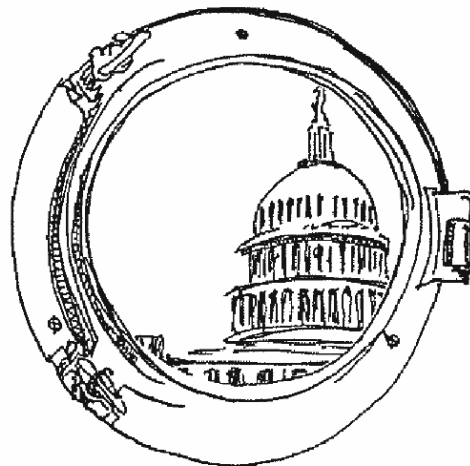


WINDOW ON WASHINGTON



This Year's NDAA Ain't NADA

By Bryant E. Gardner*

The narrow majorities in both the House and the Senate continue to present headwinds to any legislation. Nevertheless, for the 63rd consecutive year, lawmakers found a way to set aside their differences and enact the annual Defense Authorization Act. Although the National Defense Authorization Act for Fiscal Year 2024 (“NDAA”) includes a Maritime Administration title, differences between the parties prevented the Coast Guard Authorization Act from riding along with the NDAA this year, and some in Congress have suggested moving to a biannual Coast Guard bill process. As in years past, the NDAA includes key maritime-program authorities addressing many of the most pressing challenges facing the industry.

With respect to program funding, the NDAA provides increases to numerous programs. The popular Port

Infrastructure Development Program (“PIDP”) is authorized at \$500 million, a 135.63% increase from the prior year. The U.S. Merchant Marine Academy at King’s Point receives a 50.76% increase, the state maritime academies receive a commensurate 45.69% increase, the Small Shipyard Grant Program receives a 50% increase, the Maritime Environmental and Technical Assistance (“META”)¹ program receives a 150% increase, and the Federal Ship Financing Program (“Title XI”) receives a 1,334% increase, reflecting the interest in that program shown by offshore wind vessel owners. The Maritime Security Program, which provides an annual stipend to 60 militarily useful U.S.-flag vessels, receives full funding authorization at \$318 million. The boost in state maritime academies funding

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¹ According to the U.S. Maritime Administration (“MARAD”), “[t]he META program promotes the research, demonstration, and development of emerging technologies, practices, and processes that improve maritime industrial environmental sustainability. Since its inception, META’s primary focus areas have been control of aquatic invasive species transported by vessels, and reduction in vessel and port air emissions. These two areas present significant continuing challenges for ship owners and operators, the regulatory community, and the public. As other maritime environmental issues emerge, additional areas of study may be included.” <https://www.maritime.dot.gov/innovation/meta/maritime-environmental-and-technical-assistance-meta-program>.

increases the Student Incentive Payment program by 100%, doubling the stipend for students from \$8,000 to \$16,000 annually for tuition, books, and uniforms. The NDAA also provides \$2 million for the development of a national maritime strategy, and \$6 million for the design of a vessel for the National Defense Reserve Fleet.

While these increases in authorization are promising, it remains to be seen whether congressional appropriators will fully fund these maritime programs. Even if program champions are committed to doing so, as of this writing, Congress remains dangerously gridlocked, seemingly hurtling toward flat funding under some kind of continuing resolution, with the first extensions scheduled to expire January 19, 2024, and a looming government shutdown.

The NDAA expands PIDP to include port infrastructure that supports the seafood and seafood-processing industries—a nod to their importance in Senate Commerce Committee Chair Maria Cantwell's home state of Washington. Senator Cantwell's office stated that Washington's seafood industry is worth \$1.2 billion and supports 10,000 jobs, having received over \$161 million in competitive PIDP grants since the program began in 2019, including \$54.2 million to double capacity at the Port of Tacoma's Husky Terminal. Supporting the International Longshore and Warehouse Union ("ILWU"), the PIDP funds may not be used to purchase fully automated cargo-handling equipment that is remotely operated or remotely monitored, if the Secretary of Transportation determines that such equipment would result in a loss of jobs. The NDAA also waives the cost-effectiveness evaluation criterion for shore power projects located in noncontiguous states and territories.

The cargo preference laws require that at least 50% of all civilian federal government agency cargo and 100% of all military cargo be carried by U.S.-flag vessels, provided they are available at fair and reasonable rates. Because the U.S.-flag industry has experienced challenges with agency compliance, the NDAA includes a new requirement that MARAD report annually to Congress on cargo preference compliance. The report must disclose the gross tonnage of cargo, expressed by type of cargo, on U.S.-flag vessels compared to foreign-flag vessels and the total number of U.S.-flag and foreign-flag vessels contracted by each department or agency. The NDAA also mandates that shipper agencies provide such information to MARAD.

The Act amends the civilian Cargo Preference Act to eliminate the requirement that vessels eligible for the

flag preference be built in the United States. Beginning in 2030, all vessels under the U.S. flag for less than three years are only eligible for civilian-agency cargo preference if they commit to remain under the U.S. flag for no less than three years, subject to forfeiture for violation of that requirement, and such vessels must enroll in capacity commitment agreements with the Department of Defense. Additionally, the NDAA enacts a restrictive waiver process for civilian agencies, ending the current practice whereby shipper agencies grant themselves waivers with little transparency or basis for doing so. Under the new rule, any waiver must be based on nonavailability of U.S.-flag vessels; be requested by the President, Secretary of Transportation, or Secretary of Defense; and be supported by a MARAD nonavailability finding. Such waivers are limited to 60 days and extendable by 30 days, up to three months per year in total. MARAD must also determine actions that could be taken to avoid the nonavailability determination, and disclose the requests, determinations, and findings to the public and Congress.

Recapitalization of the National Defense Reserve Fleet, Ready Reserve Fleet ("RRF"), remains an ongoing concern. Last year's Defense Authorization Act required the Secretary of Transportation to complete the design of a roll-on-roll-off vessel for the fleet to allow construction beginning in 2024. The NDAA amends that provision to shift responsibility to the Secretary of the Navy, eliminates the requirement that such a vessel be a roll-on-roll-off carrier, extends the beginning construction date to 2025, and requires that the Navy submit a detailed acquisition strategy to the Armed Services Committees of Congress prior to expending more than 50% of funds made available to the Navy for travel expenses. The Joint Explanatory Statement of the Conference Committee adds: "The conferees believe that the Department of Defense needs a modernized RRF to support potential wartime demands for hauling equipment and cargo, and that a new build sealift program for the RRF, based on a possible design by the Department of Transportation, could help in that effort."

Reflecting congressional frustration with MARAD, the Act requires the Department of Transportation, MARAD, and the U.S. Merchant Marine Academy to develop training on the workings of Congress and the legislative process, and requires that the Maritime Administrator, MARAD personnel subject to Senate confirmation, MARAD Senior Executive Service personnel, MARAD congressional affairs staff, and senior U.S. Merchant Marine Academy personnel attend such training. Additionally, the Act directs GAO to prepare a report on the sufficiency of staffing at

MARAD, and requires biannual briefings to Congress regarding the long-overdue national maritime strategy. The strategy and briefings must include an assessment of great-power competition in the maritime domain, opportunities for increased cooperation with allies, an evaluation of shipbuilding capacity, an analysis of financing to increase shipyard capacity, and a discussion of potential improvements to cooperative arrangements for sealift capacity, including contested logistics.

Other provisions of the NDAA permit port captains to waive the requirements of inspection for passenger vessels engaged in overnight fishing charters. Operators utilizing such a waiver must notify passengers on their website and on passenger tickets “prominently.” Additionally, the Act expands the increasingly popular Title XI MARAD loan guarantee authority to cover retrofitting or similar activities conducted on a vessel to qualify that vessel as a U.S. vessel, using funds made available after the date of the Act only.

The U.S.-flag maritime industry widely recognizes a shortage of qualified mariners. The Act directs the establishment of a maritime-workforce working group to include the Maritime Administrator; the Superintendent of the U.S. Merchant Marine Academy; and a representative from the state maritime academies, U.S.-flag deep sea, inland river, and offshore operators, engine department labor, other maritime labor, the Centers of Excellence for Maritime Training, and private maritime-training providers. The working group is tasked with identifying mariner supply: the number of credentialed mariners, mariners with unlimited tonnage credentials, mariners participating in federal Merchant Marine support programs, mariners available to crew the surge sealift fleet, full-time mariners, and mariners in the Navy Reserve. The working group is also tasked with identifying the demand for mariners required to maintain, mobilize, and operate the RRF for 30, 60, 90, and 180 days and mariners required to submit documentation of sea service during the prior year, including those who have not done so. Additionally, the working group is required to evaluate the inventory of U.S.-flag vessels over 500 gross registered tons and the effect of requiring maritime academy graduates to fill needed positions, assess the effectiveness of recruiting and marketing maritime employment, and review the accessibility of Coast Guard maritime credentialing. The Act directs the working group to make recommendations and submit a report to Congress

within one year. The Act also temporarily reduces for the next three years the qualifying service time for able seamen from three years to 18 months—a big win for the unlicensed mariner pool.

The NDAA requires numerous reports from MARAD. These include a publicly available annual survey of U.S. shipbuilding and repair facilities and reports on preferences that ports afford to U.S.-flag vessels, increasing the effectiveness of U.S. marine highways, the availability of federal student aid for mariner training, the availability of used sealift vessels for recapitalization of the RRF, U.S. ship scrapping capacity, foreign ownership and control of marine terminals at the 15 largest American container ports, and how such ownership could affect national security. Lastly, the Act requires a report on the implementation of prior amendments to the Military Cargo Preference Act allowing waiver of cargo preference in the absence of U.S.-flag capacity at fair and reasonable rates for such vessels, instead of the prior military cargo preference standard that required carriage at like charges for private persons.

Even though this year's NDAA did not include a Coast Guard bill, the MARAD provisions are extensive and present meaningful opportunities for addressing the shortfall of mariners, increasing the number of U.S.-flag vessels, recapitalizing the RRF, strengthening MARAD, and advancing a national maritime strategy. However, because of the disparities between the costs of operating under the U.S.-flag versus open registry, truly meaningful promotion and development of the U.S.-flag fleet will require significant expenditures. While there are discussions afoot in Washington to address crewing costs by allowing controlled participation of foreign mariners, or some kind of hybrid “second flag” registry, many in the industry—and labor in particular—have expressed concerns about these proposals. Moreover, proposals to return to something like the old construction-differential-subsidy or operating-differential-subsidy programs are likely to encounter significant headwinds among deficit hawks who in the 118th Congress have demonstrated their ability to obstruct any legislation, even by a small minority. Because Congress often tends to legislate in reaction to crisis, this scale of investment will likely require a dramatic wake-up call—such as an increasingly belligerent and Taiwan-menacing China exposing a breakdown in transpacific supply-chain capability.

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