMONY OF REAR ADMIRAL WILLIAM D. BAUMGARTNER,
JUDGE ADVOCATE GENERAL, UNITED STATES COAST GUARD**

Admiral BAUMGARTNER. Chairman LoBiondo, Representative Filner, and members of the subcommittee, good afternoon and thank you for the opportunity to testify on the administration proposal of the Coast Guard Maritime Transportation Act of 2006. Mr. Chairman, for the purposes of this hearing I ask that my written statement be entered into the committee record and that I be allowed to summarize my remarks here.

Mr. LOBIONDO. Without objection.

Admiral BAUMGARTNER. Before turning to the proposal, I wish to express the Coast Guard's gratitude for the congressional response to our request for emergency powers in the wake of Hurricanes Katrina and Rita. We truly appreciate the speed with which Congress acted. As you know, H.R. 889 would make permanent some of those emergency powers, and grant or enhance other Coast Guard authorities. The Commandant appreciates the subcommittee's work on H.R. 889 and looks forward to implementing those provisions once they become law. We are also grateful for the kind comments that I received this afternoon from you.

Now, with regards to the Coast Guard and Maritime Transportation Act of 2006, we would authorize the funds and end strengths requested in the President's fiscal year 2007 budget and provide important new authorities as well as expand and clarify existing authorities.

Four provisions warrant particular attention: section 205, merchant mariner credentials; section 202, technical amendments to tonnage measurement law; section 403, Maritime Alien Smuggling Law Enforcement Act, or MASLEA; and section 401, Maritime Drug Law Enforcement Act amendment on simple possession.

The Coast Guard first proposed amendments to the merchant mariner credential statutes in 2005. In response to the subcommittee's direction, the Coast Guard has conducted an extensive public outreach effort, and section 205 is the culmination of that outreach. These amendments now include a safe harbor provision for innocent errors and protections from civil liability for persons helping others apply for a credential. They also provide a much clearer statutory language and take into account the findings or recommendations of the 9/11 Commission.

Finally, they allow for immediate temporary suspension of a merchant mariner credential when a mariner is involved in an accident involving death or serious injury and when there is probable cause to believe that that mariner was at fault.

Next, I will turn to our proposed amendments for tonnage measurement. Existing tonnage law is difficult to apply to some categories of U.S. Flag vessels and can create loopholes for certain foreign flag vessels. Section 202, another provision developed in con-

sultation with industry and labor, would remove conflicting language that suggests both a U.S. Flag vessel is ineligible for regulatory measurement and only existing vessels are eligible for tonnage grandfathering international agreements and laws of the United States.

As well, section 202 would extend mandatory convention measurement to some undocumented vessels. It would also allow undocumented vessels to be assigned regulatory tonnage. Some of these amendments are found in section 309 of the committee's discussion draft.

Now I would like to discuss section 403 the Maritime Alien Smuggling Law Enforcement Act, or MASLEA. During fiscal years 2004 and 2005, the Coast Guard interdicted over 840 maritime smugglers facilitating or attempting to facilitate the illegal entry of aliens into the United States. Yet, less than 3 percent of these smugglers were prosecuted. This low statistic is largely the result of current law, which was not designed for the unique aspects of extraterritorial maritime law enforcement that makes meaningful prosecutions difficult. With little deterrent effect, maritime smugglers consider such occasional prosecution as merely the cost of doing business. Section 403 which is modeled after the highly successful Maritime Drug Law Enforcement act, would address these shortcomings and enable us to improve security of our maritime borders through the effective prosecution of maritime migrant smugglers.

Section 401 would establish a civil penalty of an offense for simple possession of narcotics aboard vessels subject to the jurisdiction of the United States. This provision will deliver meaningful yet measured consequences for illegal and unsafe conduct. In no way is this measure intended to condone possession or use of narcotics. Rather, it will complement existing law and effectuate congressional intent with regard to the possession of controlled substances. We were pleased that this proposal was included as section 306 of the committee's discussion draft.

Finally, the administration proposal includes provisions that would improve the lives of Coast Guard members by protecting leave that would otherwise be forfeited due to the operational demands of natural disasters, by making permanent Coast Guard housing authorities, and by allowing for reimbursement of certain medical-related expenses. Such provisions are extremely important because they allow members to focus on mission execution, rather than on quality-of-life distractions.

Mr. Chairman, Representative Filner, members of the subcommittee, thank you again for the opportunity to appear before you today, and I will happy to answer any questions.

Mr. LOBIONDO. Thank you, Admiral.

Mr. Filner.

Mr. FILNER. Thank you, Mr. Chairman. Thank you, Admiral. I just want to ask a few questions that were not covered in your oral testimony. As I understand the maritime identification credentials program that was in the Federal Register earlier this year, port workers and sailors needing unescorted access to secure port areas are required to undergo name-based background checks against a

terrorist watch list and an immigration status check to receive a credential until this TWIC program will finally be implemented.

Now, where I live in San Diego, and other places, we are told that truck drivers, who make up one of the largest segment of port workers, are not being covered practically by this requirement. Is that true, and what is the rationale for that? There was an ABC news report recently that showed people in New York-New Jersey Port had fraudulent licenses, many of them undocumented drivers. So what are the facts of the matter from your perspective with this situation?

Admiral BAUMGARTNER. Thank you for that question. I appreciate the opportunity to address that. The long-range solution is the TWIC, the Transportation Workers Identification Card, and that will apply broadly and that will be the standard for access. The notice that we have put in the Federal Register about acceptable credentials for port access is an interim step, and, as such, it is targeted at what we can do efficiently and effectively until TWIC comes on line.

So we have examined first those that have the most contact with port facilities, that have the most information, the most inside knowledge of the comings and goings of those important port facilities. Those are the workers that are there most often and that have the knowledge and access of that particular facility. They are also, from a practical, pragmatic sense, those are the easiest workers to be able to screen and to regulate access through this interim process.

So that is why we started with those particular workers. They have the most ability to affect the security—

Mr. FILNER. I take that as a yes to my question. We are not looking at the truck drivers, then, by and large. I mean, you had a real long answer there, but I think you said we are not looking at those guys right now.

Admiral BAUMGARTNER. Today the truck driver that comes on occasionally to a facility would not have the additional screening under the current situation.

Mr. FILNER. If you cannot do that, how are you going to do the fingerprint-based background checks when TWIC is implemented? That is, why is that going to be any easier than what you have now? And meanwhile our ports are pretty unsecured, it seems to me, if we are not checking these thousands and thousands of truck drivers.

Admiral BAUMGARTNER. Well, when TWIC is in place, it will be able to expand more easily in a measured way to additional categories of employees and people that need unescorted access to facilities.

Mr. FILNER. Well, whatever the interim period is—and we know, by the way, in all of these situations—again, I represent a border city so I know that all of the programs that were supposed to be implemented in 2002, 2003, 2004, 2005 have never been implemented. So this interim may be a very long time, for all we know, given the complexities of these security checks. So your answer does not leave me too confident about what is going on at our ports if people with phony driver's licenses or undocumented persons can get access to the ports. It really worries me.

I think you better figure out a way—this interim period may be longer than you think, because the TWIC situation may be more complex, and we have had in every similar situation—these Department of Homeland Security's exit visas, their passports situation—everything has been delayed and delayed and delayed because of the difficulty of it being implemented. So I would look at that again if I were you.

Just quickly, I understand that the administration has requested legal authority to use funds from the oil spill liability trust fund to pay for other things such as on-site scientific or technical support services. How is that going to help people who have been injured or suffered losses from an oil spill?

Admiral BAUMGARTNER. Yes, sir. Actually this will help people that have been affected, because one of the provisions that you did not mention there are on-site contracting services. So when you have a major oil spill where there are a lot of third parties interested who have been affected and impacted—one of our major problems right now is that when the responsible party can no longer—or refuses to take care of third-party claims, those innocent people that have been damaged, we could have a flood of claims and our permanent staffing is not able to keep up with the influx of claims and it creates delays.

If we have this flexibility for those unusual and infrequent occasions when we have to set up such on-site claims adjudication facilities, we will be able to do that and we will be able to consider those claims and pay them much, much quicker than without this authority.

Mr. FILNER. Well, I hope that there is, as you say, because it seems strange to make an argument that you will help people more when you have decreased the funds available for them. And your argument is based on the fact that there are certain ones that require this expert adjudication. Is that summing up your argument?

Admiral BAUMGARTNER. Not exactly, sir. What it is, it is a matter of capacity. If we maintained a permanent capacity that could handle the third-party claims from a large spill where a responsible party was not going to adjudicate the claims themselves, that would be a tremendous resource drain that would not be available for many many things.

What this provision does when we have those exceptional circumstances, we need immediate surge response to get these claims reviewed and paid. We are able to get that kind of assistance, contract assistance in place and on site where the people are, and we can do it quickly and we can do it promptly. It is much better for us to be able to give the settlements to those people when they need them rather than, because of bureaucratic delays and inadequate permanent staffing, to have to adjudicate them from afar and have the large delay.

Mr. FILNER. Well, I hope you are right. I hope you will give us a sense after a year just what the situation was there.

Admiral BAUMGARTNER. Yes, sir.

Mr. FILNER. Thank you.

Mr. LOBIONDO. Mr. Diaz-Balart, do you have any questions?

Mr. DIAZ-BALART. Thank you, Mr. Chairman. I would be remiss if I didn't bring up two issues. One is thanking the Coast Guard.

I represent southern Florida and I think it is probably where you are busier, busiest in the country. And it is incredible to see what the Coast Guard after 9/11, particularly on these new responsibilities that you are doing, and yet you are still doing the traditional things you have always done. And Mr. Chairman, as you all know, they do it with incredible dignity, with incredible respect, and, frankly, just do a spectacular job. So I want to thank you for that.

Mr. Chairman, I also want to kind of add to what my dear friend and colleague, Ms. Brown of Florida, said. I also want to thank you for that provision—that wage penalty provision in the bill. I think it is sensible. I think it brings about some common sense to an area that has not been looked at, frankly, for probably over 100 years. I want to thank Ms. Brown for bringing that issue up. It is common sense. It affects not only a huge industry in the State of Florida, but thousands and thousands of people who are employed by that. So I just want to thank you, Mr. Chairman for including that as well. Thank you.

Mr. LOBIONDO. Thank you. Mr. Oberstar.

Mr. OBERSTAR. Admiral, thank you very much for your presentation. I join my colleagues in expressing, as I have done on so many occasions, my great admiration for our Coast Guard and the extraordinary service you render for our country.

Admiral BAUMGARTNER. Thank you.

Mr. OBERSTAR. As a previous Commandant of the Coast Guard many years ago said, it takes a very special person to wear this color blue; and I agree.

Admiral BAUMGARTNER. Thank you, sir.

Mr. OBERSTAR. And the Coast Guard, I don't know what the weather channel would do without the Coast Guard, or perhaps what the Coast Guard would do without the weather channel. You really are the darling of the network. And they bring into homes across America the extraordinary service of the Coast Guard under extreme circumstances and the heroics that are carried out that these videos literally make seem routine. And we know that they are not.

In the immediate aftermath, 6 weeks or so after Hurricane Katrina, members of our committee traveled through the Gulf States and finished in Mobile with a look at the Coast Guard facilities and a chance to look at one of those helicopters up close that I have been voting on for years and years. I see the remarkable technology of how you winch these people up from the depths of the roiling seas. I have just great admiration for your accomplishments.

The Active-Duty strength of the Coast Guard is listed at 45,500. Is that being met?

Admiral BAUMGARTNER. No, sir. I believe we are underneath that. That is our authorized limit.

Mr. OBERSTAR. How far underneath that?

Admiral BAUMGARTNER. Actually, sir, I don't have the number right in front of me, but we can get back to you with that.

Mr. OBERSTAR. It is not thousands, is it?

Admiral BAUMGARTNER. I think it is probably a few thousand less than that.

Mr. OBERSTAR. My first term in Congress, the authorized strength of the Coast Guard was 39,000. Since that time Congress has assigned to the Coast Guard 27 new duties and responsibilities that range from drug interdiction to illegal immigrant interdiction and others that we all know and need not go through. You carried out all these duties with this relatively modest increase in personnel. That is an exceptional productivity record. And we ought not to tolerate a situation in which the Coast Guard continues to have new responsibilities but does not have the personnel necessary to carry them out. And I am curious as to whether the deficiency in personnel is due to lack of appropriations or to other purposes.

Admiral BAUMGARTNER. Yes, sir, I appreciate the question. And certainly one of the reasons that we have been able to continue to be successful is our multimission character. So when you add those 27 new missions and you have got the capable platforms, trained people, the right culture, that is how we are able to do that.

With regard to the exact delta between what we are authorized and what we currently have on the books, sir, I do not have that information and a good explanation, but I certainly would get back to you with that.

Mr. OBERSTAR. When you do that, would you please also provide the ratio of the enlisted to the officer personnel in the Coast Guard?

Admiral BAUMGARTNER. Yes, sir. We can certainly do that.

Mr. OBERSTAR. I have a feeling that it was a smaller number of officers and a higher number of enlisted personnel. I have to go back to my files to check that back in 1975, 1976. But I suspect there have been a number of structural changes over time that just crept in.

[The information follows:]

QUESTION: Provide the delta between the authorized strength and current levels. Break this information down by officer and enlisted.

Delta between Active Duty Commissioned Officer Authorization and actual strength = 243 personnel under authorization.

	Authorized	Actual
Commissioned Officer	6,700	6,457
Warrant Officer	No Cap	1,575
Enlisted	No Cap	31,844
Total	45,500	39,876

- There is no explicit limit on Active Duty Warrant Officer workforce strength, merely an overall cap and a Commissioned Officer cap.
- There is no explicit limit on Active Duty Enlisted workforce strength, merely an overall cap and a Commissioned Officer cap.

Statutes used for computations:

Total Authorized End Strength by 14 USC 661: "Set by Congress each fiscal year".

Total Authorized End Strength set by Congress for Fiscal Year 2006 in public law 109-241 (Coast Guard and Maritime Transportation Act of 2006): "45,500".

Commissioned Officer End Strength by 14 USC 42: "shall not exceed 6,700 in each fiscal year for 2004, 2005, and 2006".

Mr. OBERSTAR. There is other curious reference in the pending bill, section 408, data: In each of fiscal years 2007, 2008, there is authorized to be appropriated to the Administrator of the Economic Development Administration \$7 million to acquire through the use of unmanned aerial vehicles, data to improve the management of natural disasters and the safety of marina aviation, transportation. Could you enlighten us to what that is about? I am curious about this increase in authorization to EDA of \$7 million. It does not come out of the Coast Guard budget as I read it.

Admiral BAUMGARTNER. Well, sir, that is a provision that has been added in the subcommittee's discussion draft and it is one that we in the administration are looking at right now. And we really have not developed a position and I cannot really give you a whole lot of information on that particular provision.

Mr. OBERSTAR. What kind of data would be gathered to improve management of natural disasters through unmanned aerial vehicles? Would these be similar to the weather aircraft that now fly into the eye of the storm, those that go above—as high as 70,000 feet?

Admiral BAUMGARTNER. Sir, I do not think that is what they are talking about. We have some other programs that are looking at the use of unmanned aerial vehicles in different scenarios and so forth, and frankly I do not really know how this particular provision ties into those other existing programs.

Mr. OBERSTAR. I would appreciate any information you can provide us between now and markup on this rather curious provision.

Admiral BAUMGARTNER. Yes, sir. We will do that and we will get back to you on that.

Mr. OBERSTAR. Thank you very much.
[The information follows:]

QUESTION: What types of data would/could be gathered by UAVs to improve management of natural disasters?

Section 404 of the discussion draft would authorize \$7 million in each of fiscal years 2007 and 2008 for the acquisition of data, through the use of unmanned aerial vehicles, to improve the management of natural disasters and the safety of marine and aviation transportation. The Administration's proposal did not include this or like language. As the funds would be appropriated to National Oceanic and Atmosphere Administration (NOAA), not the U.S. Coast Guard, and as the NOAA program would not be related to U.S. Coast Guard initiative, I defer to the Administrator as to the type or kind of data that would be gathered. Similarly, I defer to the Administrator as to whether the vehicles to be used are similar to NOAA's "Hurricane Hunter" aircraft.

The NOAA program and the Revised Deepwater Implementation Plan, which calls for both the procurement of Vertical Takeoff and Landing Unmanned Aerial Vehicles (VUAVs) and the purchase of High Altitude Endurance Unmanned Aerial Vehicle (HAE-UAV) sensor data, are separate. I note that HAE-UAVs and VUAVs have the potential for limited use in damage assessment and, depending on the quality of the sensors, location of survivors or stranded personnel. One major drawback with using a UAV/VUAV in this environment is the potential lack of access to airspace. The FAA requires every aircraft to see and avoid other air traffic. Currently, the technology is not available on UAV/VUAVs to see and avoid other air traffic, which was essential during rescue operations such as in the aftermath of Hurricane Katrina. As a result, this see-and-avoid capability not present in UAVs or VUAVs poses potentially lethal consequences to aircraft operating in the area.

Mr. LOBIONDO. Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. I apologize for my belated arrival. I had an earlier meeting and I have a subsequent meeting soon, so I will not be able to stay long.

Admiral, good to have you with us. I want to reiterate what my friend from Minnesota said when he extended his generous comments to the U.S. Coast Guard. It does indeed take, Mr. Oberstar, a special breed of cat to wear that Coast Guard blue.

Admiral, the draft bill retains the same level of Active-Duty personnel as was authorized in the fiscal year 2006 bill. How does the Coast Guard plan to be able to meet its increasing mission goals—and, by the way, these increased mission goals imposed upon the Coast Guard appear to be endless, but you all somehow manage to keep responding without increasing your number of personnel. Do you have a magic wand with which you operate there? I know Admiral Allen handles the apparatus, but I would be curious to know about this.

Admiral BAUMGARTNER. Yes, sir; if he has a magic wand, I haven't seen it yet.

Mr. COBLE. I think someone has a magic wand down there.

Admiral BAUMGARTNER. I think if there is a metaphorical magic wand, as I said, I think that the key is our multimission character. When you have personnel with the authorities that have the training and the right culture, that goes a long way towards it.

In terms of how we are looking to fulfill our commitments in the future, I think that certainly Admiral Allen has put it well when he testified here last week and in his change of command statement: We are looking at getting the right people, the right platforms. Deepwater is a large portion of that. Getting the right platforms in place with the right technology, the right sensors, the right systems integration so that we can work more effectively as a total system; then we do not need as many people and we can leverage technology there.

That is certainly one of the reasons we can take on a lot more than we did when Mr. Oberstar first started his committee with not that many more people, is that the platforms that we have are much more efficient in terms of manpower than they ever were. You simply look at our new cutters, new ice breakers that are serving with less than half of the crew and much more capable vessels.

