

**CARGO PREFERENCE: COMPLIANCE WITH AND
ENFORCEMENT OF MARITIME'S BUY AMERICAN
LAWS**

(117-57)

REMOTE HEARING
BEFORE THE
SUBCOMMITTEE ON
COAST GUARD AND MARITIME TRANSPORTATION
OF THE
COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 14, 2022

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Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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SEPTEMBER 12, 2022

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Coast Guard and Maritime Transportation
FROM: Staff, Subcommittee on Coast Guard and Maritime Transportation
RE: Hearing on “Cargo Preference: Compliance with and Enforcement of Maritime’s Buy American Laws”

PURPOSE

The Subcommittee on Coast Guard and Maritime Transportation will hold a hearing on Wednesday, September 14, 2022, at 10:00 a.m. ET in 2167 Rayburn House Office Building and via Zoom to examine the current state of cargo preference compliance and enforcement. The Subcommittee will hear testimony from the U.S. Maritime Administration (MARAD), the Government Accountability Office (GAO), the Hudson Institute, USA Maritime, and the International Organization of Masters, Mates & Pilots.

BACKGROUND

Cargo preference is the general term used to describe the U.S. laws, regulations and policies that require the use of U.S. flag vessels in the movement of cargo that is owned, procured, furnished, or financed by the U.S. government.¹ It also includes cargo that is being shipped under an agreement of the U.S. government, or as part of a government program.

Cargo preference has been an effective shipping strategy in maintaining the U.S. presence and economic viability in the international shipping market.² U.S. law requires that certain percentages of cargo be carried on vessels registered in the United States when the cargo is supported by U.S. federal funding.³ Such cargo is commonly referred to as “government-impelled” and typically moves:

- as a direct result of federal government involvement, such as military transportation of supplies by sea;
- indirectly through financial sponsorship of a federal program, such as food aid supported by the U.S. Agency for International Development (USAID); or
- in connection with a loan, grant, loan guarantee, or other financing provided by the federal government.⁴

Any department, agency, contractor, or sub-contractor of the federal government administering a program that directly or indirectly involves the transportation of

¹ Maritime Administration. *Cargo Preference*. <https://www.maritime.dot.gov/ports/cargo-preference/cargo-preference>

² *Id.*

³ *Id.*

⁴ *Id.*

cargoes on ocean vessels is subject to cargo preference requirements. Additionally, all members of the supply chain of said cargoes must comply with cargo preference.⁵

The U.S. uses federal laws and regulations to regulate and protect its own cargo interests. Three primary pieces of legislation guide Cargo Preference requirements in the United States: Section 2631 of title 10, United States Code, popularly known as the Cargo Preference Act of 1904; Section 55305 of title 46, United State code, popularly known as the Cargo Preference Act of 1954; and Section 55304 of title 46, United States Code, popularly known as Public Resolution 17 (PR-17).

The Cargo Preference Act of 1904 requires 100 percent of military cargo carried by sea by the Department of Defense to be shipped via a U.S.-flagged vessel.⁶

The Cargo Preference Act of 1954 currently requires that at least 50 percent of the gross tonnage of civilian agencies cargo and agricultural cargo be transported on privately owned U.S.-flag commercial vessels.⁷ This can include cargo from the Department of Agriculture (USDA), USAID, and the transportation of all U.S. government personnel and their personal effects (household goods) and all private vehicles transported at the U.S. government's expense.⁸ At first passage, this act set civilian and agricultural requirements at 50 percent.⁹ These were increased to 75 percent by the Food Security Act of 1985 (P.L. 99-198, subtitle C) but were subsequently lowered back to 50 percent when subtitle C was repealed by the Moving Ahead for Progress in the 21st Century Act in 2012.

PR-17 was enacted in 1934 to address U.S.-flag shipping requirements for the U.S. Export-Import (EXIM) Bank of the United States and requires shipping on U.S.-flag vessels for the following EXIM Bank transactions: Direct loans regardless of term or amount, and Guarantees valued over \$20,000,000 USD (excluding EXIM Bank exposure fees) or with repayment terms greater than seven years, unless the export qualifies for a longer repayment term under EXIM's Medical Equipment Initiative, Environmental Exports Program, or Transportation Security Program. Furthermore, foreign countries that are recipients of U.S. assistance through foreign military financed programs are also required by law to use U.S.-flag vessels.¹⁰

MARAD holds the responsibility of monitoring federal agencies' cargo volumes to ensure compliance with cargo preference laws and regulations.¹¹ MARAD's Office of Cargo and Commercial Sealift manages all MARAD Cargo Preference activities.¹² Data regarding compliance by agencies was previously published by MARAD and publicly available up until 2013, when MARAD stopped publishing this information because they were no longer required to do so by Congress.¹³ Section 3502(b) of H.R. 7900, the National Defense Authorization Act for Fiscal Year 2023 which passed the House on July 14, 2022, reinstates the reporting requirement.

Current regulations make one entity, the prime contractor, the responsible party for ensuring that U.S.-flag vessels are used throughout the supply chain. The prime contractor is deemed to have violated its U.S.-flag requirements if any person or entity in its supply chain—including sub-contractors, vendors, suppliers, freight forwarders, and shipping companies—does not meet the requirements. The Federal Contracting Officer is the official enforcement authority and can impose financial assessments against the prime contractor if the U.S.-flag vessel use requirements are not met by any member of the supply chain.¹⁴

I. THE PURPOSE OF CARGO PREFERENCE

Cargo preference, the reservation of certain cargoes to U.S.-flag ships, is necessary for our national defense and a key driver of domestic and foreign commerce. This helps maintain a U.S.-flag commercial merchant marine that can be called upon in times of war or national emergencies.¹⁵ Section 50101 of title 46, U.S.C., dictates that the United States must have a merchant marine—

- sufficient to carry the waterborne domestic commerce and a substantial part of the waterborne export and import foreign commerce of the United States,

⁵ *Id.*

⁶ 10 U.S.C. § 2631

⁷ 46 U.S.C. § 55305

⁸ *Id.*

⁹ Congressional Research Service. *Cargo Preferences for U.S.-Flag Shipping*. October 29, 2015.

¹⁰ 46 U.S.C. § 55304

¹¹ Maritime Administration. *Cargo Preference*. <https://www.maritime.dot.gov/ports/cargo-preference/cargo-preference>

¹² *Id.*

¹³ Government Accountability Office. *Maritime Administration: Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

¹⁴ Maritime Administration. *Cargo Preference*. <https://www.maritime.dot.gov/ports/cargo-preference/cargo-preference>

¹⁵ *Id.*

- capable of serving as a naval and military auxiliary in times of war or national emergency;
- owned and operated as vessels of the United States by citizens of the United States;
- composed of the best-equipped, safest, and most suitable types of vessels constructed in the United States and manned with a trained and efficient citizen personnel; and
- supplemented by efficient facilities for building and repairing vessels.

It is the United States' policy to encourage and aid in the development of a merchant marine satisfying the above objectives.¹⁶ Cargo preference coupled with other programs such as the Maritime Security Program¹⁷ (MSP) and Voluntary Intermodal Sealift Agreement¹⁸ (VISA), are intended to support the U.S.-flag shipping industry so that the United States has a fleet capable of supplementing the capacity of the U.S. military with U.S.-flagged vessels and trained mariners during times of war or national emergency, while also providing transportation for the nation's maritime commerce.¹⁹ Despite this objective, the number of oceangoing vessels in the U.S.-flag fleet has fallen over time.²⁰ According to MARAD data, the fleet of U.S.-flagged vessels engaged in international trade has declined from approximately 199 vessels at the end of 1990 to 84 vessels in 2021.²¹ This is in part due to the increased costs associated with operating a U.S.-flagged vessel in comparison to foreign-flagged vessels and the continued practice of using flags of convenience.²² Cargo preference requirements ensure a baseline of cargo for vessel operators which guarantees at least a portion of the defense capability needed for United States national sealift capability.²³ The figure below demonstrates the decline of the number of vessels in the U.S.-flag fleet since 1990.

¹⁶ 46 U.S.C. § 550101

¹⁷ The Maritime Security Program (MSP) maintains a fleet of commercially viable, militarily useful merchant ships active in international trade. The MSP fleet is available to support U.S. Department of Defense (DoD) sustainment sealift requirements during times of conflict or in other national emergencies. The program also provides DoD access to MSP participants' global intermodal transportation network of terminals, facilities, logistic management services, and U.S. citizen merchant mariners. In return, vessel operators receive a federal stipend. Maritime Administration. <https://www.maritime.dot.gov/national-security/strategic-sealift/maritime-security-program-msp>

¹⁸ MARAD's Voluntary Intermodal Sealift Agreement (VISA) program is a partnership between the U.S. Government and the maritime industry to provide the Department of Defense (DoD) with assured access to state-of-the-art commercial sealift and intermodal equipment when DoD deploys military forces during a national emergency or wartime operations. Maritime Administration. <https://www.maritime.dot.gov/national-security/strategic-sealift/voluntary-intermodal-sealift-agreement-visa>

¹⁹ Government Accountability Office. *Maritime Administration: Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

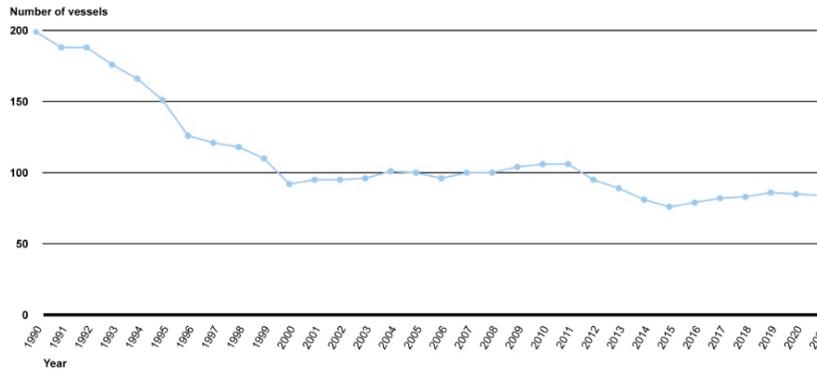
²⁰ Maritime Administration. U.S. Department of Transportation. *U.S. Flag Vessels*. <https://www.maritime.dot.gov/national-security/us-flag-vessels>.

²¹ *Id.*

²² Maritime Administration. U.S. Department of Transportation. *Comparison of U.S. and Foreign-Flag Operating Costs*. September 2011. <https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/resources/3651/comparisonofusandforeignflagoperatingcosts.pdf>

²³ Maritime Administration. *Cargo Preference*. <https://www.maritime.dot.gov/ports/cargo-preference/cargo-preference>

Figure 1: Number of Internationally Trading U.S.-Flag Vessels, 1990 to 2021



Source: GAO analysis of Maritime Administration data on non-Jones Act eligible ocean-going vessels. | GAO-22-105160

Figure 1: Number of Internationally Trading U.S.-Flag Vessels from 1990 to 2021. Government Accountability Office. Maritime Administration: Actions Needed to Enhance Cargo Preference Oversight. GAO-22-105160. September 12, 2022.

In testimony to the subcommittee earlier this year, MARAD Deputy Administrator Lucinda Lessley stated that:

“Critical to the operation of both Government-owned and commercial U.S.-flag vessels is an adequate supply of qualified U.S. mariners to crew them. Access to a pool of qualified mariners from a robust, commercial maritime fleet is essential to maintaining sufficient sealift readiness capacity for contingencies. Due to the declining number of ships in the U.S.-flag oceangoing fleet, MARAD is concerned about our ability to quickly assemble an adequate number of qualified mariners to operate large ships for surge and sustainment sealift operations if an extended mobilization were to occur.”²⁴

A 2020 report by the Center for Strategic and Budgetary Assessments emphasized the importance of not only recapitalizing the U.S.-flagged fleet but also the need for cargo preference and enforcement of cargo preference laws.²⁵

II. RECENT LEGISLATIVE CHANGES

A. The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009

In 2008, MARAD was granted new authorities to take certain cargo preference-related enforcement actions through amendments made by the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (P.L. 110-417) (2009 NDAA) to section 55305(d) of title 46. Those authorities include assessing civil penalties “against any person” for noncompliance with cargo preference requirements. The Secretary of Transportation was also given discretion to prescribe rules if deemed necessary to carry out the authorities granted. To date, MARAD has not issued any regulations implementing those authorities nor has MARAD taken any enforcement action.²⁶ Section 3502(a) of the National Defense Authorization Act for Fiscal Year 2023 which passed the House on July 14, 2022, directed MARAD to issue such rules within 90 days of enactment.

B. Moving Ahead for Progress in the 21st Century Act

Cargo preference laws were further amended by the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) (also known as MAP-21). As mentioned

²⁴ U.S. House of Representatives Committee on Transportation and Infrastructure. Statement of Lucinda Lessley, Acting Administrator, Maritime Administration, U.S. Department of Transportation, Before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing on “Review of Fiscal Year 2023 Budget Request for the Coast Guard and Maritime Transportation Programs.” April 27, 2022. <https://transportation.house.gov/imo/media/doc/Lessley%20Testimony1.pdf>

²⁵ Clark, Bryan; Walton, Tim; Lemon, Adam. Center for Strategic and Budgetary Assessments. Page 55 https://csbaonline.org/uploads/documents/CSBA8199_Maritime_Industrial_FINAL.pdf

²⁶ Government Accountability Office. *Maritime Administration: Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

above, MAP-21 repealed the Food Security Act of 1985 (P.L. 99-198, subtitle C), which had increased the cargo preference requirement from 50 percent to 75 percent of food aid tonnage. Section 100124 of MAP-21 reduced the percentage of U.S. food aid that must be shipped on U.S.-flagged ships (which must be owned and crewed by U.S. citizens) from 75 percent to 50 percent and repealed the requirement that 25 percent of bagged or processed food aid be shipped through Great Lakes ports.²⁷ These repeals weakened current cargo preference laws by lowering cargo levels and reducing government impelled cargo set aside for carriage on U.S.-flagged ships.

In a 2015 joint hearing before the Subcommittee on Livestock and Foreign Agriculture, Committee on Agriculture, and the Subcommittee on Coast Guard and Maritime Transportation, Committee on Transportation and Infrastructure, testimony was provided by Brian Shoeneman, with the Seafarers International Union, highlighting the impacts MAP-21 has had on the U.S.-flag fleet including a reduction of the overall size and cargo volumes.²⁸ He stated:

“There is no denying that the loss of food aid cargo resulting from reductions in appropriations, and the cuts to cargo preference in MAP-21, has cost this industry ships and jobs. Over the last 10 years food aid has made up a considerable portion of the preference cargo carried by American carriers, if not the majority. From 2000 to 2013 cargo volumes in the food aid program have dropped 77 percent. In 1999 there were 106 American ships carrying approximately 6 million tons of food aid. In 2013 the fleet had dropped in size to 75 ships, carrying slightly more than 1 million tons of food aid. According to MARAD, since 2010 the size of the U.S.-flag fleet has dropped 23 percent, from 99 ships to the 78 ships mentioned today. And that has resulted in the loss of nearly 1,000 mariner jobs.”²⁹

C. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

Included in the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 was an amendment to section 2631 of title 10, United States Code which aimed to increase DOD compliance with military cargo preference requirements.³⁰ Another part of the bill required a GAO study regarding federal compliance with existing civilian and military cargo preference rules.³¹

III. AGENCY COMPLIANCE WITH CARGO PREFERENCE LAWS

Despite the enhanced enforcement capabilities provided to MARAD by the 2009 NDAA, the degree to which agencies comply remains unclear due to a lack of transparency from MARAD and obligated agencies. Government cargoes have decreased in volume by more than half since 2004, which has placed downward pressure on the profitability and viability of the U.S.-flagged international trading fleet and, by extension, contributed to a decline in its size, raising national security concerns.³² As mentioned above, Section 8404 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 included a provision for GAO to examine federal agencies’ actions to monitor and ensure compliance with cargo preference requirements and to review MARAD’s enforcement activities.³³ In the report released September 12, 2022, GAO looked at seven agencies covered under cargo preference requirements: DOD, USAID, USDA, EXIM Bank, the Department of Energy, Department of Transportation, and the Department of State.³⁴

Data received from most agencies is typically through the review of bills of lading that agencies’ ocean transportation contractors are required to submit to MARAD

²⁷ Congressional Research Service. *Surface Transportation Funding and Programs Under MAP-21: Moving Ahead for Progress in the 21st Century Act (P.L. 112-141)*. <https://sgp.fas.org/crs/misc/R42762.pdf>

²⁸ Joint hearing before the Subcommittee on Livestock and Foreign Agriculture Committee on Agriculture and the Subcommittee on Coast Guard and Maritime Transportation Committee on Transportation and Infrastructure, U.S. House of Representatives. “*U.S. International Food Aid Programs: Transportation Perspectives*” November 17, 2015. <https://www.govinfo.gov/content/pkg/CHRG-114hhrg97713/pdf/CHRG-114hhrg97713.pdf>

²⁹ *Id.*

³⁰ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021. Public Law 116-283.

³¹ *Id.*

³² Government Accountability Office. *Maritime Administration: Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

³³ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021. Public Law 116-283.

³⁴ *Id.*

following completion of transportation services. DOD typically provides additional data beyond the bills of lading on cargo shipments. As mentioned previously, prior to 2013, data on cargo preference compliance had been publicly reported by MARAD.³⁵ This practice ceased following the 2012 removal of said reporting requirement by MAP-21.³⁶ GAO was able to obtain compliance data from MARAD for years after 2013 and found that U.S.-flagged cargo volumes decreased 36 percent from fiscal year 2012 through 2020.³⁷ The lack of published data obstructs outside oversight by industry or Congress on compliance with cargo preference laws. Without public reporting, federal agencies lack the incentive to demonstrate to the public that they are meeting cargo preference requirements.³⁸

MARAD also has the authority to issue waivers for situations where U.S.-flagged vessels are not readily available for use. DOD has statutory authority to make its own determination about the real-time availability of eligible U.S.-flagged vessels.³⁹ DOD shares this information with MARAD, but is not required to do so.⁴⁰ Other agencies vary on their procedures for determining availability and compliance. While some agencies make these determinations on their own or leave it to their contractors, others go to MARAD for guidance. A lack of guidance from MARAD on how to determine the availability of U.S.-flagged vessels and calculate the percentage of cargo shipped on U.S.-flagged ships has led to varying interpretations of cargo preference laws and calculations of compliance.⁴¹ Without conducting a rule-making and issuing these regulations, MARAD is unable to consistently assess cargo preference compliance rates across agencies and utilize enforcement capabilities that were provided in the 2009 NDAA, despite MARAD-identified instances of noncompliance.⁴²

GAO's findings resulted in two recommendations:

1. The Administrator of MARAD should publicly report, on an annual basis, the cargo preference data it receives to provide information on total cargo volumes and amounts shipped on U.S.- and foreign-flag vessels for each federal agency.
2. The Administrator of MARAD should take steps to develop regulations to oversee and enforce compliance with cargo preference requirements. These steps should include evaluating options for overcoming challenges to develop such regulations, such as (1) using a negotiated rulemaking to address challenges achieving consensus on how to implement cargo preference requirements and (2) developing and communicating a legislative proposal to address statutory challenges MARAD has identified.⁴³

MARAD has identified barriers to completing a rulemaking outlined in recommendation two. Due to varying stances, agencies have failed to reach a consensus with MARAD on a final rule. Without an agreement, MARAD cannot proceed forward with regulations and enforcement.⁴⁴ MARAD has also identified three barriers in statutory language that prevent full implementation of cargo preference laws.⁴⁵ These barriers include a failure to acknowledge containerized shipping, which became popular after the passage of the 1954 Act; a lack of definition for "geographic areas" in determining compliance, and a three-year waiting period that limits the entrance of new foreign-flagged bulk vessels from entering the U.S.-flagged fleet.⁴⁶ Section 3524 (a) of the National Defense Authorization Act for Fiscal Year 2023 passed by the House on July 14, 2022, waives the three-year waiting period. Despite these barriers, MARAD has concurred with the recommendations from GAO's report.⁴⁷ This hearing will closely examine the results of this report by GAO and provide insight from both MARAD and maritime industry representatives.

³⁵ *Id.*

³⁶ Government Accountability Office. *Maritime Administration: Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

WITNESS LIST

PANEL 1

- Rear Admiral Ann C. Phillips, Administrator, Maritime Administration
- Mr. Andrew Von Ah, Director, Physical Infrastructure, Government Accountability Office

PANEL 2

- Mr. Bryan Clark, Senior Fellow and Director of the Center for Defense Concepts and Technology, Hudson Institute
- Mr. Eric Ebeling, President and Chief Executive Officer, American Roll-On Roll-Off Carrier, *on behalf of USA Maritime*
- Captain Don Marcus, President, International Organization of Masters, Mates & Pilots

**CARGO PREFERENCE: COMPLIANCE WITH
AND ENFORCEMENT OF MARITIME'S BUY
AMERICAN LAWS**

WEDNESDAY, SEPTEMBER 14, 2022

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COAST GUARD AND
MARITIME TRANSPORTATION,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m. in room 2167 Rayburn House Office Building and via Zoom, Hon. Salud O. Carbajal (Chair of the subcommittee) presiding.

Members present in person: Mr. Carbajal, Mr. Larsen of Washington, Mr. Auchincloss, Mr. Gibbs, Mr. Weber of Texas, and Mr. Garamendi.

Members present remotely: Mr. Sean Patrick Maloney of New York, Mr. Lowenthal, and Dr. Van Drew.

Mr. CARBAJAL. The subcommittee will come to order. I ask unanimous consent that the chair be authorized to declare a recess at any time during today's hearing.

Without objection, so ordered.

I also ask unanimous consent that Members not on the subcommittee be permitted to sit with the subcommittee at today's hearing and ask questions.

Without objection, so ordered.

As a reminder, please keep your microphones muted unless speaking. Should I hear any inadvertent background noise, I will request that the Member please mute their microphone.

To insert a document into the record, please have your staff email it to DocumentsT&I@mail.house.gov.

With that, I will go into my opening statement.

Good morning and welcome to today's hearing entitled, "Cargo Preference: Compliance With and Enforcement of Maritime's Buy American Laws." Today, we will hear testimony from five witnesses.

The first testimony will be from Rear Admiral Ann Phillips, who is appearing before Congress for the first time in her role as the new Administrator of the Maritime Administration. Welcome and congratulations on your confirmation, Admiral. I am glad that you have come on board to lead MARAD at this important time with all the challenges that are before us.

Admiral Phillips will be joined on today's first panel by Mr. Andrew Von Ah, Director of the Physical Infrastructure team at the Government Accountability Office.

Two days ago, the GAO publicly released his team's report on actions needed to enhance cargo preference oversight. After months of interviews, research, and discussion with Federal agencies, maritime labor, and cargo carriers, among others, the GAO has found evidence of lack of oversight—let me repeat that—lack of oversight, inconsistent application, and noncompliance among Government agencies and contractors.

As a result, GAO has recommended that cargo preference be reported to the public on an annual basis and that the Department of Transportation take steps to fully enforce cargo preference requirements.

I would also like to emphasize the fact that we will be discussing a longstanding public law that has never been adequately enforced—not a new proposal.

Today's second panel will feature a military sealift expert, Mr. Bryan Clark, director of the Center for Defense Concepts and Technology at the Hudson Institute, and two representatives from the commercial maritime industry: Mr. Eric Ebeling, speaking on behalf of USA Maritime, and Captain Don Marcus, president of the International Organization of Masters, Mates, and Pilots, representing maritime labor.

As I expect our witnesses will make clear, compliance with cargo preference law is closely tied to the sustainment of American jobs and national security. It requires that Government-impelled cargo be shipped overseas using U.S.-flagged vessels—in other words, vessels crewed by U.S. mariners, owned by Americans, and abiding by U.S. laws. Guaranteeing a steady supply of cargo through cargo preference programs equates to job security for these hard-working citizens. Along with the Maritime Security Program and the Jones Act, cargo preference ensures that the U.S. seagoing maritime industry does not disappear completely, as it has dwindled over the years.

With cargo backlogs and rising inflation as pressing concerns, we know better than ever that maintaining a vibrant U.S.-flagged fleet is the foundation of a healthy economy. We cannot rely on foreign ships and foreign mariners to carry out our commerce any longer.

Finally, we must not forget the impact of cargo preference on our Nation's defense. The law mandates that 100 percent of Department of Defense cargo and 50 percent of nonmilitary, Government-impelled cargo be shipped on U.S.-flagged vessels when those vessels are available at a fair and reasonable rate. Cleaning up the way, quote, "availability," unquote, is decided and communicated will increase the amount of cargo available to U.S. carriers, bolstering the maritime industry while accomplishing DoD's sealift capacity needs.

Today, I expect to hear actionable next steps out of MARAD. Entrusting ill-suited agencies to make determinations has led to the poor compliance rates we are currently seeing. Enforcement power was provided to MARAD in 2009 NDAA and action is long overdue; we need a completed rulemaking. It is a stated priority of President Biden, and it needs to be a priority of every agency.

We have a lot of ground to cover today with the help of our witnesses. I thank each of them for their gracious attendance, and I am excited to begin.

[Mr. Carbajal's prepared statement follows:]

Prepared Statement of Hon. Salud O. Carbajal, a Representative in Congress from the State of California, and Chair, Subcommittee on Coast Guard and Maritime Transportation

Good morning, and welcome to today's hearing titled, "Cargo Preference: Compliance with and Enforcement of Maritime's Buy American Laws." Today, we will hear testimony from five witnesses.

The first testimony will be from Rear Admiral Ann Phillips, who is appearing before Congress for the first time in her role as Administrator of the Maritime Administration. Welcome and congratulations on your confirmation Admiral. I am glad that you have come on board to lead MARAD at this important time.

Admiral Phillips will be joined on today's first panel by Mr. Andrew Von Ah, Director of the Physical Infrastructure Team at the Government Accountability Office.

Two days ago, the GAO publicly released his team's report on "Actions needed to enhance cargo preference oversight." After months of interviews, research, and discussion with federal agencies, maritime labor, and cargo carriers among others, the GAO has found evidence of a lack of oversight, inconsistent application, and non-compliance among government agencies and contractors. As a result, GAO has recommended that cargo preference be reported to the public on an annual basis, and that the DOT take steps to fully enforce cargo preference requirements.

I'd like to emphasize the fact that we will be discussing a long-standing public law that has never been adequately enforced—not a new proposal.

Today's second panel will feature a military sealift expert, Mr. Bryan Clark, Director of the Center for Defense Concepts and Technology at the Hudson Institute; and two representatives from the commercial maritime industry, Mr. Eric Ebeling, speaking on behalf of USA Maritime, and Captain Don Marcus, President of the International Organization of Masters, Mates and Pilots representing maritime labor.

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Finally, we must not forget the impact of cargo preference on our nation's defense. The law mandates that 100 percent of DOD cargo and 50 percent of non-military government-impelled cargo be shipped on U.S.-flagged vessels—when those vessels are available at a fair and reasonable rate. Cleaning up the way "availability" is decided and communicated will increase the amount of cargo available to U.S. carriers, bolstering the maritime industry while accomplishing DOD's sealift capacity needs.

Today, I expect to hear actionable next steps out of MARAD. Entrusting ill-suited agencies to make determinations has led to the poor compliance rates we're currently seeing. Enforcement power was provided to MARAD in the 2009 NDAA and action is long overdue; we need a completed rulemaking. It is a stated priority of President Biden and it needs to be a priority of every agency.

We have a lot of ground to cover today with the help of our witnesses. I thank each of them for their gracious attendance and am excited to begin.

Mr. CARBAJAL. With that, I will now call on the ranking member of the subcommittee, Mr. Gibbs, for an opening statement.

Mr. GIBBS. Thank you, Mr. Chairman, and also congratulations to Admiral Phillips on your confirmation.

The United States uses several Federal assistance programs to hedge against its inability to compete in international ship-operating market against vessels which operate under flags of convenience which use low-paid, Third World crews.

These programs include requiring internal domestic shipments be shipped on a U.S. flagged, crewed, manned, and built vessels; loan guaranties for ship construction; the Maritime Security Program, which subsidizes the operation of certain militarily useful cargo vessels; and the cargo reservation programs we are looking at today.

Today, we are going to look at the implementation of U.S. cargo reservation, or cargo preference, programs. And especially at the failure to write, much less implement, the cargo preference enforcement regulations Congress mandated in 2009.

All Department of Defense generated cargoes and 50 percent of other Federal agency generated cargoes must be carried on U.S.-flag vessels with U.S. crews. In conjunction with the Maritime Security Program, this provides the U.S. with an international commercial fleet of 84 vessels. These vessels and the U.S. mariners that crew them provide the crucial capacity to meet future U.S. national defense sealift needs.

Unfortunately, agencies which generate cargo shipments take a shortsighted view and have tangled up MARAD efforts to write cargo preference enforcement regulations in the interagency regulatory review process. In essence, killing these regs before they are even implemented.

I look forward to hearing witness testimony today, and especially how they believe the regulatory hurdles that have prevented MARAD from writing and implementing cargo preference enforcement regulations can be overcome.

Thank you, Chairman Carbajal. I look forward to the testimony, and I yield back.

[Mr. Gibbs' prepared statement follows:]

Prepared Statement of Hon. Bob Gibbs, a Representative in Congress from the State of Ohio, and Ranking Member, Subcommittee on Coast Guard and Maritime Transportation

Thank you, Mr. Chairman.

The United States uses several Federal assistance programs to hedge against its inability to compete in the international ship operating market against vessels which operate under flags of convenience which use low paid, third world crews.

These programs include: requiring internal domestic shipments be shipped on U.S. flagged, crewed, manned, and built vessels; loan guarantees for ship construction; the Maritime Security Program which subsidizes the operation of certain militarily useful cargo vessels; and the cargo reservation programs we are looking at today.

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I look forward to hearing witness testimony today, and especially how they believe the regulatory hurdles that have prevented MARAD from writing and implementing cargo preference enforcement regulations can be overcome.

Thank you, Chair Carbajal. I look forward to the testimony and yield back.

Mr. CARBAJAL. Thank you, Mr. Gibbs. I would now like to welcome our first witnesses for the first panel, Rear Admiral Ann Phillips, Administrator of the Maritime Administration, and Mr. Andrew Von Ah, Director of Physical Infrastructure at the Government Accountability Office.

Thank you both for being here today, and I look forward to your testimony.

Without objection, our witnesses' full statements will be included in the record.

Since your written testimony has been made part of the record, the subcommittee requests that you limit your oral testimony to 5 minutes. With that, Rear Admiral Phillips, you may proceed.

TESTIMONY OF ANN C. PHILLIPS, REAR ADMIRAL, U.S. NAVY (RET.), AND ADMINISTRATOR, MARITIME ADMINISTRATION; AND ANDREW VON AH, DIRECTOR, PHYSICAL INFRASTRUCTURE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Admiral PHILLIPS. Thank you, Chairman Carbajal, Ranking Member Gibbs, and, of course, Chairman DeFazio and Ranking Member Graves. I am honored to appear today to discuss cargo preference programs.

As a retired U.S. Navy rear admiral with more than 30 years of service, I know the American merchant marine is critical to our national defense as well as to our economy.

In June, General Jacqueline Van Ovost, commander, Transportation Command, spoke at the graduation of the U.S. Merchant Marine Academy, and in addressing our graduates, General Van Ovost made the same critical point, saying that, quote, "as a maritime Nation, our national security depends on the merchant marine."

However, she also warned the graduates that they, quote, "are about to face challenges our country has not encountered since World War II." Further, she said, and I quote again, "contested waters will stress our logistics lines all the way from home port."

Cargoes paid for by American taxpayers belong on American ships. Cargo preference requirements are not just Buy America requirements. They are requirements that also help strengthen America.

In 2012, there were 106 ships in the foreign-flag trade flying the U.S. flag. Four years later, there were just 77 vessels. Today, from that low point, we have grown back to 87 foreign trading ships under the U.S. flag.

However, without cargoes, ships will leave the U.S. flag. Without cargoes, our modest fleet will continue to dwindle. Without cargoes,

we risk our ability to move military cargoes on American vessels whenever and wherever needed.

I appreciate the thoughtful new report issued by the Government Accountability Office and know this is an important opportunity to further strengthen Federal compliance with cargo preference, statutes, and regulations.

Given the critical importance of compliance with cargo preference requirements, MARAD continuously and directly engages with Federal acquisition officials and contractors over project life cycles to advise them on the practical application of cargo preference, including how to organize supply chains to maximize the use of U.S.-flagged vessels.

I am also in the process of writing to all Federal departments and agencies, reminding them of their obligations and requesting that they each identify a senior accountable official, consistent with OMB's implementing guidance on Executive Order 14005, who can be a single point of contact with whom MARAD can work to implement cargo preference requirements.

MARAD also works to ensure that agencies make up for cargoes transported on foreign vessels by employing U.S.-flag vessels to carry equal or greater volumes. Facilitating makeup cargoes produces revenue opportunities for the U.S.-flag fleet. It gets cargo on ships.

MARAD has been evaluating options to advance a cargo preference rulemaking. We recognize this effort will be a complex undertaking. Success will entail addressing multiple priorities, including the critical importance of supporting our U.S.-flagged fleet, while also ensuring that urgent aid is transported with expediency consistent with America's commitment to those in need and our many foreign policy objectives.

To lay the foundation for a rulemaking effort that navigates this intersection, MARAD plans to issue a Request for Information to seek input from all stakeholders.

Under the Biden-Harris administration, MARAD is also committed to growing our U.S.-flag fleet. The administration has proposed that Congress eliminate the 3-year period that vessels entering the U.S. flag must currently wait before they are eligible to carry preferenced cargoes.

Moreover, in the 2023 Presidential budget proposal, the administration requested that Congress fully fund the new Tanker Security Program at \$60 million, which would support 10 U.S.-flag vessels.

Growing our fleet is also critical to ensuring we have enough mariners with current, unlimited tonnage licenses and ratings to meet our sealift needs in a worst-case scenario.

Vessel operators report that mariner availability is still a challenging issue, and on September 23rd, I am convening a summit with industry and labor to discuss recruitment and retention challenges.

In closing, I would highlight that these remaining challenges times. COVID has made hard jobs harder and has created new stresses that are clearly affecting mariners' well-being and willingness to continue sailing.

I appreciate this committee's commitment to our U.S.-flagged fleet and your leadership in support of our cargo preference programs. I am pleased to answer your questions today. Thank you. [Admiral Phillips' prepared statement follows:]

**Prepared Statement of Ann C. Phillips, Rear Admiral, U.S. Navy (Ret.), and
Administrator, Maritime Administration**

Thank you, Chairman Carbajal and Ranking Member Gibbs, and of course Chairman DeFazio and Ranking Member Graves, for the opportunity to testify today.

I was confirmed to serve as the Maritime Administrator four months ago. In this position, my duty is to promote and strengthen our U.S. merchant marine, which is essential both to our economic and our national security.

As a retired U.S. