



**TESTIMONY OF
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JUDGE ADVOCATE GENERAL**

**ON
“COAST GUARD AND MARITIME TRANSPORTATION AUTHORIZATION ISSUES”**

**BEFORE THE
HOUSE SUBCOMMITTEE
ON COAST GUARD AND MARITIME TRANSPORTATION**

OCTOBER 29, 2013

Good morning Chairman Hunter, Ranking Member Garamendi, and distinguished Members of the Subcommittee.

I am pleased to appear before you today to discuss the Coast Guard’s legislative proposals.

OVERVIEW

During this Session of the 113th Congress, the Coast Guard has transmitted twelve legislative proposals – six of which pertain to the Coast Guard as a military service and a response entity; and six of which pertain to maritime safety, shipping, and navigation. From the viewpoint of the Coast Guard, both as a response entity and as a maritime safety entity, two proposals deserve specific mention:

- Active Duty for Emergency Augmentation of Regular Forces, a proposal to align the Secretary of Homeland Security’s disaster and emergency response authorities with those of the Secretary of Defense.
- Reporting of Positive Drug Testing Results, a proposal to close a statutory gap that allows certain mariners to evade the requirement to show proof of cure or rehabilitation.

Additionally, I will speak to four other matters:

- Sportfishing and Recreational Boating Safety Act of 2013, a separate proposal to modernize the administration of the Sport Fish Restoration and Boating Trust Fund.
- Physical Disability of Flag Officers, a proposal to affirm the Secretary of Homeland Security as the final authority with regard to service determinations of Coast Guard flag officers.
- Protection and Fair Treatment of Seafarers, a Coast Guard legislative proposal to facilitate the prosecution of marine environmental crimes.

¹ RADM Kenney appears before the Subcommittee on behalf the Commandant to testify on U.S. Coast Guard legislative proposals. He does not appear or offer testimony in his capacity as the Judge Advocate General of the Coast Guard.

- 18 U.S.C. § 39A(c), an exception to the prohibition on the use of laser pointers aimed at aircraft, which pose a direct threat to the safety of Coast Guard aviators and should be prohibited in all circumstances.

COAST GUARD LEGISLATIVE PROPOSALS

Active duty for emergency augmentation of regular forces.—Under current law, the Secretary of Homeland Security may order a Coast Guard reservist to active duty for not more than 60 days in any 4-month period or 120 days in any 2-year period.

Historically, this authority has been sufficient for short-duration incidents. Yet, during the 2010 BP DEEPWATER HORIZON incident, the Service discovered that current authority would have been inadequate for repeated sustained activations and deployments, particularly if such activations and deployments occurred within a 12-18 month period.

In the spring of 2010, the pool of fully mobilized, ready, and available Coast Guard reservists stood at approximately 4,700 (excluding those members who were in initial training activities, medically unfit for duty, and elsewhere committed). By January 2011, the Secretary had recalled 2,535 members – nearly 54 percent of the reserve members – to active duty (60-day orders) in response to the BP DEEPWATER HORIZON incident. As a result of the duration of the incident and the 60-day limitation of the orders, as soon as the reservists were proficient in their assigned tasks, they had to be demobilized. If, within 18 months of being released from duties in conjunction with the BP DEEPWATER HORIZON incident, the Secretary had mobilized any one of these 2,535 reservists, that reservist would have been unavailable for two years. In other words, if a Hurricane Katrina-like disaster had followed the BP DEEPWATER HORIZON incident, the Service’s response capacity would have been severely, if not critically, compromised.

Congress has anticipated this scenario. In 2011, Congress authorized the Secretary of Defense to recall reservists to active duty for a continuous period of not more than 120 days in the event of a Stafford Act disaster or emergency. This provision of law, however, does not cover the Secretary of Homeland Security or Coast Guard reservists. To permit the possibility of sustained activations, this proposal would authorize the Secretary to order Coast Guard reservists to active duty for a continuous period of not more than 120 days in the event of a Stafford Act disaster or emergency or in the event of a spill of national significance. In terms of response capacity among all branches of the armed forces, this proposal would align Coast Guard response authorities with Department of Defense authorities.

Reporting of Positive Drug Testing Results.—Under current law, the head of a federal agency must release to the Commandant of the Coast Guard a report of a verified positive drug test or a verified drug test violation for a federal civilian employee, a Public Health Service (PHS) officer, or a National Oceanic and Atmospheric Administration (NOAA) commissioned officer who is employed in any capacity on board a vessel operated by the agency.

Current law, however, is silent with regard to an applicant for employment on such vessel if the applicant tests positive for drugs or has a drug test violation.

In such cases, the applicant may, and often does, abandon the federal application process and seeks employment on commercial vessels without having to provide proof of cure or rehabilitation for the prior positive drug test or violation.

To address this gap in enforcement, this proposal would amend applicable law to treat an applicant for federal employment as it does a federal employee, thus requiring the agency head to release, to the Commandant, such information. As well, the proposal would narrow the scope of current law to cover only the federal employee, PHS officer, NOAA officer, and applicant who is a holder of a license, certificate, or merchant mariner's document issued by the Coast Guard. To ensure compliance, the proposal would require every license holder, as a condition of the document, to consent to the release of the report to the Commandant. This is intended to address any perceived ambiguity in law with regard to an agency head's capacity to release such information.

Sportfishing and Recreational Boating Safety Act of 2013.—Both the Coast Guard and the U.S. Fish and Wildlife Service derive funds from the Sport Fish Restoration and Boating Trust Fund to serve the boating and fishing public. Yet, the manner in which current law provides for the administration of those funds by the two agencies has some variance that warrants uniformity. Specifically, the funding for advisory councils should be brought into parity and an additional amendment to enhance the funding for national nonprofit organizations is appropriate to implement Office of Management and Budget and Government Accountability Office recommendations for proper measurement of program success.

Physical Disability of Flag Officers.—Under current law, if a general officer, flag officer, or medical officer is being processed for retirement by reason of age or length of service, and suffers a medical disability that would otherwise qualify the officer for a physical disability retirement, the Secretary of Homeland Security may not retire such member, place the member on the temporary disability retired list, or separate such member from an armed force without the prior approval of the Secretary of Defense. Due to an inadvertent omission of common statutory text, the Secretary of Homeland Security's decisions concerning physical disability retirements of Coast Guard flag officers are now subject to the Secretary of Defense's approval.

This proposal would make the Secretary of Homeland Security's decision regarding the physical disability retirement of a Coast Guard flag officer final, when the Coast Guard is not operating as a service in the Navy.

For some, this proposal does not preserve the ministerial protection for flag officers that current law provides under title 10. I note that the title 10 provision in question was not intended to protect flag officers, but to protect against abuse of the physical-disability system by flag officers.² Specifically, 10 U.S.C. § 1216(d) was "designed as an additional safeguard in the attempt to reduce the possibility of abuses in the administering of physical-disability retirement procedures [by medical officers as well as flag and general officers]."³ At that time, "[t]here was particular concern because of the considerably higher percentage of disability retirements among senior officers, especially general and flag officers and medical officers who had completed their careers and were retiring on length of service or because of age."⁴ Due to organizational dissimilarities, the Secretary of Homeland Security is not only a service secretary, but also a cabinet secretary like the Secretary of Defense.

² See H. Rep. No. 94-819, at 2, 3-5 reprinted in 1976 U.S.C.C.A.N. 302, 304-305.

³ *Id.* at 4 (304).

⁴ *Id.*

As such, 10 U.S.C. § 1216(d) results in two cabinet secretaries reviewing and approving disability determinations for Coast Guard flag officers. Of the several options available to resolve this double review, the Coast Guard proposes to treat the Secretary of Homeland Security as cabinet secretary and, in terms of reviewing physical disabilities for Coast Guard flag officers, to vest final approval authority in the Secretary of Homeland Security when the Coast Guard is not in the service of the Navy.

PROTECTION AND FAIR TREATMENT OF SEAFARERS

I take this opportunity to highlight one Coast Guard legislative proposal, “Protection and Fair Treatment of Seafarers,” that the Coast Guard first transmitted in 2007, but that Congress has yet to enact.

This proposal is designed, in large part, to neutralize a litigation tactic that a select few vessel owners and operators employ to evade their responsibilities under federal environmental law. Additionally, this proposal would permit the U.S. Government to render aid and assistance to mariners who, through no fault of their own, find themselves abandoned in the United States. Significantly, this proposal would not cost the American taxpayer one dollar.

The Coast Guard investigates allegations of crimes under the Act to Prevent Pollution from Ships (APPS) that routinely turn on the availability of a seafarer witness who possesses direct knowledge of the criminal act. When a vessel is found in violation of APPS, the vessel can be held *in rem* or under a customs hold until the owner or operator provides surety satisfactory to the Secretary, which includes a financial bond that covers the possible fines, as well as support for the crewmember who remains behind as a government witness. As a negotiation or litigation tactic, the owner or operator will occasionally refuse to provide surety satisfactory to the Secretary and threaten to abandon or abandon the seafarer witness by refusing to pay continued support for the seafarer witness – knowing that the United States has no other ready means, other than to incarcerate the witness using a material witness warrant, aside from negotiating surety, to ensure the continued availability of, or provide support for, the seafarer witness. And in most instances, when the owner or operator resists paying or refuses to pay the seafarer witness’ support, the United States is often left to acquiesce to unsatisfactory conditions, such as lesser surety amounts to secure the fine, or to abandon an investigation altogether, which undermines the effectiveness of the Act’s regime.

Occasionally, the Coast Guard encounters the seafarer whom an owner/operator has abandoned for purely economic reasons. Under current law, the United States’ ability to assist the seafarer victims is extremely limited. More importantly, the inability to assist the seafarer provides no moral incentive for other coastal nations to do the same for the American seafarers who may be abandoned in those countries.

To address these unique circumstances, this provision would authorize the Secretary to provide necessary support for the seafarer whose continued availability in the United States as a witness is necessary for an investigation, reporting, documentation, or adjudication and for the seafarer who is simply abandoned in the United States. The provision is unique in that the funds for such support would be derived solely from reimbursements paid by the owner/operator who fails to provide the necessary support.

That is to say, when an owner/operator who fails to provide support for a seafarer who remains behind to be a witness in an enforcement case, if the United States is forced to pay for the maintenance and support of the crew, this provision would require the owner/operator to reimburse the United States for any expenditures it was required to make. Such support is consistent with the International Maritime Organization (IMO) and the International Labour Organization (ILO) “Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident” (IMO Circular Letter No. 2711 (June 26, 2006); IMO Resolution LEG.3(91) (April 27, 2006), and “Guidelines on Provision of Financial Security in Case of Abandonment of Seafarers” (IMO Resolution A.930(22) (November 29, 2001)).

Resolving this issue remains a priority for the Coast Guard. I would appreciate the Subcommittee’s further consideration of this proposal. If necessary, I am prepared to brief each Member of this Subcommittee personally and address any concerns that you may have. I am confident that we can find a means to address any Member concerns or objections.

18 U.S.C. § 39A(c)

As a final matter, I draw the Subcommittee’s attention to 18 U.S.C. § 39A, which establishes the criminal prohibition against knowingly aiming a laser pointer at an aircraft, yet allows an individual to use “a laser emergency signaling device to send an emergency distress signal.”

The physical characteristics of lasers that retain very high irradiance over distance make them a highly ineffective means of emergency signaling in a maritime environment: the likelihood of an individual, in both distress and perpetual motion, fixing the beam on the eyes of rescue personnel or a reflective surface visible to such personnel is, at best, remote. Those characteristics also render it a deadly means of signaling: aiming at a vessel or an aircraft could cause temporary blindness (a.k.a. “flash blindness”), retinal bruising and, in extreme cases, permanent blindness if the beam strikes the eyes of rescue personnel. For the Coast Guard, which commonly uses air assets to facilitate the location of mariners in distress, the consequences could not be more adverse: the use of such a signaling device by an individual in distress could cause the temporary disruption of a search and rescue mission and the loss of equipment and death of personnel deployed to effectuate a rescue.

Since reports of laser incidents first began in 2005, the number of reported incidents have increased dramatically – nationwide, from 311 in 2005 to 3,591 in 2011. In fiscal year 2013, there were 54 lasing incidents involving Coast Guard aircraft and vessels, a 210 percent increase from fiscal year 2012. More often than not, the incidents occurred at dangerously low altitudes (*i.e.*, less than 3,000 feet) and overwhelmingly involved green laser light (94%), which inflicts the severest degree of eye damage.

As recently as October 9, 2013, a Coast Guard small boat and helicopter, while operating near the Pacific Coast Highway bridge in Depoe Bay, Oregon, were targeted by a green laser. The small boat was struck several times; the helicopter was struck once. Coast Guard personnel subsequently identified passengers in a parked car who were pointing a laser light out of the vehicle. Local law enforcement conducted a stop of a vehicle, and a laser was recovered during a search incident to arrest. In statements made to local law enforcement officers, one passenger implicated the other. The latter individual has been arraigned in state court on multiple charges, including menacing and disorderly conduct (a misdemeanor) for pointing the laser at the small boat and helicopter.

The District Attorney's Office does not anticipate proceeding on the misdemeanor charge in favor of possible federal prosecution. Potential federal criminal violations include both 18 U.S.C. § 39A (Aiming a laser pointer at an aircraft) and 18 U.S.C. § 2280 (Violence against maritime navigation).

In light of the limited utility of lasers as emergency signaling devices and the grave harm that such devices could likely cause to Coast Guard personnel, I recommend that Subcommittee reconsider this exception to the general prohibition.

CONCLUSION

Thank you for the opportunity to testify today, and for your continued support of the United States Coast Guard. I look forward to answering any questions you may have.