Certainly in other areas, maritime domain awareness, where we are trying to leverage technology and intelligence to provide a common operating picture that gets us more knowledge about the environment we are operating in, rather than more people and more brute strength. So in many ways, as as I said, we are trying to work smarter.

We are also working much better with our interagency colleagues in terms of within DHS, with DOJ, with DOD and the rest of the Federal agencies. We can certainly leverage our people, our authorities, and our capabilities much better than we used to be able to do.

Mr. COBLE. I thank you, Admiral. What is the overall enlisted and officer strength now?

Admiral BAUMGARTNER. Unfortunately, sir, I do not have that exact number in front of me but we can provide it to you.

Mr. COBLE. Mr. Chairman, I would like to have that information imminently, if we could.

Admiral BAUMGARTNER. Yes, sir. It is around 40- to 41,000, I believe, but I do not have the exact number.

Mr. COBLE. Total.

Admiral BAUMGARTNER. I believe it is around there, but we will get that number to you.

[The information follows:]

QUESTION: Provide the current overall enlisted and officer strength.

- End of June 2006 strength of Active Duty Commissioned Officers: 6,457
- End of June 2006 strength of Active Duty Warrant Officers: 1,575
- End of June 2006 strength of Active Duty Enlisted Members: 31,844
- Total end of June 2006 strength of Active Duty workforce: 39,876

Mr. COBLE. Thank you, Admiral. Thank you, Mr. Chairman.

Mr. LOBIONDO. Mr. Taylor.

Mr. TAYLOR. Thank you, Mr. Chairman.

Admiral, from a quick look, this bill appears to have been written by a lobbyist here in D.C. Rather than the Coast Guard.

Let's start with 307. I worked very hard to put that language in the bill that would trace back who actually owns the vessel, so that folks, like neighbors in particular, would not portend to be an American-owned vessel when they are actually owned by a French firm. That French firm actually brags about operations in the Gulf of Mexico in their business brochure, so there should not be any doubt that the French guys don't know that they own this company, and there should not be any doubt to you that they own this company, and that is in violation of the Jones Act. So I would very much object to that and I would be curious where that language came from.

But let me just walk down. 309. Why would our Coast Guard want to accept the measurements of any other State? As we know, there are some countries around the world where you can get a master's license just by showing up and paying a fee. My hunch is you could probably get a tonnage the same way. So why would we sign off on those inaccuracies? I am curious to hear your explanation on 310. I am willing to hear you out on that one.

On 403 for years, if I am not mistaken, there has been a car dealership out of the State of Florida that kind of wants the best of both worlds. If their vessel were to catch on fire or if it were to sink, they want the right to call the United States Coast Guard. And yet, after being told on this issue for something in the neighborhood of 15 years that the Jones Act is reserved for American-built vessels, if I am not mistaken, the same folks keep insisting on buying a number now of foreign yachts, which is contrary to the Jones Act. It is not like these guys do not know the rules. This has been an issue since the Democrats controlled the House, and that was a very long time ago. So I would like you to explain that one.

Tell me about 404. Jones Act waivers are not an end-all. It is sort of like those of us who used to be a city councilman. It is sort of like granting a variance. Every time you give one waiver, there are ten more guys who want a waiver. So once you do that, why have a Jones Act at all? I think the Jones Act exists for a very good purpose. It is there to protect our citizens, and so I have a little trouble with 404 and 405 granting those waivers.

That ought to get you started. And while you are talking, I will be reading the rest of this. But this surely does not look like something that was put together for the benefit of the American citizen. On a very quick glance, it looks like something that made K Street a lot of money, and I will let you tell me that I am wrong.

Admiral BAUMGARTNER. Yes, sir. Actually, most of those provisions in the discussion draft is not a bill that is put forth by the administration. We did come forth with a proposal that many of the provisions are contained in the discussion draft. The particular provisions that, I think most of the ones that you mentioned there, were not ones in the administration proposal and the discussion draft from the committee the administration is looking at and developing positions on the different provisions; but I don't have posi-

tions to discuss the specifics of most of the things you asked. One thing I can discuss—

Mr. TAYLOR. Excuse me, sir. Let's go back to 307. This committee made a mistake, and I cannot even remember how I voted, so I will presume I have voted for it. This committee made a mistake when we allowed foreign financing of American flag vessels. And the reason for that is for those of you who do not have a documented vessel, you look on the back of that documentation paper, and if you have a lien against that vessel it is written on the back. That is who really owns it. And so for the while that the Hancock Bank had my note, they were the real owners of the boat, not me. So thank goodness since then that note has been paid off, so it is really my vessel. But in the foreign financing, we actually had an offshore supply boat company that built some boats here, and that is great. But on the back of that paper, on the documentation they listed a French firm as that owning the boats. So here they were, getting the best of the both worlds. They were operating in the Gulf of Mexico. If they caught on fire or started to sink, they call on the Coast Guard 24 hours a day, 7 days a week, 365 days a year. But by a very clever financing scheme, the American firm would see to it that they never made any money; that all the profits were passed on to the folks who held the paper over in France. So they did not pay American taxes because they did not make money. They paid the company over in France a pretty good chunk of money. They made money, but because the French company was making money in the Gulf of Mexico and since most countries do not tax overseas income, no one paid taxes. So the benefit of the United States Coast Guard was made available to this firm for free.

That is wrong. It is in complete contradiction to the Jones Act. We want to know the folks that operate in our waters are American owned, American built, American crew. So we are closing that door.

And again, my question to you is, you felt like—and when I say “you,” I mean the Coast Guard—that you were under resourced to enforce that in the past; that you did not have clear and compelling language to enforce that. Is that still the case? Do you feel like you are under resourced to enforce that so that we know that these vessels are American owned, and do you have the resources both legally and financially to make that happen?

Admiral BAUMGARTNER. Congressman, I think the most important thing along those lines was the change in the substantive lease financing law. And if we had, in terms of the leased financing vessels, we have mortgage financing and leased financing, the changes that were made there that clarified what the rules were so that we could easily and fairly enforce them. That was, as you know, that was the important item there. With the mortgage-financed vessels, substantive rules are sometimes the most important ones because there are ways for clever people to get around them. Reporting requirements and giving us a better ability to inquire and ask reports of vessel owners is helpful—I am sorry, of mortgage companies—and so forth to find out what is really going on and what the business relationships are.

But it has been a difficult thing for us to try to investigate a large number of transactions, and many times what our process is, is we look at the documents and if we do not see problems with them, then that is the best way. The document process proceeds from there.

There are exceptions, and certainly there are the ones that you mentioned there with those particular vessels. So the ability to ask for more information and get more information and find out what the details are is certainly helpful. There is also the problem of when they come forward and they have information or provide information that appears to meet the requirement of the regs and the statutes. We may end up in a situation where people think they know what is going on behind the scenes, but there isn't any real way to prove that.

In terms of one of the other things you mentioned, tonnage is one of the provisions that I can speak to because that is part of our proposal here. And we had significant tonnage amendments that we would like to go through. And you mentioned our acceptance of foreign tonnage measurements and so forth. That is part of the backbone of current commerce right now, maritime commerce, is the regime of international conventions and standards, and the classification societies that act as independent inspectors and guarantors of those different things.

So if a vessel has been measured under the rules of a foreign country, they will also have been inspected by classification societies. And so, therefore, the results of those measurements, we will recognize those. I do not see any significant problems there. And those are part of our reciprocal obligations under the international conventions.

Mr. TAYLOR. For clarification, your language requires that it be backed up by one of the measuring society's—let me give you a for instance that jumps out at me. You take a less-than-well-organized Third-World country. You take a very large vessel. You pay off the right guy. It is now a 50-ton vessel. Anybody with a couple weekends on a boat who goes and attends their course can get a 50-ton vessel. It doesn't take a whole lot. So you could have a 400- or 500-foot ship that some nation says is a 50-ton vessel, you hire some guy who doesn't have the experience to be operating a 400-foot ship but, under these changes, when I first look at them, you actually created a safety problem.

Now, again, tell me that that won't happen.

Admiral BAUMGARTNER. Well, Congressman, I can't guarantee that that won't happen, but I think that the likelihood that something of that egregious happening is not significant and that the registries that issue the certificates and so forth have a lot at stake in maintaining their credibility.

We do have a port—

Mr. TAYLOR. Going back to my question, are you tying it to those registries? A brief summary doesn't say that.

Admiral BAUMGARTNER. The law doesn't tie—the statute wouldn't specifically require a classification society to have been involved, but that is the normal process. What we do do is, in our port state control boardings, is we track the compliance of vessels by nationality, by registry. So if a particular nation has sub-

standard vessels and does not have good inspection processes, they do have things like, as you were suggesting here, that appear to be blatantly inaccurate items, we would challenge those. It would then be noted in the port state control process, and the vessels of that nation would be targeted for increased numbers of boardings.

Now the businesses that register their vessels under that particular nation's registry don't like that, and they put pressure on that nation or that country to increase the overall quality of their vessels so they aren't targeted, and that actually works pretty well. We just received word from a major flag state in the last week that they decertified some of their vessels because they weren't up to snuff, and they did not want to see their scores in our Port Security Control boarding regime, our matrix, to lift them up into another category that would subject other vessels of their nationality to a higher frequency of inspections and a higher intrusiveness of inspections when they called on U.S. Ports.

I am confident that that won't be a problem on a systematic basis and that we have enough disincentives built into the system to keep everyone honest.

Mr. TAYLOR. For the record, I would like someone from your office to come tell me about Section 405.

Admiral BAUMGARTNER. Yes, sir.

Mr. TAYLOR. Mr. Chairman, you have been very generous.

Mr. LOBIONDO. Admiral, Section 206 would establish a civil penalty offense for simple possession of narcotics on a vessel or in a facility. What facilities would be included in this definition?

Admiral BAUMGARTNER. Thank you, Mr. Chairman.

Facilities there would be broader than simply facilities that are specifically regulated under the Maritime Transportation Security Act regulations. So we would mean here the facility could include a marina. So that if we were followed or we were boarding vessels in a marina and had some particular purpose to be at that marina and there happened to be a personal use situation at the marina, we would be able to take action.

If it was a more limited definition of facility and only applied to facilities that were regulated under Section 105, that type of marina wouldn't be covered. The only kind of facilities we would be looking at then would be ones that had four and five vessels or large passenger vessels.

So this is a much broader meaning. So it would encompass the smaller facilities like marinas and so forth where we may still encounter personal use issues and scenarios.

Mr. LOBIONDO. Since there is already a criminal statute in the law, what is the need for this proposal?

Admiral BAUMGARTNER. Well, this proposal gives us a very good tool to cover a gap in the current practical enforcement scheme; and there are a couple of different places where that comes in to play.

One is there are certain areas where State law and local laws don't apply. That might be from 3 to 12 miles in our territorial seas and on a high-seas vessel subject to U.S. Jurisdiction. In those cases, if we were going to take criminal enforcement action for personal use quantities, we would have to prosecute them in U.S. Federal court.

Resource and other efficiency constraints there have caused the Department of Justice as well as State and local law enforcement and prosecutors to develop different thresholds over what type of a case merits the commitment of resources for a criminal prosecution. So sometimes we find ourselves in a situation where it isn't best or efficient for the prosecutor in that area to go forth with a criminal prosecution for a simple possession case, and what that does is that leaves our young Coast Guardsmen and women in a situation where they find people in possession of unlawful drugs on a vessel. They will confiscate the drugs, of course, but then, without the civil penalty provision, there may be no consequence.

So the people that they have found in possession or perhaps even using the substances, there isn't a practical consequence. It technically is a violation of the criminal law, but it is not a practical item that—it may not be a practical case for a prosecutor to take.

This civil penalty provision is a streamlined, efficient way of attaching consequences to possession in those particular circumstances.

Mr. LOBIONDO. Switching to deepwater, what annual level of funding would be required to complete deepwater within 15 years?

Admiral BAUMGARTNER. Well, sir, it would certainly take more than what we have right now in the current budgets. That is a question that is under study, and I think you know H.R. 889 would require a report on that. I think that, in anticipation of that, we do have people who are looking and providing those numbers, but I don't have numbers that I can provide for you here today for you, sir.

Mr. LOBIONDO. Thank you, Admiral.

We will now move to the second panel. Oh—Ms. Brown.

Ms. BROWN. I guess my first one, when you get the information ready for Mr. Oberstar on the composition and the numbers, would you also give that to me? And I am interested in minorities and women and females.

My other question, as you develop credentialing programs for, I guess, the longshoremen and for the truckers, I am very interested in—you know, Florida has some program that they don't have to go to each port to get a different credential and pay a different fee, some kind of uniform program. But I am also interested in, as you come up with some of the—I want to say very sensitive, some have checkered pasts, but they served their time. They paid their dues. I don't want to see people squeezed out of jobs because of some program that we come up with that is not related to September the 11th.

So can you tell me a little about how you plan on formulating the program? I understand you have something in the Federal Register.

Admiral BAUMGARTNER. Yes, ma'am. There are a couple of things there.

First, what I would do is turn to the transportation worker identification card, the long-term vehicle for that; and we are working with the Transportation Security Administration on the particulars of that particular program. There is a notice of proposed rule-making that was issued last month, and we have had four hearings held so far with over a thousand attendees. So there has been a

significant amount of public interest and comment. That particular card would be a national card so that it wouldn't require—it wouldn't be port specific, and it would allow you to go where you need to go.

It also—in the notice of proposed rulemaking, it does set forth what the different criteria are for, I guess, security issues or where you might be denied a card. And it is focused on security issues. It is not focused on merely the fact that someone got in trouble and had a criminal record. So it is very clear in there that it is looking at things that would cause a security concern.

And that sort of leads me to an important aspect of this whole program, is that the trick and the interim procedure that we did put forth in the Federal Register last month, those are both compliments to the facility's security plans which are in place right now under the Maritime Transportation Security Act regulations. Those particular plans require the facility operators to outline how they are going to control access to their facilities.

And I may have given a misleading impression that right now that a trucker could go on any of those facilities because they aren't covered by a process. That is not accurate. What our interim process does, it says, in addition to what the facility does to screen escorts—or they may have surveillance or other ways they keep track of truckers or other employees on that facility. In addition to that, we are saying that they must, at a minimum, fulfill this other interim credential core requirement; and that requires us to screen those permanent workers and people who have frequent access to that facility. That is above and beyond the requirements that are laid on that facility and that are reflected in that security plan, and those are plans that are all reviewed and approved by the Coast Guard. So there are significant access controls.

Ms. BROWN. Couple of other questions.

Coming from Florida—and, of course, various places around the country have these gambling ships that—that they are not—they don't actually move into the waters. They are just stationary. And a lot of the States want you all to inspect these ships or facilities. What is the Coast Guard's position regarding inspecting vessels that are permanently attached to the shores and would the Coast Guard continue to inspect vessels that are not permanently attached to the shores?

Admiral BAUMGARTNER. Well, that is a good question; and there are many parts of that. We did put out a proposed policy to address different vessels. At that point in time, we called them permanently moored vessels. That is not a technically legal correct term anymore. That policy received a lot of comment and, right now, it is being reviewed as to what exactly we are going to do with those particular vessels.

Another thing we are reviewing right now is the impact of some court decisions that define what the term "vessel" means, particularly for vessels that are permanently attached to the shoreline or to the seabed; and we are looking at all of those things right now to see what the best course is for the future.

Some of that is not necessarily all in our hands because of the interpretations the Supreme Court has made, and there are other courts that are looking at this as well. So we are reviewing all of

these particular items to figure out what is the best policy as we go forward. But we do realize if we don't inspect vessels as—inspect these structures or crafts as vessels, then the State or local jurisdictions will then look to inspect them under their particular laws and codes.

Ms. BROWN. Thank you, Mr. Chairman. I yield back my time.

Mr. LOBIONDO. Thank you, Admiral.

Mr. LOBIONDO. We will move now to the second panel.

All right. Thank you, gentlemen.

We have Professor Myron H. Nordquist with the Center for Oceans Law and Policy of the University of Virginia School of Law; and Mr. Douglas B. Stevenson, Director for the Center of Seafarers Rights of the Seamen's Church Institute of New York City and New Jersey.

TESTIMONY OF PROFESSOR MYRON H. NORDQUIST, CENTER FOR OCEANS LAW AND POLICY, UNIVERSITY OF VIRGINIA SCHOOL OF LAW; AND DOUGLAS B. STEVENSON, DIRECTOR, CENTER FOR SEAFARERS' RIGHTS OF SEAMEN'S CHURCH INSTITUTE OF NEW YORK AND NEW JERSEY

Mr. LOBIONDO. Professor Nordquist, would you please proceed?

Mr. NORDQUIST. Thank you, Mr. Chairman—

Mr. LOBIONDO. Could you please turn on your mike?

Mr. NORDQUIST. Thank you, Mr. Chairman and other members.

My name is Myron Nordquist, and I am the Associate Director at the Center for Oceans Law and Policy at the University of Virginia School of Law.

Two weeks ago, I was called by the International Counsel of Cruise Lines and asked for independent views on proposed amendments to the wage penalty provisions in existing law. I make no pretense at being an expert on labor law. Rather, my experience is in broader international maritime law and in analyzing legal provisions. In any event, I was subsequently invited by this Subcommittee to testify today.

My overall reaction then and now is that the existing law pertaining to penalty wage provisions, while historically understandable, is out of date. I respectfully submit that the proposed amendments provided by the subcommittee genuinely promote a better and more equitable maritime policy for passenger vessel seamen, many of whom on cruise ships today are more akin to hotel or restaurant employees. I also believe that it is more equitable for masters, owners, operators, and employers.

Moreover, as elaborated in my written testimony, my view is that the proposed amendments reflect sound public policy that ought to be incorporated into updated chapters of Title 46 of the U.S. Code. The penalty wage provision in the proposed amendments, in my view, incorporate evenhanded due process procedures for all concerned. If these due process procedures are added, Congress will advance a major step in the direction of circumscribing and promoting a fair, early settlement of seamen wage disputes. Due process to me means fundamental fairness in how the law is applied to everyone.

In response to several of the members' inquiries, I would like to stress that the proposals do not change the wage penalty law itself. They only relate to the timing before it kicks in.

The proposed amendments contain a more rational procedure whereby a seaman is to provide written notice of his wage claim, and the master, owner, operator or employer then has an opportunity to remedy the dispute. The amount in question must be paid either immediately then to the seaman or deposited in a fiduciary account while the dispute is resolved. The penalty is assessed if the payer does not follow the clearly outlined procedures.

It is not accurate to argue that the existing wage penalty is only imposed for willful misconduct, as no finding was made, for example, in the leading Supreme Court case of Griffin vs. Oceanic Contractors, Inc. There, the U.S. Supreme court affirmed a judgment of over \$300,000 for a \$400 wage dispute. The decision held that the district courts lacked discretion to vary the period of the penalty, and Congress was challenged to rectify the obvious deficiency in the judgment.

Further, the allegation that the owners are attempting to avoid customary maintenance and cure obligations via the proposed amendment is just plain wrong.

I urge the subcommittee to lay this "red herring" to rest by inserting appropriate language wherever it is needed to provide the clarification.

What puzzles me is why there is such passionate resistance to due process procedures that are commonplace throughout all of American law. The proposed amendments will facilitate the prompt payment of seamen wages. The proposed amendments do at long last treat seamen as responsible adults.

The repeated use of the adjective "unscrupulous" for passenger vessel operators, which is contained six times in six paragraphs on page 5 of Mr. Stevenson's written testimony, is really unconstructive for a resolution.

Seamen also have their share of moral shortcomings. Emotional calls for collective punishment for all shipowners to reach a few bad actors is plainly unfair and, in my view, a violation of due process of law.

My last point is that a statute of limitations ought to be measured from an objective date, such as when the alleged dispute arises, not from some subjective time based on a seaman or anybody else's knowledge.

The purpose of the statute of limitations in all cases is to bring an end to stale claims and promote timely administration of justice. The current wage penalty provisions stand legal rationale on its head by actually providing incentives to delay the settling of seamen disputes.

In conclusion, my view is that the proposed amendments are long overdue and, in modern society, not all seamen are hapless fools and not all passenger vessel owners are unscrupulous. The due process requirements of notice and opportunity to remedy disputes and the proposed amendments strike me as being fair and even-handed to all concerned. I believe they are good public policy and ought to be enacted.

Mr. LOBIONDO. Thank you, Professor.

Mr. Stevenson.

Mr. STEVENSON. Thank you, Mr. Chairman and subcommittee members.

I am very pleased to be here today at the subcommittee's invitation to testify on the United States Penalty Wage Act.

Just to begin with, I might want to respond to one of the questions about my use of "unscrupulous" passenger vessel operator. I use that because the Act could allow unscrupulous ship operators to do certain things and would allow the responsible scrupulous passenger vessel operators to differentiate themselves from the unscrupulous ones.

But, Mr. Chairman, there is no law that better expresses what America stands for and that confirms American values than the United States Penalty Wage Act. This law was enacted by the first Congress of the United States, the same Congress that started the U.S. Coast Guard, the predecessor agency U.S. Coast Guard; and, like the Coast Guard, this law has served the United States well. It has served seafarers well; and the statute simply requires, very simply, that shipowners should pay seafarers on time and accurately.

The Act is purposely simple: to encourage quick payment of wages without the need for lengthy procedures or judicial interpretation. The Act attempts to deter unscrupulous shipowners from arbitrarily and unscrupulously withholding seafarers' wages by imposing a 2-day penalty for each day that wage payments are delayed.

It is clear from court decisions that responsible shipowners have nothing to fear from the Penalty Wage Act because the Act makes clear and the court decisions make clear that penalty wages do not apply every time a seafarer's wages are not paid on time. Only when the failure is without sufficient cause is a seafarer entitled to penalty wages.

Without sufficient cause means that conduct which is in some sense arbitrary and willful. As one court has said, penalty wages are appropriate only when the employer has acted in a dishonest or very highhanded way.

Mr. Chairman, the special protections accorded to merchant mariners by the Penalty Wage Act are as relevant and necessary today as they were in 1790, 1872 and 1898 and 1915. I know from my own institution, which was heavily involved in the amendments in 1915, that these protections are as necessary today as they were then.

The issue is not technology of the vessels. The issue is rather the disproportional bargaining position, disproportional bargaining power of a shipowner compared with a seafarer and the intimidation that seafarers have suffered, and that has not changed since 1915 or 1790.

This situation was brought upon by some cruise vessels who were sued in court on the Penalty Wage Act claims for Royal Caribbean, Norwegian Cruise Lines and Carnival Cruise Lines. In each of the cases you should understand seafarers are foreign seafarers working on foreign flag vessels working 70 over to a hundred hours a week, and many times it was alleged that they were not paid their overtime salaries. We should understand that, what salaries

that they were paid, the tip employees were paid approximately \$50 a month; and they are relying on tips between \$1,000 and \$3,000 a month for the remuneration.

But rather than instituting an industry-wide standard to ensure that seafarers are properly paid, the cruise industry has responded by asking Congress essentially to amend the Penalty Wage Act that would essentially repeal the effect of the Penalty Wage Act on seafarers on cruise vessels.

My comments on the particular provisions are contained in my paper, but I would suggest that we could look at this request from this perspective: This cruise industry which chooses to avoid obligations under U.S. Law by operating their vessels under foreign flags and employing foreign workers under Third-World wages is asking Congress to protect them from an arbitrary and unscrupulous failure to pay their foreign seafarers on foreign flag vessels the Third-World wages they work so hard to earn.

I would suggest—if I could have 30 more seconds, Mr. Chairman. I would suggest that, rather than throwing out over 200 years of vitally important legislation and jurisprudence protecting all seafarers in the United States ports, I would respectfully ask that Congress reject the industry proposal; and the industry should be asked to initiate a proactive program, as they have done so well in the environmental field, to change the culture of the cruise industry by putting into place appropriate record keeping procedures that will accurately record the hours of work of their crew members and by establishing a zero tolerance policy against intimidating crew members who seek only to enjoy their legal entitlements.

The cruise industry did a very good job when they were hit with a lot of pollution cases in the late 1990s. But instead of going to Congress and asking Congress to repeal the environmental laws, they instituted changes within the industry that are designed to prevent point source pollution from cruise vessels. The same sort of procedure, the same sort of initiative could be started by the industry with regard to seafarers' rights that could be a model for the industry.

I thank you, Mr. Chairman, for the extra minutes.

Mr. LOBIONDO. Thank you.

Mr. Filner.

Mr. FILNER. Thank you, Mr. Chairman.

Mr. Nordquist, you started off by saying you weren't an expert in this law. Your testimony certainly confirms that. Do you know why the people who know this better, like the cruise line operators and their lobbyists and their attorneys, are not here instead of you?

Mr. NORDQUIST. Actually, they are here. If you have questions, I am certain you are the master of your own forum; and they could answer them.

Mr. FILNER. Could we invite those half-dozen to join us? I mean, you are getting notes from the guy behind you, who I think is with the International Council of Cruise Lines, so why doesn't he come up?

Mr. NORDQUIST. Mr. Chairman, I am not in charge of anything.

Mr. FILNER. You are just here because somebody told you to be here, huh?

Mr. NORDQUIST. No, I am here because I read the proposed amendments and was invited to testify.

Mr. FILNER. Are you getting paid for being here?

Mr. NORDQUIST. I am certainly getting paid.

Mr. FILNER. By who?

Mr. NORDQUIST. By the cruise industry.

Mr. FILNER. Interesting. Thank you.

Mr. NORDQUIST. I think everybody who appears here is paid by someone. I got into this because I was asked to provide independent views. I guess they thought what I said made sense.

Mr. FILNER. Well, it didn't make any sense to me. You said everything all out of date.

Mr. NORDQUIST. I didn't say that. Those are not my words. The law—

Mr. FILNER. You said the law is out of date.

Mr. NORDQUIST. Of course—

Mr. FILNER. So is protection for overtime out of date? Protection for when a person gets paid out of date? Are those things out of date, in your view?

Mr. NORDQUIST. The proposed amendments are intended actually to update all those kinds of records.

Mr. FILNER. Have you met or interviewed any of the seamen who have brought the class action lawsuits against the Norwegian cruise lines so you knew what they were saying? Even though they worked over a hundred hours a week and weren't paid overtime, have you talked to any of those guys?

Mr. NORDQUIST. I am familiar with the kind of allegations that go into litigation.

Mr. FILNER. Do you think that is fair?

Mr. NORDQUIST. Excuse me?

Mr. FILNER. Do you think working over a hundred hours and not getting overtime is fair?

Mr. NORDQUIST. The ones that I have talked to, frankly, are working mostly for tips; and when you tell them that they have to go back and stop working, it means access to a larger source of income is cut off from them. I think there is a distortion in the mind of people that don't understand that most of the money that many get comes from tips.

Mr. FILNER. So you don't agree with the settlement that the cruise lines had to pay?

Mr. NORDQUIST. I don't know enough about the facts to give a judgment. That wasn't really what I was offering testimony on.

I think we ought to give due process to everybody, and I think that the Constitution is more fundamental than some law passed with a few sentences in the First Congress. That is my position. I guess the cruise industry liked that.

Mr. FILNER. I guess.

Thank you for your definition of compassionate conservatism.

You said in your statement that the amendments don't change the law, they just refer to the timing of when things come in. Let me read you a couple of changes that occurred.

Mr. NORDQUIST. I didn't say that.

Mr. FILNER. Yes, you did.

Mr. NORDQUIST. I said it didn't change the penalties.

Mr. FILNER. Let me read to you a couple of things and ask if you want to stay with that.

The proposed amendment changes the penalty computation from 2-days' wages for each days payment delay to not more than 2 days' wages. Isn't that a change in the penalty?

Mr. NORDQUIST. And that is an error. It is an error in the document that I reviewed, and I had to give counsel an explanation prior to this hearing that that is an error.

Mr. FILNER. So what should it say?

Mr. NORDQUIST. It should say the penalty is the same whether it is in Chapter 103 or chapter 105.

Mr. FILNER. So we have something that was written by the cruise ship industry in error.

Mr. NORDQUIST. I am not really able to say where the error occurred, but certainly what I can say is that the penalty is intended to remain.

Mr. FILNER. That is not what the language says right now.

It also changes, as I understand it, where the burden of proof is. For example, that the proposed amendment requires a seaman to prove that his employer did not have sufficient cause not to pay him. You are shifting the burden of proof there.

Mr. NORDQUIST. I didn't say that. I don't know where this is coming from.

Mr. FILNER. That is what the amendment says.

Mr. NORDQUIST. I certainly didn't read it that way.

Mr. FILNER. You wouldn't read it as shifting the burden of proof?

Mr. NORDQUIST. That is correct. I would not.

I would say that it imposes an obligation, as it exists almost everywhere else in the law of the land, that a seaman is to give notice that he wants to be paid what he thinks he is due. How can you pay a debt you don't know about? That is common sense.

Mr. FILNER. How does an individual person—who may have language problems, may have other issues, including intimidation and afraid of not being rehired, that he's supposed to know why or prove that—he has to prove that there was cause? Maybe there was a computer error. How does he know one way or the other? But he has to have cause to bring the complaint.

Mr. NORDQUIST. You are mixing up, sir, cause and notice. Notice is when the man gets his pay stub. He looks at it and says, wait a minute; I am owed more money than this. Then he should have a duty to go to whoever it is that issues a paycheck and say, I am short. I don't think it is a very onus provision to give notice. Now that doesn't mean he has to prove it. It simply means he has to give notice.

Mr. FILNER. We will have to read that part of it a little more directly, because I think you are putting the burden of proof in this amendment back on the individual, as opposed to the people who ought to have the burden on them.

I will have a second round, Mr. Chairman, if you don't mind.

Mr. LOBIONDO. Ms. Brown.

Ms. BROWN. Thank you. I have always supported workers' rights, and I am a strong supporter of workers' rights, but for 2 years I have looked at some of these provisions, and I really think they need to be updated.

Some of the things that greatly concern me is, for example, a worker has to go to Western Union—you know, that mentality—that Western Union mentality. They have to spend a large portion of their money wiring the money back home because, in law, that you have to pay that person in cash, that is ludicrous.

So that is one provision I know that needs to be updated, that the cruise ships have to have cash on hand and they have to pay them in cash. Now do you agree that that is one provision that needs to be corrected?

Mr. STEVENSON. Yes, ma'am. Thank you for that question, because—I mean, I have direct deposit for my salary.

Ms. BROWN. I have direct deposit, too; and when we came up for the provision for Social Security, it was a difficult task getting my seniors to understand that that is a good thing. Now it is, and I don't have to worry about people attacking them when they go to the bank to cash their checks.

Mr. STEVENSON. But, you know, I have been working defending seafarers for the Seaman's Church Institute for 16 years. We have a free legal aid program for seafarers worldwide. I have never in my experience had a seafarer come to me and say, I want direct deposit. I want allotments made back home. I want to be able to send home money through electronic means.

A few years ago, the ITF tried to initiate a program where seafarers would—they have an agreement with all of the shipping companies to set up a worldwide direct deposit program with ATM cards and ATM machines at seafarers' centers all over the world. Seafarers would have nothing to do with it. They didn't want it at all. They want to be paid cash. They want to be paid cash.

Because seafarers are coming from a lot of developing countries—the Philippines, in particular—are very, very accustomed to abuses in allotments, that things are taken out. That is why they prefer—and I agree with you. They don't like going to Western Union. That is why they come to the Seafarer Union in the New York area, and others who have passenger ship terminal industries provide a service of wiring money home at a cheap rate.

Ms. BROWN. Could you all take a check? Could you take a check?

Mr. STEVENSON. We would take a check, of course, but they don't want to be paid that. I can't—

Ms. BROWN. I think—

Mr. STEVENSON. The other problem with this, though, in the language of the proposed bill is that it would open the door for taking out payments for, say, personal medical insurance for seafarers. This is not a red herring that was suggested because we have had complaints particularly from what are called entertainers and hotel staff workers that the cruise industry is trying to exclude from the definition of seafarers, that they are as much a seafarer on a cruise vessel, on the mission of a cruise ship, as a tanker man is on a tanker.

But we have had complaints that they have been required as a condition of employment through their recruiting agency to show that they have personal medical insurance. It is not against the law for someone to have their own medical insurance, but if you can set up a system where money is being taken out of your pay for medical insurance and you are told you must voluntarily agree

to this as a condition of employment, then the shipowner has reduced expenses for medical care and it is something that we are very concerned about.

Ms. BROWN. The other provision that I want—I have brief time and we can discuss this as this moves forward, but I have a concern about—the only issue that I am concerned about is that I think that the workers should notify the employer if they have a problem. If I have a problem with my check, I am going to let you know the day that I have a problem, the moment that I have a problem. There will be no confusion if there—if my check isn't right, I am going to let you know.

Mr. STEVENSON. I think that is something that land-based workers have a very good understanding about. The difference, however, is when you are dealing with a disproportionate strength in bargaining power between a seafarer, let us say coming from the Philippines, working as—and most of them do, 28 percent of the world seafarers are from the Philippines. They know for every job that is offered there is 200 people behind them. They know if they are labeled a troublemaker they lose their job and they are not rehired.

Ms. BROWN. I don't think it is being a troublemaker if it is a problem with your money.

Mr. STEVENSON. I don't either. But, unfortunately, what they experience is we have had many, many, many, many cases of seafarers who have been dismissed from their employment who have been retaliated against simply—and blacklisted from future employment by the system of recruiting agencies in the Philippines simply for requesting what they are legally entitled to have.

Ms. BROWN. And I think we should work with this, but I think there should be some way to modernize this, that it should be fair on each side.

Mr. STEVENSON. And I think so, too, Congresswoman.

I think what I suggested is that the first step ought to be that the industry itself, which is in the best position to know whether or not a person is properly paid, should set up a system so they know exactly how much that seafarer is being paid. They keep track of the hours. They can keep track of every drink that a passenger drinks. They can keep track.

Ms. BROWN. You don't think they are doing that?

Mr. STEVENSON. No.

Ms. BROWN. Do you think they pay people—that they don't know how much they are paying them?

Mr. STEVENSON. If you look at the allegations in the class-action suits, there are many allegations—and I think affidavits could be provided—where the shipping company could not verify the hours worked.

Ms. BROWN. I don't know how that could possibly happen, but, as we move forward, the industry, as it moves forward, maybe there are some recommendations that you could make that would be helpful to them. But I think you should look at some of their proposals; and I really have a concern about, you know, the Western Union provisions.

Mr. STEVENSON. I am very happy to work with you, with the industry, with anybody, if it is going to help seafarers.

Ms. BROWN. Thank you, Mr. Chairman; and thank you, Mr. Ranking Member.

Mr. LOBIONDO. Mr. Taylor.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. Chairman, more of an observation, I welcome the thoughts of both of these gentlemen. In the wake of Hurricane Katrina, our Nation at considerable taxpayer expense hired several cruise ships, one of which went to Pascagoula, Mississippi, went to Mobile, at least one went to New Orleans. And since all of us, hopefully, are here to look out for our constituents, one of the things I find troubling, I hope we can address in this, is, you know, a foreign ship is, in effect, an island. It is a little bit of sovereignty of whose flag it flies and lives under those rules.

That may be fine for a ship that is transiting our waters or may be here for a day or 2, but when some of these ships sit at our docks for 4 or 5, 6, 7, 8 months and continue to pay people something less than the minimum wage, continue to be exempt from the workman's comp laws, and they are right across the street from hotels that have to live by all the rules or, in the case of New Orleans, they were immediately adjacent to an American flag vessel that was paying its folks American wages, living by the American rules, seafarers' rules, workman's comp, Mr. Chairman, it is not fair. And if we are going to address unfairness in this bill, it is something that we should look at and particularly since we were the charter.

We hired those guys. We hired those guys in my home county. As recently as February, we had something like 18 percent employment. In an adjacent county, we had 16 percent employment. Many of those people had come from the casinos in Biloxi. They would have loved to have done something similar to that on a ship that we are chartering. Unfortunately, we have got that ship from a Third-World country who are living by the very rules that are unfair.

Again, it is—I think if it is transiting our water, but when it is camped out in our water 4, 5, 6, 7 months at a time on the American taxpayers' time, that is not right. I would hope that this bill would be the vehicle to address that.

I mean, we, as a Nation, have made several mistakes along the line. We had just finished two cruise ships that were under construction in Pascagoula early on in the Bush Administration. In the wake of 9/11, a guy named Zell chose not to finish it. So we sold them for about a penny on the dollar. They are being built in Germany, which is not a low-wage country. They are going to be completed. But if we would have completed them, they would have been in our inventory, and we would not have to have hired those foreign ships who were adding ships to our inventory.

That was mistake number one. That is water under the bridge.

Katrina wasn't the last disaster to hit America. There will be other disasters. Some of them will probably be manmade. One of the ways we are going to respond to that is with temporary housing being brought in; and since many of our major cities are on the water, it is a pretty good bet that the temporary housing will come in the way of ships.

In fairness to the American mariner on that tugboat across the dock or that off-shore supply vessel across the dock or that crew boat across the dock, in fairness to those guys who are living by all the rules, some rules have to be established in this committee that, if we are going to hire somebody, they are going to have to live by the same rules. If they are going to be tied up to the American dock for 3, 6, 7, 8 months, they are going to have to live by our rules.

Again, if this bill is in the process of being put together, I would ask for that consideration; and I would also welcome the comments of you two gentlemen as to that. Because I just don't see, if you people pride yourself on the law, how on earth can we have a set of laws for this ship but not that one and they are right across the dock from each other.

Mr. STEVENSON. Well, I can take you one step further. You can have on the same ship people from different nationalities working side by side and one nationality on a foreign flag vessel getting totally different conditions than another. So there are many disparities of the law; and that is why I think it is so very important that we think very, very carefully about throwing out the projections that we have without fully understanding the ramifications of them.

I would really wish that we could have an industry-wide model program first before we step into those waters of changing hundreds if not thousands of years of maritime practice and law protecting seafarers.

Mr. NORDQUIST. I wanted to say my colleague knows the Maritime Labor Convention much better than I do, having participated extensively in it; and all I want to comment on is that the proposed amendments, in my judgment, are comparable to what is state practice around the world. That isn't to say that it is fair. The living conditions and many other things are different in different countries, and we still have an awful lot of respect for the flag. It comes in handy when it is one of our warships that is under our flag. So that the flag system is very complex, and I have no comment I can actually offer on what you raised except, the way you expressed it, it certainly sounded to me like there was something that was wrong about it. But I can't say anything about the specifics because, sir, I don't know.

Mr. TAYLOR. Mr. Chairman, if I may close, you know, there has been a heck of a lot of debate in this Congress, particularly this summer, about illegal immigrants taking the jobs of Americans. In this instance, these are jobs that the American taxpayers paid for. It is part of the Hurricane Katrina recovery. It will be a part of the next hurricane recovery. And, again, in fairness, I would ask that we have a full and open debate on that.

If a ship is going to be tied up in our dock for months at a time at taxpayer expense, the very least we, as the stewards of those tax dollars, ought to demand is they live by our rules, every one of our rules, just like the American flag vessel across the dock from them.

With that, thank you, Mr. Chairman.

Mr. LOBIONDO. Mr. Oberstar.

Mr. OBERSTAR. I think the gentleman from Mississippi has raised some very cogent and pertinent questions and the gentlelady

from Florida has done as well. I was listening with one ear as I was talking to the FAA about other matters in the company room. I didn't—

Mr. FILNER. I raised them, too.

Mr. OBERSTAR. I didn't hear yours. There was a break in the conversation. I wasn't able to hear what you were saying, but I am sure they were very, very relevant. No question at all.

Luis Bonanos is a 61-year old pastry chef from Colombia. He understands, writes a little bit of English, can read only a little bit of English. His shift was 1:00 a.m. to 10:00 a.m. And then 1:00 p.m. to 3:00 p.m. And then 4:30 p.m. to 8:00 p.m. On Sunday through Friday and so on, for a total of 14 and a half hours Sunday through Friday and then 15 hours on Saturday. That is 99 and a half hours a week. His requirement was to put in 70 hours a week. We have a deposition from him to this effect. But Norwegian Cruise Lines never paid him overtime, even though the Norwegian Seamen's Union contract provided that he would be paid overtime for over 70 hours.

Now I have never worked on board a cruise line, but I have taken three cruises. Well, they really weren't cruises. As a student, I traveled from New York to New Java aboard the Queen Mary en route to a graduate program and came back aboard the SS United States; and when I left Haiti, I took Grace Lines from Haiti to—after working there 3 and a half years—to New York. So it wasn't really a cruise, but it was a port. One of these things we call cruise vessels today. There were a lot of people that were taking it for a cruise.

I worked in the inermis. I worked in a concrete block factory. I earned my way through college. I ducked out a few times, but I never put in 70 hours in a week. The human body has limits. Our turnover of time hasn't changed in 50,000 years. To ask a person to work 99 hours is bad enough—I mean, on top of not to pay.

So when it came to make the deposition in U.S. District Court he said, quote, from the deposition, I did not complain about not being paid overtime because I could not afford to lose my job. I had a family to support, and they depended on the money I earned. Workers on the ship are very much afraid of losing their jobs. The union cannot prevent people from being fired for trivial things. There is no guarantee you will be rehired at the end of your contract.

For these reasons, people on the ship do not complain about conditions or the lack of payment of overtime because they are afraid they will be called a troublemaker by the supervisors and soon be fired. They are not like airline mechanics, AFP mechanics certified by the FAA; and if the mechanic says I will not sign off this slip, that plane doesn't move.

So what do you think about that? Is that, Professor Nordquist, what you said is an industry-wide practice?

Mr. NORDQUIST. I did not say anything like that.

Mr. OBERSTAR. You were referring to questions asked by the gentleman from Mississippi and saying, well, these are sort of industry nation, not worldwide practices.

Mr. NORDQUIST. The Maritime Labor Convention does have a 70-hour provision, but, frankly, I am sure that Mr. Stevenson has

something to offer here. But, frankly, I think I can almost rest my case on what you have said about why I support putting due process into this 1790 law. It is in our 4th and 14th amendments to the Constitution.

There ought to be due process for a fellow like that, but I don't think he is the only person that deserves due process. I think everybody deserves due process. And I am not sure that on a case like that that I would have any quarrel with the facts as you presented. It is just that I would like to see him—get paid what he is due right away, rather than waiting 10 years and going through some big class-action lawsuit clogging up the courts.

Mr. OBERSTAR. Your testimony, which I read over last night, says much has changed in the last 90 years. Vessels and cruise are much larger. Treatment of seamen, many of whom are women, is more humane. I don't find 99 and a half hours to be more humane.

Mr. NORDQUIST. In the case you gave, was it a woman?

Mr. OBERSTAR. No.

Mr. NORDQUIST. The Maritime Labor Code is attempting to improve on this situation. In any work setting, there are going to be problems like this person encountered; and I am not at all sympathetic to any employer that treats his people that way. Doug Stevenson has been a much more articulate advocate than I have been on that point. But my argument for you is that there should be a due process procedure so that they don't have to go into court, that if they have a complaint about their pay stub, they go in and have proper records. And if they are not getting their overtime and they are entitled to their overtime and they have really signed a contract, I am in favor of, obviously, of their getting paid promptly.

Mr. OBERSTAR. And—I want to get Mr. Stevenson. And you would be right if everything were on the level. But if they are—the workers on board these ships are in the nature of indentured servants. They don't have much recourse. Then it is a different picture.

Mr. Stevenson.

Mr. STEVENSON. Well, that is exactly why we are here, sir. These incredible hours of work that seafarers are induced to work for tips—and, actually, they would get no additional tips whether they worked 70 or 110 hours a week. They get the same tips, but it is a way to inhumanely work people beyond human limits.

And I might add that probably the person you are talking about not only was working these kind of hours every week but 4 weeks out of the month and for a contract from 6 to 10 months out of the year with no right to be rehired. Once these seafarers finish their contracts, they go to their recruiting agency, and they try to get another contract. Because they are hired through recruiting agencies, for the most part, in their home country; and they know from the ship and they know from the recruiting agency that if they try to enforce their rights they will be labeled a troublemaker and they will be sent home probably never to work again on another ship. And these are highly valued jobs.

An ordinary seafarer, ordinary seaman coming from the Philippines working on a cruise vessel is making more than the doctor in his hometown, making more than his high school principal. So

they are not going to jeopardize that. That is why they put up with these kinds of hours.

And putting a notice requirement—let us say, for example, the 180-day notice requirement. Seafarer starts his 10-month contract. Notices his first paycheck is wrong. He complains. He is on the next plane home.

And, by the way, the shipping company doesn't have to pay him for 4 days. By that time, our immigration laws, which say, well, he is out of a job. He is no longer a crew member. He is out of the country within 24 hours.

Mr. OBERSTAR. So how do you get protection for this person? If that happened in an iron ore mining processing plant in my district, they would shut that plant down today. The union would shut it down, and no one would walk off the property, and they would fix the problem right then. What protection does this person have on a ship?

Mr. STEVENSON. Fortunately, this person still has a penalty wage statute that exists today. That person, if we change it in the notice requirements, it would encourage litigation. The provision that says that the penalty is up to 2 days wages would make—guarantee that the shipping company would never pay because it would want to litigate what is an appropriate penalty. And, furthermore, the process where the shipping company would have a certain period of time to correct their own—put the money into escrow, he has two choices when notified. He can either pay the seafarer or he can put the money into escrow and then go to court for determination.

Well, what does that result in? If the shipowner puts the money in escrow, goes to court, the seafarer is home. He can't come back to litigate; and if he could come back, he couldn't afford the cost of defending the suit. So the shipping company would have a default judgment, be able to keep the penalty and the wages. It would not help the seafarer.

What these notice requirements do is not provide due process for the seafarer but rather makes a simple, straightforward process into a highly complicated procedure that would make it guaranteed that the seafarer would never be able to take advantage of it. It would be as, Professor Nordquist's written statement said, the equivalent of our U.S. Tax Code in complexity.

Now we don't want to change a simple procedure that is understandable by anybody, that doesn't require judicial determination and can be understood whether you speak English or not, to be changed to this complex issue that even I have trouble understanding, and I am a lawyer.

Mr. OBERSTAR. Well, I understand that the Royal Caribbean and Norwegian Cruise Lines have respectively reached settlement agreements in class action cases for \$18.4 million and \$25 million respectively. How would this due process language work in such—if you could bring a class action suit?

Mr. NORDQUIST. Mr. Oberstar, you wouldn't have that extraordinarily complex litigation when you are talking about 5,000, 10,000 litigants if there would have been a fair process in place to begin with. That is, if a wage earner is due money and he notifies his payer, the payer is only given 60 days and he has got to pay

that money or put it in escrow, and there are lots of ways that pay disputes are settled short of going into that kind of litigation.

Mr. OBERSTAR. Does that individual have a shop steward on the ship to defend him and back him up with the captain?

Mr. NORDQUIST. I am not sure there is uniform practices about that.

Mr. OBERSTAR. I know in the days before the Steelworkers Union in the ore mines in northern Minnesota, if you complained about something, if the mining boss didn't like it, he sent you home; and that was it. And they had spies in the—we called them stool pigeons—in the barber shops and in the pool halls and in the libraries to see what books the men took out because they might be taking out something subversive about how to organize a union; and if they had just a little snitch, bang, you are out.

Then we got the Steelworkers Union; and my father, frankly, was the first one to join—card number one, 1937.

Then they had someone to stand up for them.

If you are on board a ship and do not have an union and you don't have an organization and have someone to back you, and you are from land's end someplace and you do not speak English very well, and you do not read it very well, and they want to hang you, they can do it.

Mr. NORDQUIST. Under the Maritime Labor Convention, if a seaman is in a U.S. Port, even if he/she is a foreign seaman, there is a requirement to comply with its judicial settlement terms. They can be enforced by the Coast Guard.

There are a lot of things that we need to do to improve from what you outlined, and I respect very much the distance we have come. There is a lot of room for commonality here. I am not sure there is that much disagreement.

Mr. OBERSTAR. Thank you. Luis Bonanos, by the way, was fired for having a not quite clean enough pot in his locker.

Mr. Stevenson.

Mr. STEVENSON. Thank you, sir. Just from the practice in the cruise industry, not every cruise line has collective bargaining agreements. Some do and some don't.

And some international unions in foreign countries are not the same type of unions that you would understand in the iron fields in Minnesota. Some unions are nothing more than hiring halls for replacement agencies for seafarers.

Now I go back: What is due process? What does a seafarer do in this situation?

That is what the value of the Penalty Wage Act has been over the years, since 1790, where seafarers have known, when they come to the United States, there is some hope of justice. They may not be able to afford counsel to litigate a case because when you look at the cost of litigation in the United States, that is another issue that we want to look at. But they knew that there was a penalty wage statute that said any seafarer on a ship that takes on or discharges cargo in the United States, the courts of the United States are open and there will be a 2-day penalty for every day of delay to encourage ship owners to make sure they are paying their seafarers on time.

Another way of looking at this is, perhaps these class action suits have demonstrated that the cruise lines involved were not deterred by that 2-day penalty for every day of delay. And maybe another solution would be to raise the penalty to 3 or 4 days' penalty. That is another way we can look at it.

But the cards are all in the ship owners' hands. They are the ones who can determine how much the seafarer is getting paid. They are the ones who can make sure the seafarers are getting paid; and they, as an industry, can set an industry-wide standard of conduct to make sure that seafarers' rights are protected in that industry, to dispel all of these bad past practices we are talking about.

Mr. OBERSTAR. That is exactly what concerns me is, the deck is stacked against the worker. The ship owner has great power. In this draft discussion, draft bill there is a proposal for a statute of limitation on wage claims. They would propose 3 years from the date of commencement of the voyage.

Now, Professor Nordquist, you are from a very distinguished institution, Mr. Jefferson's university, on which there was a great program the other night on the History Channel. It was wonderful. I will be diverting if I go into discussion of it. You should get it and see it, the brilliance of Jefferson.

But I do not think he would have agreed that the statute of limitation should run from the commencement of the voyage, but rather from the date that the claim arose. Is that not the way you usually do?

Mr. NORDQUIST. To be very direct, the principle of the statute of limitations is what is important, and it ought to be a clear event to trigger it. In the Fair Labor Standards Act they have a 3-year statute of limitations for where there is willful misconduct.

Mr. OBERSTAR. When does it start running?

Mr. NORDQUIST. From the time the dispute arises.

Mr. OBERSTAR. But not from the commencement of the voyage?

Mr. NORDQUIST. No. They tailored this to their circumstances.

The important point is that there is no change to the penalty in the law under the proposed amendments. There is a proposed 3-year statute of limitations. If 3-1/4 years is better, you know, I cannot offer any judgment on it.

I do think that there is a very sound reason that virtually every other aspect of American law has a statute of limitations. The reason is that after a certain period of time, you simply cannot get justice.

Mr. OBERSTAR. I agree, but, Mr. Stevenson, should that time start running from the date you get on board the ship or should it start running from the time of the infraction?

Mr. STEVENSON. Well, if there is a statute of limitation, obviously the time of commencement of any statute of limitations should be the time the injured party has knowledge of the injury or should have had knowledge of the injury.

I mean, this case that is proposed by the cruise industry is that the statute of limitations would begin from the time the seafarer started working on the ship, before—there could be months or a year before anything happened.

Mr. OBERSTAR. It just does not make any sense at all. That is abusive.

Mr. STEVENSON. But it has not been a problem actually in the past, without having a statute of limitation. The law of laches, the equitable principle of laches, has worked quite effectively in the very few cases that ever come to court under the Penalty Wage Act. So I am not certain that is a necessity for the change.

I think all of the changes taken together show there is a lot more study that needs to be done in every single one of these provisions before it is enacted.

Mr. OBERSTAR. Now, the draft legislation also would—it seems to me, would stop class action cases by requiring an employee to provide 180 days' notice. Is that your reading?

Mr. NORDQUIST. That would be the longer of the two periods, yes.

Mr. OBERSTAR. Well, there are many other questions about this draft legislation, and I just I think it is really oppressive on the worker. And if we were to be enamored of the wages and hour law in the U.S. That is time-and-a-half for overtime over 40 hours. Steelworkers even negotiated time-and-a-half for over 8 hours; that was a major breakthrough. It took us 200 years in the Industrial Revolution to get to a 10-hour workday. That was 1910. And then it took another 25 years to get to an 8-hour workday. And now, in the cruise lines, it has gone to 70 hours and to 100 hours.

Body circadian rhythms haven't changed in 50,000 years, and I do not know how people do that. I do not know how they perform under those circumstances. But when they sign on, they ought at least to have justice on their side. And I do not think this language in here provides a path to justice.

Thank you, Mr. Chairman.

Mr. LOBIONDO. We are supposed to have votes in about 15 minutes. It is my intention to wind this up at this time. I have tried to be very generous with the allotment of time to ask questions.

If anybody has additional questions, we will be happy to accommodate, but we are going to wrap this up before the votes I can promise you.

Okay, seeing no more questions, the meeting is adjourned.

[Whereupon, at 4:46 p.m., the subcommittee was adjourned.]



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DEPARTMENT OF HOMELAND SECURITY

U. S. COAST GUARD

STATEMENT OF

REAR ADMIRAL WILLIAM D. BAUMGARTNER

ON THE

COAST GUARD AND MARITIME TRANSPORTATION ACT OF 2006

BEFORE THE

SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

COMMITTEE ON TRANSPORTATION INFRASTRUCTURE

U. S. HOUSE OF REPRESENTATIVES

JUNE 20, 2006

INTRODUCTION

Good morning. Thank you for the opportunity to appear before the Subcommittee to testify on the Administration proposal, the “Coast Guard and Maritime Transportation Act of 2006.”

Before turning to the Administration proposal, I wish to express the Coast Guard’s gratitude for the Congressional response to our request for emergency powers in the wake of Hurricanes Katrina and Rita. The Coast Guard Hurricane Relief Act of 2005 (Public Law 109-141) provided much needed temporary authorities, and the speed with which Congress acted was truly appreciated.

As you know, some of these emergency powers expired February 2006, and the replacement permanent authorities are found in H.R. 889. Moreover, other authorities that would enhance the Coast Guard’s capacity to respond to disasters (section 206 – Reserve recall authority), protect the marine environment (title VI—Delaware River Protection and Miscellaneous Oil Provisions), and secure the Nation’s maritime borders (section 201 – Extension of Coast Guard vessel anchorage and movement authority; section 303 – Certification of nationality in drug smuggling cases) are found in the conference report. The Commandant appreciates the Subcommittee’s work on H.R. 889 and looks forward to implementing these provisions once they become law.

COAST GUARD AND MARITIME TRANSPORTATION ACT OF 2006

I want to acknowledge this Subcommittee’s tradition of taking up a Coast Guard authorization act each year and its willingness to address the challenges facing the Nation. Such reflects the understanding that the strategic environment in which the Coast Guard operates has dramatically changed in the past five years and continues to evolve. Such also reflects an understanding that the Coast Guard must continually adapt and, where current law impedes this necessary adaptation, that Congress must address those barriers each year.

On February 28, the Commandant transmitted the Administration proposal, the “Coast Guard and Maritime Transportation Act of 2006.” The proposal would authorize the funds and end strengths requested in the President’s fiscal year 2007 budget. Additionally, it would provide important new authorities, as well as expand and clarify existing authorities. Of these authorities, four warrant particular attention:

- Section 205 – Merchant Mariner Credentials;
- Section 202 – Technical Amendments to Tonnage Measurement Law;
- Section 403 - Maritime Alien Smuggling Law Enforcement Act (MASLEA); and
- Section 401 – Maritime Drug Law Enforcement Act Amendment on Simple Possession.

The remaining provisions would address issues, ranging from uses of the Oil Spill Liability Trust Fund (OSLTF) to the well-being of Coast Guard members.

Section 205 – Merchant Mariner Credentials

The events of September 11th made clear that the Nation must take more care in controlling who is able to secure and use government-issued forms of identification. The 9/11 Commission, which noted that the September 11th hijackers obtained and used government-issued identification cards, such as driver’s licenses, recommended that forms of identification be made more secure.

Congress partially addressed this deficiency through section 70105(b)(2)(B) of the Maritime Transportation Security Act of 2002, which requires merchant mariners to have a Transportation Worker Identification Credential (TWIC).¹ Additionally, merchant mariner credentials, commonly known as licenses or merchant mariner documents, now include new and improved security and anti-counterfeiting features. Notwithstanding these initiatives and improvements, amendments to the statutes pertaining to merchant mariner credentials are necessary.

The Coast Guard first proposed amendments to the statutes in calendar year 2005. In response to the Subcommittee's direction concerning that legislative initiative, the Coast Guard conducted an extensive public outreach effort, including a public meeting and a public docket to collect comments on the proposal. Moreover, the Coast Guard held a series of one-on-one meetings with stakeholder groups to identify concerns with the initiative and gather feedback.² The Coast Guard also consulted with a working group of the Merchant Marine Personnel Advisory Committee (MERPAC).

Section 205 is the culmination of this public outreach. It now reflects some 75 pages of public comment and ten out of eleven recommendations of the MERPAC working group. Many changes have been made. For example, protections were added for innocent mistakes, such as a "safe harbor" provision for applicants and current holders who inadvertently forget to disclose material information. Additionally, it protects those who assist others applying for a credential from civil penalties. (The Coast Guard rejected only one MERPAC working group recommendation to shorten the look-back period for drug convictions from ten years to five.). Section 205 also includes—

- Providing much clearer statutory language. Existing statutes have developed piecemeal over the last 50 years, with no significant revision in over 20 years. As a result, the statutes are unclear, self-contradictory and, in some cases, obsolete. Section 205, if adopted, would render the statutes easier for mariners to understand.
- Taking into account the findings and recommendations of the 9/11 Commission regarding the importance of preventing terrorists from obtaining government-issued identification cards.

Finally, the suspension and revocation chapter would allow for immediate temporary suspension of a merchant mariner credential when a mariner is involved in an accident involving death or serious injury, and there is probable cause to believe the mariner was at fault. To ensure fairness to, and protect the rights of, merchant mariners, the amendments would also explicitly address an applicant's appeal rights, including the right to recover attorney fees if a credential is wrongfully denied.

Section 202 – Technical amendments to tonnage measurement law

¹ The Coast Guard has been working with the Transportation Security Administration (TSA) to implement the TWIC and recently published a NPRM at 71 Fed. Reg. 29395.

² The following organizations participated in the stakeholders meetings: American Maritime Officers, American Waterways Operators; Passenger Vessel Association; American Pilots Association; Offshore Marine Service Association; International Organization of Masters, Mates and Pilots; Seafarers International Union; Sailors' Union of the Pacific; Marine Firemen's Union; and Marine Engineer's Beneficial Association.

Section 202 is another provision where the Coast Guard consulted with industry and labor groups. It would eliminate conflicts and inconsistencies in statute, strengthen tonnage requirements for foreign flag vessels, and incorporate clarifications and administrative updates and corrections. Existing tonnage law is difficult to apply to some categories of U.S. flag vessels and can create loopholes for certain foreign flag vessels. Significantly, section 202 would:

- Remove conflicting language that suggests a U.S. flag vessel is ineligible for regulatory measurement if it was measured under the convention measurement system at the request of the owner.
- Remove conflicting language that suggests that only existing vessels are eligible for tonnage grandfathering under international agreements and laws of the United States.
- Eliminate inconsistencies in the measurement treatment of documented and undocumented U.S. flag vessels in favor of extending mandatory convention measurement to some undocumented vessels and allowing all undocumented vessels to be assigned optional regulatory tonnage.

Section 403 – Maritime Alien Smuggling Law Enforcement Act (MASLEA)

During FY 2004 and FY 2005, over 840 maritime smugglers facilitated or attempted to facilitate the illegal entry of aliens at an estimated profit of \$13.9 million. Yet, during the same period, less than three percent of interdicted maritime smugglers were prosecuted.

This low rate of prosecution may be surprising to some. Yet, it is largely the result of current law, which was not designed for the unique aspects of extraterritorial maritime law enforcement operations. Due to the manner in which the elements are set out in existing statute, the Government is unable to prosecute the crew or others involved. In turn, there is little deterrent effect, and the smugglers consider such occasional prosecution a cost of doing business in the highly lucrative trade of smuggling.

Section 403, which is modeled after the highly successful Maritime Drug Law Enforcement Act (46 U.S.C. App. §§ 1901-1904), would address the specific shortcomings of existing law that impede the prosecution of maritime smugglers. It would enable the United States to improve the security of the maritime borders against unlawful entry by those who seek to enter the United States without official permission or lawful authority and to prosecute maritime smugglers.

Section 401 – Maritime Drug Law Enforcement Act Amendment on Simple Possession

Section 401 would establish a civil penalty offense and process that will serve as an effective deterrent to the simple possession of narcotics aboard vessels subject to the jurisdiction of the United States. The provision is intended to deliver meaningful, yet measured, consequences for illegal and often unsafe conduct in the maritime domain; in no way is the measure intended to lessen the criminal laws already in effect or condone possession or use. Rather, this new civil penalty offense adds a practical alternative when criminal possession is not efficient, complements the existing laws and provides a means to effectuate congressional intent to prohibit possession of controlled substances.

Various Coast Guard Personnel Authorities

The Administration proposal includes other important provisions directed at improving the lives of our uniformed men and women. One such provision would allow service members to retain leave they would otherwise forfeit due to support of major disasters or other emergencies. Another would make permanent the Coast Guard's current housing authorities, which are scheduled to expire on October 1, 2007, thereby permitting the Coast Guard to continue to meet the housing needs of its members. Yet another would permit the Coast Guard to reimburse travel expenses that member, who are stationed on an island, must incur when accompanying dependents to specialty-care providers who are located on the mainland. I believe such provisions are extremely important because they can only enhance a service member's focus on the mission by minimizing or even eliminating such quality-of-life distractions as a loss of earned leave, quality of housing, or unexpected financial burdens.

CONCLUSION

Whether responding to a natural-disaster or performing one of its many other missions, the Coast Guard prides itself on its ability to provide outstanding service to the Nation. However, in order to remain effective, the Coast Guard must possess the necessary authority to perform as expected when called upon to execute any of its varied missions. The provisions before the Subcommittee will ensure the Government remains responsive and I urge you to consider them.

Mr. Chairman, thank you again for the opportunity to appear before the Subcommittee today. I will be happy to answer any questions.

**THE HONORABLE BOB FILNER
RANKING DEMOCRAT
SUBCOMMITTEE ON COAST GUARD AND
MARITIME TRANSPORTATION
OVERSIGHT HEARING ON
COAST GUARD AUTHORIZATION ACT OF 2006
June 20, 2006**

Thank you Mr. Chairman for scheduling today's hearing on the "Discussion Draft" bill to authorize appropriations for the Coast Guard for Fiscal Year 2007, which includes other amendments to our nation's maritime laws.

It is my understanding that the Subcommittee may markup this legislation on Thursday and that the Full Committee may mark it up on June 28th. That's a quick schedule and I am hopeful that all of these provisions can be worked out in time.

The purpose of today's hearing is to get the Administration's views on their proposed authorization bill for Fiscal Year 2007 and to receive testimony from 2 witnesses on a proposed change to the seaman's wage penalty statute.

The Seaman's wage penalty statute has its origins in a statute enacted in 1790 – the very first Congress. Seamen have historically been considered wards of the government who would seek to protect them from abusive shipowners.

It is my understanding that in 2003 Royal Caribbean Cruises reached a settlement agreement for unpaid overtime wage claims for \$18.4 million and in 2005 Norwegian Cruise Lines reached a settlement agreement for similar unpaid wage claims for approximately \$25 million. Now the cruise lines are seeking to have the wage penalty act changed to decrease the chances of them ever being penalized if they fail to pay a seaman the wages due without sufficient cause.

I look forward to hearing from today's witnesses. It is unfortunate that the cruise line industry is not participating in these hearings so that the Subcommittee can get the information it needs before deciding on whether or not to change the seaman's wage penalty.

Again, thank you Mr. Chairman for scheduling this hearing. I look forward to working with you to develop a bipartisan Coast Guard Authorization Act of 2006.

**STATEMENT OF THE HONORABLE FRANK A. LoBIONDO, CHAIRMAN –
SUBCOMMITTEE ON
COAST GUARD AND MARITIME TRANSPORTATION
AT THE SUBCOMMITTEE HEARING FOR FISCAL YEAR 2007 COAST GUARD
AUTHORIZING LEGISLATION
JUNE 20, 2006**

Today, the Subcommittee is meeting to review a discussion draft of the Coast Guard Authorization Act of 2006. This hearing will give all members of the Subcommittee the opportunity to consider the authorized funding levels and the legislative language that is included in this draft bill.

The draft bill would authorize nearly \$8.3 billion in funding for the Coast Guard in fiscal year 2007. This authorization includes funding to support each of the Coast Guard's important missions.

For purposes of discussion, the draft bill would authorize \$1.1 billion for the Coast Guard's Integrated Deepwater Systems program. Deepwater will result in a complete recapitalization of Coast Guard vessels, aircraft, and associated communication and control systems. Because the Coast Guard has been tasked with increased responsibilities following September 11th, the Service's legacy fleet of vessels and aircraft are deteriorating at an alarming rate. As I have in previous years, I intend to support an increase in the authorized funding level for the Deepwater as this bill moves forward. Additional funding is necessary to accelerate the production of new Deepwater assets and to sustain the Service's existing legacy assets.

I cannot overestimate my concern with the pace of the Deepwater program. Each day, the men and women of the Coast Guard are faced with the possibility of a major asset failure that puts the safety of personnel and the success of their missions in jeopardy. I am particularly concerned about the service's 110-foot patrol boat class which continues to suffer from hull breaches and unexpected maintenance needs. First, the Coast Guard planned to convert the remaining 110-foot patrol boats by lengthening the hulls and improving the electronic and communications systems that have become outdated. Following construction, however, the Coast Guard realized that the 123-foot converted boats were plagued with design problems and, as a result, the conversion program has been terminated. To address the increasing gap in patrol boat readiness, the Coast Guard then proposed to accelerate construction of the Fast Response Cutter (FRC). Just a few months ago, however, the Coast Guard postponed construction and acquisition of the FRC due to concerns about the vessel's proposed design. I am deeply concerned by these problems and as a result, I would urge the Coast Guard to move quickly to identify an available design to replace the 110-foot patrol boat class.

We must complete this program with all deliberate speed. I urge my colleagues to support funding levels that will not only allow the Coast Guard to acquire the assets they need, but would allow the program to be accelerated and brought online over the next fifteen years rather than the 25 years that is in the revised plan.

**WRITTEN TESTIMONY OF MYRON H. NORDQUIST
ASSOCIATE DIRECTOR AND EDITOR
CENTER FOR OCEANS LAW AND POLICY
UNIVERSITY OF VIRGINIA SCHOOL OF LAW**

**REGARDING "PENALTY WAGE" AND RELATED DUE PROCESS
AMENDMENTS TO TITLE 46, UNITED STATES CODE**

**HEARING ON
THE FISCAL YEAR 2007 COAST GUARD AUTHORIZATION ACT**

**BEFORE THE
SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES**

JUNE 20, 2006

Thank you Chairman LoBiondo and Members of the Subcommittee. My name is Myron H. Nordquist and I am privileged and honored to testify today on proposed penalty wage and related due process amendments to Title 46 of the United States Code.

BACKGROUND

My academic observations are personal comments and are not intended to reflect the views or policy positions of the Center for Oceans Law and Policy or the University of Virginia School of Law. Briefly, I am a semi-retired law professor who has served, among other duties, for 30 years as Editor-in-Chief of the Virginia Commentary on the 1982 Convention on the Law of the Sea. The preparation of the Commentary was a collegiate effort at the Virginia Center with some 100 scholar-diplomats from around the world. The goal was to identify the sources for and provide an objective commentary on the 320 articles and nine annexes in the 1982 Convention, some times called a "Constitution for the Oceans." The sixth and last volume in the Commentary was published last year, with the series as a whole containing some 4,000 pages of citations and line-by-line analysis of the maritime law provisions in the 1982 Convention. I believe that it was due largely to my work on the Commentary at the Center that led to my being contacted recently by the International Council of Cruise Lines ("ICCL"). The ICCL asked for my comments on proposed amendments to the wage penalty and related provisions in Title 46 of the United States Code. Subsequently, the Subcommittee invited me to present testimony today on substantially similar proposed amendments.

My overall reaction is that the existing law pertaining to penalty wage provisions, while historically understandable, is out of date. I respectfully submit that the proposed amendments provided by the Subcommittee genuinely promote a better and more equitable maritime policy for passenger vessel "seamen" (many of whom in the cruise industry are now more akin to hotel or restaurant employees) as well as for masters, owners, operators and employers. Moreover, as elaborated in my testimony, my view is that the proposed amendments reflect sound public policy and ought to be incorporated into updated chapters in Title 46 of the United States Code.

The Members and staff are well aware that United States laws often differ depending upon whether the vessel in question is in a foreign and intercoastal voyage or in a coastwise voyage. Thus, proposed amendments intended to impact both types of voyages must often amend different provisions in separate chapters of Title 46, even if the text of the proposed amendments for each respective category of voyage reads just about the same. For this reason, proposed amendments to Title 46 can be cumbersome to express precisely in narrative form. I apologize in advance to the Members and staff of this Subcommittee for redundancies in my testimony occasioned by my effort to be clear and concise about the legal implications of the proposed amendments in the complicated context of Title 46.

FOREIGN AND INTERCOASTAL WATERS (Chapter 103)

Existing law pertaining to voyages in foreign and intercoastal waters is found in Chapter 103 of Title 46, United States Code. Section 10313 provides that a seaman's entitlement to wages begins when the seaman begins work, or as specified in the shipping agreement. Section 10313 also qualifies a seaman's entitlement to wages if the vessel is lost or wrecked, if the seaman is discharged improperly, if the seaman unlawfully fails to work or if the seaman is imprisoned. Procedures are provided for the payment of wages at each port on cargo ships, and at the "end of the voyage" as defined by applicable case law. Interestingly, the section applies to seamen on foreign vessels in United States harbors, but not to fishing vessels, whaling vessels or yachts.

The wage penalty and related statutes which the proposed amendments fix were originally enacted in 1790, with increasingly severe penalties through amendments in 1872, 1898 and, finally, in 1915. It is noteworthy that the last update was at the beginning of the last century. Traditionally, law makers promoted maritime commerce by trying to accommodate fairly the competing demands of the vessel owner and crew, most of whom were traditional seamen. Given the relative disparity between owners and crew, penalty wage provisions were enacted to encourage prompt payment of wages due to seaman and to impose penalties where non-payment was inexcusable.

Much has changed in the last 90 years: vessels and crews are much larger, treatment of seamen, many of whom are women, is more humane, and a global economy has come with major advances in communications and methods of doing business. Updating the law, especially in the case of the cruise lines and other passenger vessels operating in the United States, ought to be understandable. The obvious concern of the First Congress, over 200 years ago, was to provide incentives to ensure that masters or owners did not improperly withhold wages, thereby unjustly enriching themselves while wrongfully denying seamen the fruits of their labor. This equitable notion is as appealing today as it was with Members from over 100 Congresses ago. Individual seamen ought as a matter of sound public policy to be protected from arbitrary and unscrupulous treatment by more powerful masters or owners. That is not to say, however, that it is fair or sound public policy to impose grossly disproportionate penalties where sufficient cause exists to doubt whether the wages at issue are due and owing.

This brings me to comment on the most important provision in the Subcommittee's penalty wage proposal: the "notice and remedy" section. The proposed amendments do **not** change the current wage penalty, but rather they introduce a straightforward procedure to settle disputes in a timely fashion. Indeed, as discussed below, the antiquated provisions of the seamen wage statutes, including the existing penalty provisions, grant foreign hospitality workers on foreign cruise ships far greater protections, including more onerous penalties, than are provided for any American workers, of which I am aware.

PENALTY PROVISIONS

Turning to the statutory provisions involving penalties for failure to pay wages properly, the proposed amendments do not change the existing requirement of Section 10313 (f) that upon discharge a seaman must be paid at least 1/3 of his final wages immediately, and the balance within the earlier of either 24 hours after cargo is unloaded or 4 days. Instead, the proposed amendments improve the current subsection (g) of existing law, which reads:

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

While the proposed amendments do not change the prescribed penalty amount at all, they do strike "When" in subsection (g) above and insert:

"(1) Except as provided in paragraph (2), when".

Next, the **most important procedural improvements** from a due process of law standpoint in the entire package of proposed amendments are made by inserting a new paragraph (2) to read:

(2) A seaman serving on a passenger vessel shall notify the master, owner, operator or employer in writing of any claim that a payment was not made as provided in subsection (f) of this section without sufficient cause, within 180 days of the seaman's receipt of the information giving notice of any disputed payment, or 30 days after the termination of the seaman's employment contract, whichever occurs later. A penalty payable under the subsection, if any, shall accrue only after the expiration of 60 days from receipt by the master, owner, operator or employer of such written notice from the seaman and the failure by the recipient of such notice either to (a) cause to be paid the amount disputed or (b) cause to be deposited the amount disputed into an interest bearing account and commence appropriate legal action to determine whether the claim has merit. A penalty assessed under this subsection shall not exceed 2 days' wages for each day payment is delayed. The seaman's failure to give the notice required under this subsection shall be a bar to any claim or penalty under this subsection.

The above new paragraph brings modern due process procedures for all concerned: seamen, masters, owners, operators and employers. If these due process procedures are added to Title 46, the 109th Congress will advance a major step in the direction of circumscribing and promoting fair, early settlement of seaman wage disputes. To avoid repetition in this testimony, the substantive legal consequences of this identical

proposed amendment are discussed below in the context of Chapter 105 dealing with coastwise voyages.

COASTWISE VOYAGES

Section 10504 in Chapter 105 of Title 46 is addressed to when seamen on coastwise voyages may obtain portions of their wages. The proposed amendments are to 10504(b) and (c). The section does not apply to fishing vessels, whaling vessels or yachts, and portions of it do not apply to vessels taking oysters. It does apply to foreign vessels while in United States ports.

Section 10504(b) of Title 46 currently reads:

(b) The master shall pay a seaman the balance of wages due the seaman within 2 days after the termination of the agreement required by section 10502 of this title or when the seaman is discharged, whichever is earlier.

The proposed amendments strike subsection (b) and substitute the following:

(b) Subject to subsection (d) of this section, the master shall pay a seaman the balance of wages, less permitted deductions and withholdings, due the seaman, on the earlier of-

- (1) 2 days after the termination of the agreement required by section 10502 of this title for a seaman on a cargo vessel,
- (2) 30 days from the commencement of the voyage for a seaman on a passenger vessel, or
- (3) when the seaman is discharged or the employment ends.

As noted, the language of the proposed amendment for coastwise voyages cited immediately above is substantively identical to the proposed text amendment inserted above in Section 10313 (f) for foreign and intercoastal voyages. The legal result clearly intended by the proposed amendments is to treat seaman wage disputes the same whether they arise in foreign and intercoastal or coastwise voyages.

Paragraph (c) of Section 10504 of Title 26, United States Code, currently reads:

(c) When payment is not made as provided under subsection (b) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days wages for each day payment is delayed.

As we saw in Section 10313(g) above, the proposed amendments for Section

10504 strike “When” in paragraph (c) cited immediately above and insert two paragraphs, the first of which reads as follows:

- (1) Subject to subsection (d) of this section, and except as provided in paragraph (2), when.

The second paragraph proposed for amendment in Section 10504 has the same text as was inserted in Section 10313(g) (2) above dealing with foreign and intercoastal voyages. Again, the intention is to authorize and require the same application of law with respect to similar cases, regardless of whether the dispute involves foreign and intercoastal or coastwise voyages. Thus, we reach the heart of the new procedural due process protections in penalty wage cases.

Current law imposes no obligation on seamen serving on passenger vessels to notify the master, owner, operator or employer in writing of disputed wage claims. The proposed amendments give the seaman 180 days to tender **written notice**, but only after the seaman’s receipt of the information indicating a disputed payment. Alternatively, the seaman’s notice obligation arises 30 days after the termination of the seaman’s employment contract, *whichever occurs later*.

These new notice provisions are slanted in the favor of the seamen who now work on passenger vessels. Common sense tells us that seamen and employees in general scrutinize the amounts they are paid and are usually outspoken about wage disputes. The underlying premises of the 1790 law and its even harsher subsequent amendments at the turn of the century distort the diligence and intelligence of modern seamen and exaggerate the extent to which cruise lines and other passenger-vessel employers act in bad faith. My view is that both groups deserve more respect, and I submit that modern laws should assume that individuals are reasonably intelligent and normally honest. American law is not unfair in expecting seamen as well as masters, owners, operators and employers to act as responsible persons by giving timely notice and an early opportunity to settle potential wage disputes amicably. Indeed, such due process requirements are commonplace throughout American law. Compliance with the truly draconian United State Tax Code and its filing requirements imposes far more confusing and burdensome legal obligations than the relatively straightforward notice and opportunity to remedy requirements in the proposed amendments. Public policy interests also are served by requiring the master, owner, operator or employer in the proposed amendments to act more promptly than seamen to deal with their written notice *i.e.*, within 60 days. The disparity in positions and resources between the two groups, in my view, justifies giving more time for seamen to act. The point is that all concerned parties, seaman, masters, owners, operators and employees deserve equitable and fair treatment before the law.

Part of what is manifestly unfair about the existing law is that the payer is penalized even if he is completely unaware of the potential wage dispute. And that

penalty can be grossly disproportionate reading the code as currently written. The leading case in this area of law is Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982). The U.S. Supreme Court chose to adopt a literal (not a “liberal”) construction of the existing code text and, in a split decision, held that the district courts have no discretion to limit the period during which the wage penalty is assessed. The decision in Griffin allowed the failure to pay a single seaman \$412.50 to amount to a penalty award of over \$300,000. Such a penalty award is grossly disproportionate by any reasonable standard. The Court placed the blame for endorsing what is on its face a grossly disproportionate award by stating that the remedy for dissatisfaction with the results in the case lies with Congress that had the power to amend the statute, which the Court did not. In legal effect, the United States Supreme Court threw equity out the window in that case and stated that Congress had to do the fix. I can not understand how the words contained in the statute i.e. “without sufficient cause” can be construed not to reflect equitable legal content. My view is that Griffin was a bad decision that is understandable only if the Supreme Court deliberately wanted to goad the Congress into updating the law.

At present, the failure to pay even \$1 that is later determined by a jury to be “without sufficient cause” automatically requires a court to impose a penalty of two days full wages for every day that dollar remained unpaid. A maritime employer’s first notice of a wage claim may be in the form of a lawsuit filed years after the fact, since there is no requirement in the current law for the seaman to give notice of a claim or make a demand. The penalty in the Code is the same regardless of the amount of the wages in dispute.

By comparison, my understanding is that the Fair Labor Standards Act allows an employee to file a private lawsuit seeking unpaid minimum wages or overtime wages plus an additional amount equal *only* to the wages sought. Thus, an employee can seek double the amount owed in damages, in addition to attorney’s fees. See 29 U.S.C. § 216(b). The employee can not recover, under any circumstances, twice his *total* daily wage for every day the claim remained outstanding, even if unasserted.

Comparison between wage laws on land and the penalty wage statutes at sea raise a constitutional question in my mind of equal protection under the law. But as noted, the proposed amendments still lean over backwards towards seamen by leaving in place the penalty of 2-days wages for each day any amount of payment is delayed. The proposed amendments can only be seen to reflect confidence that seamen’s wage claims will be properly handled if the passenger vessel master, owner, operator or employers know about the grievance and have a reasonable time to either settle the dispute or put the amount in dispute in trust until the issues are resolved. To repeat, the proposed amendments leave in place the penalty wage provisions in existing law but introduce notice and an opportunity to remedy – procedures designed to settle disputes in a timely manner. I believe this is good public policy and the proposed amendments are a major improvement in this area of maritime law.

Lastly, under the proposed amendments to Sections 10313 and 10504, the seaman's failure to give the statutory notice is a bar to any claim by the seaman or the imposition of a wage penalty on the master, owner, operator or employee. Such a bar is commonplace in American law, and an inherent requirement to give any meaning to due process. An efficient functioning judiciary is in the public interest and, by and large, the calendars of courts in the United States are overcrowded. My view is that the present law is so outdated that it actually provides an incentive for seamen to hold off on asserting claims (which as in Griffin can be for relatively minor amounts) to take advantage of the huge wage penalty provision windfall. Existing law actually promotes unnecessary work for the courts. My judgment is that the proposed amendments promote early settlement of disputes while dealing fairly in a customary and evenhanded way with all concerned parties. Time limits for the assertion of claims by seamen are sound public policy typically seen as beneficial to the American judicial system.

STATUTE OF LIMITATIONS

The existing law in this area is inadequate from another public policy point of view: there is no uniform statute of limitations. The federal courts in penalty wage cases have had to resort to the application of the relevant statute of limitations for the state where cases concerning the disputes are brought. As is predictable, claimants shop for the forum that is most favorable to their particular case. This is bad public policy for different results for nearly identical cases occur which cannot be credibly argued as fair or conducive to the principle of equal treatment under the law. For example, recent cases have been brought in the State of New York which has a six year statute of limitations; such cases would not be allowed in states with shorter statutes of limitations.

The statute of limitations generally refers to the time period after an incident occurs during which a lawsuit may be filed regarding the incident. The public policy rationale underlying a limitation on the initiation of legal disputes is to encourage the timely settlement of legal grievances before an undue passage of time obscures evidence and prejudices fair adjudication. The doctrine evolved out of common sense experience and common law concepts such as due process and equity. One point that especially reinforces the need for a change to the 1790 law as amended was noted above in that current law does not mandate that the payer even have **notice** of the payee's claim. That is, even if the seaman is well aware of the claim, he (or she) has little incentive, let alone obligation, to notify the master, owner, operator, or employer of the claim. Even with no knowledge of the claim, the payee is required to render payment, including penalties under existing law. As mentioned previously, wage penalties can accrue to an almost unbelievable amount if the jury finds the reason for the delay is "without sufficient cause." The master, owner, operator or employee may, in fact, agree with the seaman before the court that the payment was withheld without sufficient cause. Perhaps the paymaster was a crook or an accountant made a bookkeeping error that a fair-minded payee readily agrees should have been caught. The interests of justice are not served by grossly disproportionate remedies being endorsed as the law of the land. Public respect for the rule of law is not advanced by strict enforcement of outmoded laws written for an earlier era. Fundamental fairness as reflected in modern doctrines of due process dictate

that those against whom the legal grievance is alleged have notice of the claim and a reasonable opportunity to take corrective action. Moreover, public policy is not served by burdening the court system in the United States with stale claims.

Thus, if a statute of limitations is desirable, how much elapsed time is fair for seaman wage cases? For foreign and intercoastal voyages, the proposed amendments are to Section 10313 of Title 46 that adds a new subsection (k) to read:

(k) An action under subsection (g) (2) of this section shall be commenced within three years of the date of the commencement of the voyage for which the wages are claimed.

Likewise, for coastwise voyages, the proposed amendments are to Section 10504 by adding a new subsection (g) to read:

(g) An action under subsection (c) (2) of this section shall be commenced within three years of the date of the commencement of the voyage for which the wages are claimed.

An argument can be made that the selection of any number limitation to end disputes is arbitrary. To ascertain what time limits are reasonable, law makers and courts typically seek to provide similar treatment for similar cases. The first precedent that comes to mind is to look at the wage protections afforded most employees performing similar work on land in the United States. In such instances, my understanding is that the Fair Labor Standards Act applies a two-year statute of limitations for wage disputes, except in cases of proven willful violations where a three-year statute of limitations applies. It seems reasonable to me that the proposed amendments with a three-year statute of limitations commencing with the voyage in question promotes nearly equal and uniform treatment for shore-side workers and seamen alike. Treating similarly situated individuals similarly is fair as well as sound public policy and the proposed three year statute of limitations ought to be made law.

CREW BENEFITS

Turning to other provisions proposed for amendment, the first sentence of paragraph (f) of Section 10313 of Title 46 reads:

At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier.

The amendment proposed as a substitute for the foregoing first sentence reads:

At the end of a voyage, the master shall pay each seaman the balance of wages less permitted deductions, withholdings, allotments due the seaman within the earlier of –

- (1) 24 hours after the cargo has been discharged for a seaman on a cargo vessel,
- (2) 30 days from commencement of the voyage for a seaman on a passenger vessel, or
- (3) 4 days after the seaman is discharged, or the employment term ends. (emphasis added)

A new subsection (j) for Section 10313 also is proposed to read:

(1) In the case of a passenger vessel, nothing in this section or in sections 10314, 10315, or 10316 prohibits the master, owner, operator, or employer from deducting or allotting from the seaman's wages expenses incurred, with written consent of the seaman in the employment agreement or other writing, which written consent shall be renewed annually, for-

(A) premiums payable to a licensed insurance provider eligible to issue health, life, accident, or disability insurance for the seaman or his family, unless otherwise prohibited by law; or

(B) deposits permitted by section 10315(e).

(2) Deductions withheld under paragraph (1) (A) of this subsection shall be disclosed to the seaman in writing and may not exceed 10 percent of the total earnings paid (including tips and overtime) to the seaman from which the deduction was made during the current pay period.

The merit of the above proposed amendments is a self-evident attempt to modernize the handling of wages by passenger vessels in Title 46. First, subsection j (1) (A) permits certain limited deductions, when the seaman so expressly directs in writing, of various benefits for the seaman or his/her family. The deductions are only for benefits not owed already to the seaman by maritime employers, such as maintenance and cure (a daily living allowance and payment of medical bills for injuries or illnesses while in the service of the ship).

Further wage handling improvements are offered for Sections 10314 and 10315. Section 10314 of existing law forbids advance payment of wages to seamen prior to the commencement of the seaman's employment and provides civil penalties for enforcement. This section prohibits the use of employment agencies for hiring seamen and several other, none germane provisions. Section 10315 lists the persons to whom a seaman may allot wages, specifies the conditions which make an allotment valid, and provides a civil penalty for falsely claiming qualification as an allottee. Compliance with both Sections 10314 and 10315 is required before a foreign or United States flag vessel can be cleared from a United States port. Section 10316 qualifies the two previous

sections by allowing an employer to make deductions from a seaman's wages for the purpose of placing the wages into a trust fund or holding them in trust to provide for the seaman's benefit.

Amendments to implement part of the new 10313(j) are proposed by inserting conforming text for Sections 10316, 10314(a) (1), and 10315(b) and (c) with a new sentence at the end of subsection (e) of 10315 to read:

However in the case of a seaman employed on a passenger vessel, nothing herein shall prevent the master, owner, operator or employer, pursuant to the employment agreement or other writing signed by the seaman, from making any allotment permitted by this section or making deposits into a checking, savings, investment or retirement account in any financial institution or to an agent other than the master, owner, operator or employer, designated by the seaman for deposit into such account.

The combined legal effect of the proposed amendments, including technical conforming amendments, is to allow all seamen on passenger vessels in a foreign or intercoastal voyage to request a deduction *in writing* from wages to cover payment of premiums for health, life, accident or disability insurance for the seaman or his family. The proposed amendments deal with an acute, practical problem in existing law by allowing the direct deposit of wages into a foreign crew member's bank account, even in an overseas country. The proposed amendments take into account inherent differences between the typical "crew" of cargo as contrasted with passenger vessels. The language provides different procedures for the payment of the respective wages on cargo or passenger vessels given that the needs of the two industries and their seamen are now different. Major safeguards against abuse and, indeed, against the spawning of unproductive disputes are the requirements that the wage deduction take place only upon *written request* from the passenger ship seaman within a cap of 10 percent of total earnings paid. In my view, such requirements in the proposed amendments provide updates with clarity and uniformity in practice that is well designed to serve the best interests of all concerned parties and are therefore sound public policy.

The proposed amendments also add a new subsection (f) (1) and (2) to Section 10504 that conform the provisions for coastwise voyages with the textual changes proposed for Chapter 103 covering foreign and intercoastal voyages (see proposed amendments and comments above on Section 10313 (j) (1) and (2)).

Section 10505 prohibits any person from paying a seaman on a coastwise voyage advance wages, or paying another person any form of a seaman's wages prior to the commencement of the seaman's employment. The section also prohibits a person seeking or receiving remuneration for providing a seaman with employment and requires that a vessel comply with this section before clearing port with penalties for offenses of its provisions. The section does not apply to fishing vessels, whaling vessels, or yachts, but does apply to vessels taking oysters.

The proposed amendments bring coastwise voyages into conformity in this regard by changing the text in Section 10505(a) (1) to read:

Except as provided in section 10504(f), a person may not...

Section 10506 permits deductions from wages of seamen on coastwise voyages if the deductions are to be used for the benefit of the seamen or their families. The proposed amendments retain the existing law by inserting "a" at the beginning of Section 10506 and adding a new subsection "b" to read:

(b) Nothing in this section applies to deductions authorized by section 10504(f).

The net legal effect of the proposed amendments is to allow all seamen on passenger vessels to request a deduction from wages to cover payment of premiums for health, life, accident or disability insurance for the seaman or the seaman's family. They also allow for direct deposits into a foreign crew member's bank account in his or her home country (if he or she wishes it there). The proposed amendments empower seamen to deal more effectively and efficiently with the daily problems of life in modern times, and they reflect the way masters, owners, operators and employers of passenger vessels prefer to do business in the 21st century. In my view, the proposed amendments are fair updates of the existing law.

In conclusion, Mr. Chairman and other Subcommittee Members, I thank you for the opportunity to present my views on the wage penalty and related due process provisions of the law in Title 46 of the United States Code. From my perspective, the proposed amendments provided for my review by the Subcommittee are, as a whole, fair and sensible updates of the existing law. They provide reasonable rights and obligations with procedural due process safeguards for all concerned parties. Adoption of the proposed amendments will bring the antiquated wage penalty provisions in Title 46 more into conformity with the passenger vessel and crew conditions in the 21st Century. By exercising its constitutional powers to legislate sound public policy, Congress will not only be responding forthrightly to the challenge posed by the United States Supreme Court but also be remedying the inadequacies and inequities in existing law for wage penalties.

**STATEMENT OF
THE HONORABLE JAMES L. OBERSTAR
RANKING DEMOCRAT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
AT HEARING ON
COAST GUARD AUTHORIZATION ACT OF 2006
June 20, 2006**

Thank you Mr. Chairman for scheduling today's hearing on the "Discussion Draft" bill to authorize appropriations for the Coast Guard for Fiscal Year 2007, which includes other amendments to our nation's maritime laws.

We are on a fairly quick schedule for this bill. The Subcommittee would like to mark it up on Thursday and the Full Committee would like to mark it up next week. That means that we will have to work in a bipartisan manner and minimize controversy.

The "Discussion Draft" before the Subcommittee includes some provisions that are controversial – including changing the seaman's wage penalty as it applies to the foreign-flag cruise ships that operate out of U.S. ports. As currently written, this provision, (section 308) –

- Requires the seaman to prove that his employer did not have "sufficient cause" to pay him.
- Requires the seaman to notify his employer of any errors in his paycheck within 180 days of receiving his paycheck – or else he cannot get any of his unpaid back pay.

- Allows the seaman to pay for his own health insurance even though the courts have held the vessel owner's liable to pay for "maintenance and cure".
- Authorizes the seaman's pay to be electronically deposited with some foreign agent.
- Gives the vessel owner until 4 days after the seaman is discharged from the cruise ship to pay him what he has earned – even though he will probably be back in his home country by then.
- Allows the courts to set the penalty by changing the seaman's wage penalty from 2 days' wages for each day the seaman didn't receive his proper wage to an amount "not to exceed" 2 days wages for each day the seaman didn't receive his proper wages.
- Allows shipowners that intentionally defraud a seaman of his wages to avoid paying them if the seaman doesn't catch that fraud within 30 days after he is discharged from the ship.
- Virtually eliminates any possibility of a class action suit to collect unpaid wages for thousands of cruise lines workers by requiring that they all have provided notice of the unpaid wages.

This is a complex issue. Unfortunately, the cruise industry did not send a witness to today's hearing so that we can learn about how their pay system does or does not work. The cruise industry has paid out millions of dollars to their seamen for failing to pay them for the overtime they earned when working more than 70 hours per week. When a company can keep track of every drink that thousands of people buy when they're on a cruise ship – I don't understand why they can't keep track of overtime that their employees accrued.

I hope the witnesses today can help the Subcommittee understand the nature of the overtime violations that have occurred in the past before we venture to make any changes to the law that has worked effectively for over 100 years to protect seamen and ensure they receive the compensation that was agreed to in their employment contract.

Thank you Mr. Chairman.

REVISEDTHE SEAMEN'S CHURCH INSTITUTE
OF NEW YORK AND NEW JERSEY

Testimony of

Douglas B. Stevenson, Esq.

Director, Center for Seafarers' Rights
Seamen's Church Institute of New York and NJBefore the House Subcommittee on
Coast Guard and Maritime Transportation

June 20, 2006

Chairman LoBiondo and Subcommittee members, I am pleased to be here today at the Subcommittee's invitation to testify on proposed amendments to the United States Penalty Wage Act. I am also prepared to provide testimony on maritime security issues related to port chaplains' access to maritime terminals and the proposal to place limitations on maritime liens on fishing permits.

My name is Douglas Stevenson. I direct the Seamen's Church Institute's Center for Seafarers' Rights. The Seamen's Church Institute of New York and New Jersey, founded in 1834 to improve the treatment of merchant seafarers in the Port of New York, is the largest, most comprehensive not-for-profit merchant mariners' agency in North America. Headquartered in Manhattan, with facilities in New Jersey, Kentucky and Texas, the Institute every year serves more than 150,000 merchant mariners from 75 different countries through its programs of hospitality, professional training and worldwide legal advocacy.

Mr. Chairman, there is no law that better expresses what America stands for, that confirms American values, than the United States Penalty Wage Act. Enacted by the first Congress in 1790 and strengthened in 1872, 1898 and 1915 to enhance seafarers' protections, the statute simply requires shipowners to pay their seafarers their hard-earned wages promptly.

The purpose of this statute is to protect seamen from "arbitrary and unscrupulous" refusals of their employers to pay their wages. Requiring ship owners to pay seamen their wages promptly was intended to prevent ship owners from using the threat of nonpayment to force seamen to release the ship of all claims¹ and to prevent seafarers

¹ Petersen v. Interocean Ships, Inc., 823 F.2d 334, 336 (9th Cir.1987); Fanos v. Maersk Line, Ltd., 246

from being put ashore penniless and becoming a public charge on the harbor.² The Act is purposefully simple to encourage quick payment of wages without the need for lengthy procedures or judicial interpretation.³

The Act attempts to deter unscrupulous shipowners from withholding seafarers' wages by imposing a two-day penalty for each day that wage payments are delayed. The penalty is imposed only when the delay was caused by arbitrary and unscrupulous acts or omissions. The text of the statute makes clear that penalty wages do not apply every time a seaman's wages are not paid in a timely manner. A seaman is entitled to penalty wages only when the failure to pay is without sufficient cause. Without sufficient cause means either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment.⁴

After analyzing court decisions relating to the Penalty Wage Act, two things are clear: in the majority of cases the employer will not have to pay a penalty if there was sufficient cause for the withholding; and a penalty will be imposed only if the employer has acted in a dishonest or very high handed way.⁵

Since the very beginning of this great nation, the Congress and the American courts have recognized the arduous work and occupational perils that threaten merchant mariners' welfare and well-being. The Congress and the Courts also have long recognized that merchant mariners work under the disproportionate bargaining power of the shipowner from the moment articles are signed until final wage payment is received; and they are particularly vulnerable to exploitation and abuse by unscrupulous shipowners. In response to such threats, and recognizing the crucial contributions that merchant mariners make to our nation's economy and security, the Congress and the courts have zealously safeguarded seafarers' rights.

Mr. Chairman, the special protections accorded to merchant mariners by the Penalty Wage Act are as relevant and necessary today as they were in 1790, 1872, 1898 and 1915. The necessity to preserve these protections accorded to vulnerable seafarers was recently demonstrated by three separate class-action lawsuits against cruise line companies Norwegian Cruise Lines (NCL), Royal Caribbean Cruise Lines (RCCL) and Carnival Cruise Lines (CCL). The NCL case involved approximately 12,000 seafarers, the RCCL case involved approximately 28,000 seafarers and the CCL case involved approximately 30,000.

The three lawsuits alleged very similar courses of conduct that deprived seafarers of their overtime pay. All of the seafarers were foreign nationals from developing countries working on foreign cruise vessels having their primary locus of operations in the United

F.Supp.2d 676, 680 (S.D.Tex.2003), aff'd 363 F.3d 358 (5th Cir.2004)

² *Belidor v. L/P/G Benghazi*, 653 F.2d 812,818 (3rd Cir. 1981), 1981 A.M.C. 2427.

³ *Bunn v. Global Marine, Inc.*, 428 F.2d 40, 45 (5th Cir. 1970); H. R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Cong., 2d Sess.

⁴ *Collie v. Fergusson*, 281 U.S. 52, 55, 50 S.Ct. 189, 191, 74 L.Ed. 696 (1930); *Fanos v. Maersk Line, Ltd.*, 363 F.3d 358, 362 (5th Cir.2004).

⁵ Thomas Schoenbaum, *Admiralty and Maritime Law*, Fourth Ed. Vol.1, p. 281

States. All of the seafarers had similar contracts that required them to work seven days a week for ten hours a day (70 hours per week) without a day off throughout their six to ten month contracts. Most were also required to work an extra 1 to 2 hours overtime per day. RCCL's and NCL's collective agreements specified that special overtime pay be paid for hours worked in excess of the regular 70 hours a week. There was no collective bargaining agreement for seafarers working on the CCL vessels. CCL did not pay any overtime pay, rather they considered passengers' tips to be the equivalent of overtime pay. The cases alleged seafarers worked from 10 to over 20 hours of overtime work a week without being paid the overtime wages they earned, that they were coerced and intimidated to work the excessive hours out of fear of losing their jobs, that managers on some vessels did not keep accurate records of the hours worked and that some seafarers were coerced to sign false time records.

Many of the seafarers involved in the cases worked for tips. Many of their contracts provided for a salary of \$50.00 per month (approximately 16 cents an hour). The bulk of their earnings came from passengers' tips, not from the cruise lines. Seafarers could earn between \$1000 and \$3000 a month in tips, if passengers tipped according to the cruise lines' recommendations.

The RCCL and NCL class action cases were settled by the parties out of court. The settlements did not produce windfall recoveries for the affected seafarers. In the NCL settlement, seafarers were eligible for compensation of between \$3.00 and \$72.00 a month for the months they were denied overtime pay. The RCCL case was settled with payments of between \$15-\$50/month worked during the class period. After litigation expenses were deducted, an average of about \$1,000 was available for each claimant.

The CCL case was dismissed by the United States District Court in Miami after finding that the Panama and Bahamas laws allowed tip income from passengers to be considered sufficient for overtime pay. When the claimants' appealed the decision, Carnival settled the case for \$6.25 million, (\$2.4 million less than the CCL's CEO's compensation for 2005) inclusive of attorneys' fees and costs. Estimated average payouts will probably be about \$100 per CCL claimant. These estimates are based on the reported recoveries distributed amongst the class claimants in RCCL, and to be distributed in NCL and CCL. While only estimates, they reveal that the claimants are not receiving "penalty" wages. The seafarers are not even recovering all of their lost earned wages.

The cruise lines have responded to these lawsuits by asking Congress to amend the Penalty Wage Act's application to seafarers working on passenger vessels. The following are my comments to their proposals:

SECTION 308 PASSENGER VESSEL PENALTY WAGE

(a) FOREIGN AND INTERCOASTAL VOYAGES

Proposal 1 would change existing law in 46 USC 10313(f) by confirming that deductions, withholdings and allotments may be taken from a seaman's wages, would remove the requirement to pay wages within 24 hours after cargo has been discharged from a passenger vessel and would allow masters of passenger vessels to delay paying their seafarers wages for 30 days after commencing the voyage.

Comments:

- As will be discussed below, passenger vessels wish to reduce their obligation to pay crew expenses by transferring more and more of their obligations to the seafarers themselves through deductions, allotments and withholdings. This strategy should not be endorsed by enacting the proposed changes.
- The amendments would require the passenger ship operator to pay wages within 4 days of discharge or 30 days from the commencement of the voyage. This would enable an unscrupulous passenger ship operator to have three extra days to pay wages to discharged seafarers than is allowed in existing law. By this time a foreign seafarer would be long-gone and essentially unable to recover his or her wages or to take advantage of the statute.
- The requirement for paying wages at the time of discharge should be the rule for all passenger vessels. If this provision were removed, unscrupulous passenger vessel operators could discharge foreign seafarers without pay, and because foreign seafarers must leave the United States as soon as they are discharged, the seafarers would be left without a practical remedy for recovering their wages.

Proposal 2 would add a new requirement in 46 USC 10313 (g) for seafarers on passenger vessels to give written notice of a wage claim within 180 days of their receipt of information giving notice of a disputed payment or within 30 days after termination of the seafarer's employment contract. The proposal would change the penalty from 2 days' wages to "not to exceed 2 days' wages" and it would delay starting the penalty for 60 days from the master's, owner's, operator's or employer's receipt of the seafarer's written notice. The proposal establishes a procedure for the master, owner, operator or employer to place the disputed amount in an interest bearing account and commence legal action to determine the merits of the claim. The proposal would also bar any seafarer's wage claim if the seafarer did not follow the notice requirement.

Comments:

- These proposals would effectively repeal the Penalty Wage Act's protections for seafarers working on passenger vessels. They would overturn the basic principles of the Penalty Wage Act by turning a simple, uncomplicated and consistent deterrent to all unscrupulous shipowners into a complicated and unpredictable tool for unscrupulous passenger vessel operators to avoid their obligations to pay their crews' wages.

- The notice requirements shift the burden of ensuring that seafarers on passenger vessels are properly paid their wages from the shipowner to the seafarer. Shipowners should be encouraged, by the deterrent effect of the Penalty Wage Act, scrupulously to keep accurate records of their seafarers' hours of work and wages. The notice requirements remove that deterrent by requiring seafarers to keep accurate records and give notice of any underpayments. Unscrupulous shipowners will already know, or should know, if they are properly paying crew wages. Making the penalty dependent upon seafarers complying with the complicated notice requirements would provide an unscrupulous passenger vessel operator a mechanism for avoiding obligations to pay wages. Principled passenger vessel operators have nothing to fear from the existing Penalty Wage Act because penalties are imposed only when wages are withheld "without sufficient cause", defined by the courts, as "arbitrary and unreasonableness".
- Placing a 180-day notice requirement on employed seafarers would allow an unscrupulous passenger ship operator to unjustly withhold wages because an employed seafarer would not risk certain dismissal by filing a notice of claim while employed.
- The procedure for passenger ship operators to place disputed wages in an interest bearing account and commence legal action would provide yet another way for an unscrupulous employer to avoid paying crew wages and penalties. By the time this procedure could be used, the affected foreign seafarer would be long gone and unable to defend his claim in court. Even if the seafarer were in the United States, the litigation expenses of defending the claim would be prohibitively high. Unscrupulous employers could simply put the disputed claim in escrow, wait for a default judgment and be exonerated from any future claim or maritime lien for the unpaid wages.
- The proposal would make the penalty unpredictable and uncertain for passenger vessels. The proposed penalty "shall not exceed 2 day's pay." This means that a court would have to determine the penalty, without criteria, in each case. This would certainly require more litigation and unpredictability. The penalty should be an amount certain that provides a sufficient deterrent to an unscrupulous passenger vessel operator. If the penalty is to be changed, recent litigation would suggest that the existing penalty does not provide sufficient deterrence, and it should therefore be increased.
- The amendments would allow passenger vessels to delay paying wages without any penalty for 60 days. Not only would this provision remove any deterrent for passenger vessels to pay wages on time, it would also remove any capability for foreign seafarers to enforce their wage claims. More importantly, the change would put the onus on seafarers to keep track of their wage entitlements instead of encouraging passenger vessel operators to put controls in place that would ensure that their crews are properly paid. There would be no incentive for an unscrupulous passenger vessel operator to invest in systems that would ensure

their crews are properly paid when there is scant chance that they would be penalized if they don't.

- The amendments would bar seafarers' wage claims if seafarers do not comply with the complicated notice requirements. This change, if enacted, would produce an unprecedented rejection of basic concepts of maritime law. The Penalty Wage Law would be of little value to seafarers if it did not allow a lien on the vessel. Maritime liens are unique security devices that are designed to keep vessels moving in commerce while not allowing them to escape their debts by sailing away⁶. The Supreme Court has declared that "scamen's wages ... are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages."⁷ The sacred maritime lien for wages is an important remedy that must be retained in conjunction with the penalties of the Penalty Wage Act. Seafarers should not be deprived of this remedy by enacting the proposed amendments.

Proposal 3 would amend 46 USC 10313 (j)(1) by adding provisions allowing passenger vessel masters, owners, operators or employers to make deductions or allotments from seafarers' wages for health, life, accident, or disability insurance premiums for the seafarer and his or her family. The allotments would require the seafarer's consent in an employment agreement or other written consent. Deductions would be limited to a maximum of 10% of seafarers' total income, including tips. The proposal creates a statute of limitations for wage claim court actions of three years from the commencement of the voyage.

Comments:

- Seafarers are not asking for deductions to be made from their wages for medical insurance or other purposes. Seafarers prefer being paid in cash and distrust the intentions behind the proposal.
- The proposal is intended to allow passenger ship operators to reduce their obligations to provide medical care for seafarers by inducing them to take out their own medical insurance as a condition of employment on a passenger vessel. One of the oldest and most enduring rights seafarers enjoy is their right to free medical care. This right, called maintenance and cure, is so firmly established in maritime law, that it is an assumed part of every mariner's employment contract. It is a right so fundamental that no individual mariner can give it away by contract. However, passenger vessel operators can require seafarers voluntarily to agree deductions from their pay for medical insurance. It would not be prohibited by law for a seafarer voluntarily to buy medical insurance in addition to his or her employer's medical benefits. Passenger vessel operators could thereby reduce

⁶ Equilease Corp. v. M/V Sampson, 793 F.2d 598, 602 (5th Cir. 1986) (en banc), cert. denied, 479 U.S. 984 (1986)

⁷ The John G. Stevens, 170 U.S. 113, 119 (1898).

their medical insurance expenses if the seafarers' medical insurance policy became the prime cover.

- This proposal would allow passenger vessel operators to be freed from paying tip earning employees any wages at all – and also to take some of the seafarers' tips to pay for medical insurance. Ten percent of the total earnings of a tip-earning employee would be much more than the wages paid to tip-earning seafarers. (They are typically paid \$50.00 per month and earn from \$1,000 to \$3,000 in tips.)
- The proposed statute of limitations would unfairly start the running of the statute even before a wrong has occurred. Rather than the usual requirement that a statute of limitations begins to run when the injured party knows, or should know, about the wrong, the proposal statute of limitations would start running when the voyage commences.
- The current time limitation for commencing lawsuits to enforce the Penalty Wage Act has up to now worked well and is not in need of amendment. If, however, a statute of limitations is to be included in the Penalty Wage Act, it should be at least three years (which is consistent with admiralty practice) from the time when the seafarer knows or should know about the wrongful withholding of wages.

Proposal 4 would amend 46 USC 10314 (a)(1) by allowing passenger vessel operators to make advance payments of seafarers' wages to pay for the medical insurance.

Comment:

- By allowing passenger vessel operators to make advance wage payments for seafarers' medical insurance, the operators could become like "company stores" making seafarers indentured to them for expenses that the ship operators rightfully should bear themselves.

Proposal 5 would amend 46 USC 10315 to allow passenger ship operators to take deductions from seafarers' wages for their and their families' medical insurance premiums and would permit them to make allotments to financial institutions and agents designated by the seafarer.

Comments:

- See comments to proposals 3 and 4 above.
- Current law would prohibit foreign vessels from making allotments that do not conform to the protections in 46 USC 10315 (allotments can be made only to designated close family members or accounts in the seafarer's name that are insured by FDIC or FSLIC) from seafarers wages while the vessel is in United States waters. The statute does not apply to foreign flag vessels while they are

outside of the United States. The Republic of the Philippines requires their citizens working on foreign flag vessels to remit by allotment 80% of their wages to accounts in the Philippines. Presumably, cruise vessel operators have already developed a mechanism for making legitimate allotments from Filipino seafarers' wages that conform to United States and Philippines law. I am concerned by the proposal's authorizing allotments to accounts that are not in the seafarer's own name, especially to "agents". It is a common practice for recruiting agencies in foreign countries to require seafarers' to pay illegal placement fees that are repaid to the agents by allotment. In addition, deductions are sometimes made from seafarers' pay for repatriation expenses that should be paid by the employer. Before enacting the proposed allotment authorizations, there should also be established a quick and easy administrative mechanism under United States law for seafarers to recover from their employer improper or illegal deductions and allotments.

- I am also concerned about authorizing allotment payments to a "retirement account in any financial institution." If allotments are to be made to a retirement account, there should be assurance that the contributions are fully vested and available for withdrawal by the seafarer.

Proposal 6 would exempt would allow passenger ship operators from the requirements for seafarers' trust funds of 46 USC 10316 for deductions or allotments made for seafarers' medical insurance premiums.

Comments:

- See comments to proposals 3 and 4 above.

(b) COASTWISE VOYAGES

The proposals for coastwise voyages generally parallel those proposals for foreign and intercoastal voyages. There are significant differences that suggest that the proponents of the changes to the Penalty Wage Law wish to diminish rights for foreign seafarers working on foreign flag vessels because the only passenger ships making "coastwise" voyages are the three American flag NCL vessels to which Congress granted a monopoly to sail coastwise in Hawaii. For example, in proposal 1, unlike seafarers on foreign and intercoastal voyages, seafarers on coastwise voyages must be paid wages when discharged or the employment ends without having to wait four days. The penalty for failing to pay wages without sufficient cause to seafarers on coastwise voyages is a certain 2-days wages, not the "no greater than 2-days' wages" for those on foreign and intercoastal voyages.

Comments:

The comments made to proposals in section (a) for foreign and intercoastal voyages relating to Notice, Failure to Give Notice, Statute of Limitations, When Penalty Wages Begin to Accrue and Deductions for Medical Insurance Premiums apply as well to coastwise voyages.

- All seafarers, including those on foreign and intercoastal voyages, should be paid their wages immediately upon termination of their employment without having to wait four days.
- There is no reason why the penalty should be different for coastwise and international and intercoastal voyages.

Summary to Section 308:

Mr. Chairman, there are many ways to look at the cruise industry's proposals to change the United States Penalty Wage Law. I offer this perspective: The cruise industry, which chooses to avoid obligations under US law by operating their vessels under foreign flags and employing foreign workers earning scant wages, is asking the Congress to protect their industry from penalties under United States law if they arbitrarily and unscrupulously fail to pay their foreign seafarers on their foreign flag vessels the seafarers' meager wages that they worked so hard to earn.

Rather than throwing out over 200 years of important legislation and jurisprudence protecting all seafarers in United States ports, I respectfully request the Congress to reject the cruise industry's proposals to amend the Penalty Wage Law. The cruise industry should instead be asked to initiate a proactive program, as they are doing so well with environmental concerns, that will change the culture of the cruise industry by scrupulously paying their crewmembers their earned wages, by putting in place accurate record-keeping systems that will accurately record the hours their crewmembers work and by establishing a zero tolerance policy against intimidating their crewmembers who seek only to enjoy their legal entitlements.

When the cruise industry was hit with several marine environmental violations in the late 1990's, the cruise industry did not go to Congress to request repealing the environmental laws' application to passenger vessels. Rather the cruise industry initiated a responsible and commendable industry-wide program designed to eliminate polluting the marine environment from cruise vessels. The cruise industry can and should initiate a model industry-wide program to ensure that all seafarers' entitlements on passenger vessels are scrupulously protected.

SECTION 310 SEAMEN'S SHORESIDE ACCESS

Proposal: Amend 46 USC 70103 by adding a provision requiring facility security plans to provide a system for allowing seafarers and representatives of seamen's welfare agencies and labor organizations access through the facility in a timely manner and at no cost.

Comment: Regulations implementing the Maritime Transportation Security Act and the International Ship and Port Facility Security Code require all shore facility security plans to contain procedures for facilitating shore leave as well as access to ships by representatives of seafarers' welfare organizations. The requirements are based on the principles that seafarers have primary security duties under the ISPS, and they should be viewed as partners in the new security regime rather than as potential threats to security.

Since coming into force on July 1, 2004, several shore facilities in the United States have subverted the intent of the security requirements by placing obstacles to seafarers and representatives of seafarers' welfare agencies in the form of exorbitant escort fees and onerous administrative requirements. Enacting this provision would improve maritime security and enhance seafarers' welfare and well-being. Attached is our latest survey of shore leave and port chaplains' access issues at shore facilities in the United States.

Terminal Access Issues

JUNE 2006

PORT	ISSUE
Baltimore, MD	Maryland Port Authority Terminals: Seafarers cannot walk to phone booths in State terminals. No port arrangement to transport seafarers to phone booths or to front gate of terminal, rely on sporadic taxi service and 2 vans of seafarer center. Upon return, have to pay for taxi to wait at gate for security escort to arrive, frequently for long periods of time. One reported instance of seafarers having to walk to the gate (25min), with no taxi service allowed in terminal. Private terminals generally allow access for chaplains with proper notice & identification.
Boston, MA	Gulf: Recently switched from providing transportation to/from gangway to only allowing access if chaplain van or one hired through agent @ \$150 per 30hr round trip. Proterized: Scrap metal dock denied shore leave due to liability reasons due to unsafe conditions on dock.
Houston, TX	Westway Terminal: \$700 to transit dock. Jersey gates padlocked when gateman not present. Magellan Terminal: charges seafarers \$25 for ride to gate and additional \$25 to return to vessel, in areas less than 100yard walk through non-operational part of terminal
New Haven, CT	Magellan Terminal: <i>Director of Security denies access unless chaplains provide armed Fort Security personnel to board vessels at cost of \$250 per visit.</i>
Port Arthur, TX	Sunoco Oil Nederland Terminal, Port Arthur: Crew changes must be conducted waterside. No crew access to vessel through terminal. No stores delivery permitted through facility. Waiver on case-by-case emergency basis. Crew boats available for \$125/hr, 55/hr fuel surcharge, 2hr min. Functional equivalent of shore leave denial as crew launch can only come alongside when ship is not pumping out oil.
Portland, ME	No problems reported.
Portsmouth, NH	No problems reported.
Port of New York/New Jersey	ConocoPhillips Bayway: Chaplains have limited access and must be driven down by security from Bayway. Ship's company must pay for these transports, so they are not eager to authorize many visits. Many logistical difficulties reported, even with pre-arranged visits/service. No seafarers allowed off vessels. In theory, security may walk to the gate with seafarers charge a minimum of \$200.00 each way. The owner or captain pays and this occurs for crew change or medical emergency. Unconfirmed if US citizens allowed off. KMI (Kinder-Morgan), Carteret: Chaplains with proper ID and who are on the visitor's list for the day (we are routinely placed on this list) may drive down to the berths for ship visits. they make it virtually impossible for seafarers to go ashore. Chaplains may not take them seafarers in vans, and the terminal charges \$300 (possibly \$350) for a one-way ride to the gate (round trip \$600) per person. Seawaren/ Perth Amboy: Motiva I & II: Chaplains had access with proper ID and if on the visitors' list, no one allowed off ship, even with U.S. visa. Now chaplains can no longer drive down to the tanker in previously allowed vans. Security now charging \$300 per ride to the berth. (\$600 round trip). Chevron: Chaplains have access, no one allowed off ship. Stolt/OBT: Chaplains have access; those with U.S. Visas are allowed off if they pay for security: \$300 one-way, \$600 round trip per person. Chaplains are not allowed to transport seafarers out of the terminal.
San Diego, CA	No consistent problems at the moment.

SECTION 402. LIMITATIONS ON MARITIME LIENS ON FISHING PERMITS

The proposal would amend 46 USC 31310 to exclude state and federal fishing vessel permits from being attached by maritime liens.

Comment:

- This proposal would enable fishing vessel operators to avoid their obligation to provide medical care for sick or injured crewmembers on their vessels. We oppose the amendment. Fishing is the most dangerous occupation in the world, and fishing vessel crews are frequently seriously injured. Some marginal fishing vessel owners operate their vessel without adequate insurance to cover medical expenses for their crews who become sick or injured while working on their vessels. In such situations, injured crewmembers must seek recovery from the owner's assets, which may be limited to the value of the fishing vessel and the fishing permit. If the fishing vessel permits are excluded from attachment by maritime liens, there may be insufficient funds available from the value of the fishing vessel to cover medical expenses.
- This is not a theoretical issue. We are assisting a seafarer who suffered grievous injuries, including loss of his arm, while working on a fishing vessel that was later discovered to be uninsured. His medical expenses have already exceeded the value of the vessel on which he was working. The vessel's owners have no assets and appear to have abandoned the vessel. His only hope for compensation is attaching a maritime lien on the fishing vessel's permit.

**STATEMENT OF THE HONORABLE DON YOUNG, CHAIRMAN
TRANSPORTATION AND INFRASTRUCTURE COMMITTEE AT THE
COAST GUARD AND MARITIME TRANSPORTATION SUBCOMMITTEE
HEARING
FISCAL YEAR 2007 COAST GUARD AUTHORIZING LEGISLATION**

JUNE 20, 2006

I THANK THE SUBCOMMITTEE CHAIRMAN FOR HAVING THIS IMPORTANT HEARING TODAY ON THE COAST GUARD AUTHORIZATION ACT OF 2006. IT PROVIDES A FUNDING LEVEL THAT WILL GIVE THE COAST GUARD THE RESOURCES IT NEEDS TO CARRY OUT BOTH THE SERVICE'S TRADITIONAL MISSIONS AND ITS HOMELAND SECURITY MISSIONS.

AS WE SAW LAST SUMMER, THE COAST GUARD PROVIDES VITAL SERVICES TO THE PEOPLE OF THIS NATION. WE MUST GIVE THEM THE TOOLS THAT THEY NEED TO DO SO. IT ALSO MAKES CHANGES TO VARIOUS STATUTES WHICH SHOULD IMPROVE MARITIME TRANSPORTATION AND COMMERCE.

THE SECOND PANEL THIS MORNING WILL DISCUSS THE ISSUE OF WHETHER TO SET LIMITS ON THE CURRENTLY OPEN ENDED PENALTY FOR INCORRECT PAYMENT OF SEAMEN'S WAGES.

THIS HAS BEEN A CONTROVERSIAL ISSUE, AND I PARTICULARLY LOOK FORWARD TO HEARING THAT PANEL'S TESTIMONY.

THANK YOU, MR. CHAIRMAN.

For the Record

Statement by

The

Reserve Officers Association of the United States

submitted to the

House Committee on Transportation and Infrastructure
Subcommittee on Coast Guard and Maritime Transportation

FY-2007 Coast Guard Budget
June 2006



"Serving Those Who Serve™"

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The Reserve Officers Association of the United States (ROA) is a professional association of commissioned and warrant officers of our nation's seven uniformed services and their spouses. ROA was founded in 1922 during the drawdown years following the end of World War I. It was formed as a permanent institution dedicated to National Defense, with a goal to teach America about the dangers of unpreparedness. When chartered by Congress in 1950, the act established the objective of ROA to: "...support and promote the development and execution of a military policy for the United States that will provide adequate National Security." The mission of ROA is to advocate strong Reserve Components and national security, and to support Reserve officers in their military and civilian lives.

The Association's 75,000 members include Reserve and Guard Soldiers, Sailors, Marines, Airmen, and Coast Guardsmen who frequently serve on Active Duty to meet critical needs of the uniformed services and their families. ROA's membership also includes officers from the U.S. Public Health Service and the National Oceanic and Atmospheric Administration who often are first responders during national disasters and help prepare for homeland security. ROA is represented in each state with 55 departments plus departments in Latin America, the District of Columbia, Europe, the Far East, and Puerto Rico. Each department has several chapters throughout the state. ROA has more than 450 chapters worldwide.

ROA is a member of The Military Coalition where it co-chairs the Tax and Social Security Committee. ROA is also a member of the National Military/Veterans Alliance. Overall, ROA works with 75 military, veterans and family support organizations.

DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Reserve Officers Association is a private, member-supported, congressionally chartered organization. Neither ROA nor its staff receive have received, grants, sub-grants, contracts, or subcontracts from the federal government for the past three fiscal years. All other activities and services of the Association are accomplished free of any direct federal funding.

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INTRODUCTION

Mister Chairman and distinguished members of the House Subcommittee on Coast Guard and Maritime Transportation, on behalf of ROA's 75,000 members, the Reserve Officers Association thanks the committee for the honor, privilege, and opportunity to submit testimony on issues relating to the Coast Guard budget.

The U.S. Coast Guard and its Selected Reserve are a valuable, unique and increasingly visible service within the armed forces structure of this nation. ROA would like to thank this sub-committee for the on-going stewardship it has demonstrated on issues of homeland security, as the Coast Guard is a non-DOD uniformed service. The USCG needs and capabilities do not always receive the public attention ROA believes they should. Since Hurricanes Katrina and Rita, the nation has come to expect even more from this proud service and has levied additional consequence management missions upon it, while retaining the lead Federal agency mission for maritime homeland security.

ROA's two overall legislative priorities are:

- Fully fund equipment and training requirements of the National Guard and Reserve.
- Provide adequate resources and authorizations to support current recruiting and retention requirements of the National Guard and Reserves.

EXECUTIVE SUMMARY

Our Coast Guard's plate is overflowing with workload demands for homeland security. That our men and women in the Coast Guard and its Selected Reserve have kept their heads above water is a testimony to exemplary leadership and selfless personal motivation and dedication.

ROA asks the Committee to respond to the unselfish service of U.S. Coast Guard's men and women and recognize the need for funding assistance in order for the Coast Guard and its Reserve to continue this outstanding work.

This high level of performance can only be sustained by supporting the Total Force. The USCG Reserve component cost-effectively provides flexibility to respond to changing demands and threats. Its Selected Reserve augments the active Coast Guard and reinforces all 11 of the Coast Guard's mission goals. Yet like the active Coast Guard, its Reserve has more missions than people to perform them. While the CG Reserve is authorized at 10,000 serving members, it has been only funded at a level of 8,100 Reservists.

ROA's testimony recommends an increase in authorization for funding to an interim end-strength level of 9,300 for FY-2007, which will create a more robust Coast Guard Selected Reserve by enhancing its capabilities toward mission accomplishment.

DISCUSSION**Resetting the Force:**

In 1995 the Coast Guard Selected Reserve was fully integrated into the Active duty Coast Guard to be trained and employed as a part-time work force doing the same jobs as Active duty members. The Congress indicated, in 1995, that the minimum size of the Coast Guard Selected Reserve be 8,000 serving members. Over the past several years, the Active duty Coast Guard budget and mission scope has expanded to meet the service's increased responsibilities for maritime homeland security.

A 2004 GAO report noted that resource hours for many of the Coast Guard's traditional missions have decreased as demands for its critical port security mission have increased. Coast Guard legacy vessels are experiencing increased unscheduled maintenance and personnel stress issues are arising as a result of higher operational demands across its 11 missions.

ROA believes additional emphasis should be given to the personnel resources required to meet these new missions, which are in addition to the Coast Guard's traditional missions. This mission burden has clearly had an effect on the overall readiness of the Coast Guard. In FY 2006 the Coast Guard was able to satisfactorily meet only eight of its present 11 mission goals. Of particular note was the failure to meet its Defense Readiness combat rating standard (69 percent achieved versus 100 percent target).

Sources within the Coast Guard have indicated to ROA that they have recruiting and training resources that would permit them to expand beyond an end-strength level of 8,100 to 9,300 in FY-2007.

ROA urges that Congress to authorize an increase in the funded size of the Coast Guard Selected Reserve from the Fiscal Year-2006 level of 8,100 to 9,300 in FY-2007.

ROA Resolution No. 04-12 recommends increasing the authorized end-strength of the Coast Guard Selected Reserve to at least 15,000. The USCG has come up with similar results. In a recent study the Coast Guard identified through its Contingency Personnel Requirements List (CPRL) an end-strength of 14,000 officers and enlisted by FY-2011.

The Coast Guard has the ability and infrastructure to immediately begin recruiting to, and training of, a Selected Reserve funded to a level of 9,300 serving members. As for the

future, the Coast Guard can ramp up to attain an authorized end-strength of 14,000 Selected Reservists by FY-2011.

ROA suggests an increased authorization and funding to 10,475 in FY-2008, with further sequential end-strength authorization increases and funding of 1,175 personnel each fiscal year from FY- 2009 to FY- 2011.

This increased end-strength will permit a highly cost effective way for the Coast Guard to match the Contingency Personnel Requirements List (CPRL) developed from the eleven mission performance goals presently assigned to the service.

ROA recommends hearings by the U.S. Senate to determine FY-2008 authorization and funding levels for the USCGR and the development of annual incremental increases to obtain an end-strength level of 14,000 by FY-2011.

Currently, the USCG Reserve does not have aviation assets. Aviation skills, acquired on Active duty, atrophy in the Reserve component as they are not maintained through regular use. These skill sets tend to migrate to other services' Reserve components, reducing USCG capabilities.

ROA suggests that the establishment of a Coast Guard Selected Reserve aviation structure be studied. It would help retain and maintain these valuable proficiencies and provide the USCG with a surge capability when needed for the missions of maritime domain awareness and disaster response.

Background

Readiness & Capabilities:

Readiness is the product of many factors, including the quality of personnel, full manning, extensive training and exercises, well-maintained weapons and equipment, efficient procedures, and the capacity to operate at a fast tempo. The pace of operations dictated by the Global War on Terror (GWOT) and the Coast Guard's major responsibility as the lead Federal agency for maritime homeland security has a major impact on Reserve component member's ability to continually contribute to mission accomplishment across the spectrum of Coast Guard operations. More than 1,000 members of the Coast Guard's 8,100 Selected Reserve were activated during Hurricanes Katrina and Rita. These activations were in addition to those Reserve activations that are on-going and in support of the Global War on Terror (GWOT).

As an armed force, multimission and maritime service, the Coast Guard and its Selected Reserve operates in a unique domain of oceans, seas, lakes, rivers, bays, sounds, harbors and waterways. This maritime domain represents the last global commons and is a fundamental vehicle to today's global interconnectivity. Maritime safety and security are not just issues of U.S. national interest and security, but of global stability. It is essential to both domestic and international economic prosperity. The purpose of the U.S. Coast

Guard and its Reserve is to exercise authority and deploy capabilities to guarantee the safety and security of the U.S. maritime domain. The ability to adapt to the ever changing maritime domain is a constant requirement, one enabled by awareness and adequate equipment.

To safeguard the flow of global maritime commerce, the United States needs to expand Coast Guard capabilities in ways that can enhance international cooperation and do so in a cost-effective manner. Expansion of the Coast Guard's International Port Assistance Program is one way to accomplish this strategic objective. Support of these strategic objectives must include an expanded Coast Guard Selected Reserve force that is able to augment and reinforce the Active component to attain and sustain higher mission performance standards in Safety, Waterways Management, Security and Defense goals.

With 361 U.S. ports, and 95,000 miles of shoreline, the US Coast Guard's capability must be expanded. Its Reserve component is a cost-effective method.

Improving Maritime Awareness:

Securing our vast maritime borders depends on our ability to enhance maritime domain awareness (MDA). This is one of three key priorities that compose the foundation of a relevant maritime strategy. The remaining key priorities are establishing and leading a maritime security regime, and deploying adequate, effective and relevant integrated operational capability. The Coast Guard Reserve should play a key role in each.

Homeland Security is considered by many the most important issue facing the United States today. Maritime Transportation Security is a major element of an adequate national defense. The 2002 Maritime Transportation Security Act (MTSA) levied requirements that included Port Security Vulnerability Assessments in 55 strategic ports and the development and implementation of Area Maritime Security Plans. These are time - and manpower-intensive tasks. In an attempt to address these mission assignments the Coast Guard has identified the need to set up 13 Maritime Safety and Security Teams (MSST). A significant slice of the team's 100 members are programmed to come from the Selected Reserve. Insufficient Selected Reserve end-strength has allowed only the partial staffing of just four teams for this strategically and operationally important mission.

In addition, the National Guard Bureau has asked the Coast Guard to assume the state-level MTSA port and waterway responsibilities which requires the assignment of senior Coast Guard Reserve officers to each State Guard Headquarters as liaison officers. To date, insufficient Selected Reserve end-strength has allowed only three officers to be assigned to this important Homeland Security duty.

Port Security units (PSUs) are identified in Coast Guard and Combatant Commander contingency plans that call for 11 Port Security Units. Presently only eight PSUs, with a staffing of 115 Reserve and five Active duty billets are operational. PSUs perform maritime interception operations (MIO), coastal security patrols, and port security

missions for military and humanitarian missions worldwide, including the protection of national assets.

PSUs are units that are being frequently deployed. Meanwhile the USCGR is having a difficult time recruiting to these units from other billets within the Coast Guard Reserve. Conversely this program has the highest frequency of individual repeat mobilizations for Coast Guard Reservists, which has resulted in retention problems. ***Funding authorized at a higher end-strength level would help reduce the stress to these units.***

CONCLUSION

Since 9/11 the Coast Guard has added 7,000 Active personnel and 5,000 civilian members, an expensive approach in a resource-constrained environment. Still it has yet to satisfy mission requirements in the Homeland Defense and Maritime Security areas.

With only 8,100 funded billets, the USCG is playing musical chairs with its Reserve personnel. Insufficient Reserve end-strength requires the Coast Guard Selected Reserve to transfer personnel among vital Reserve missions, an attempt that only partially addresses these legislated national security requirements. Adding to Active structure is an expensive solution, and hiring civilians cannot realistically solve these operational shortfalls. With the present size of the CG Reserve, these missions have no realistic chance of being fully accomplished. Neither can technology, in the near-term, address constraints on the Coast Guard's operational capabilities and reach within the maritime domain.

Using FY-2007 Coast Guard budget data, the Coast Guard Reserve, as presently structured, only comprises about 2.25 percent of the Coast Guard's budget. The tasks that Congress has mandated in current homeland defense legislation could actually be accomplished by the CG Reserve at a cost of about one-fifth of what an active duty personnel solution would cost. An increase in authorized and funded end-strength of the Coast Guard Selected Reserve to 9,300 billets is a cost-effective solution to attain higher and more sustainable levels of mission performance and accomplishment.

An under-strength Coast Guard Reserve was able to perform in a true national disaster, but how long can this performance be sustained? The right for increased funding has been earned. ROA does not wish to take funds away from the active Coast Guard and its projects; we feel that the CG Reserve is a good investment for additional funding.

The Reserve Officers Association respectfully asks the Committee to support this requested funding in FY-2007 and review a programmatic and sequenced increase in the authorized and fully funded end-strength for the Selected Reserve of the U.S. Coast Guard.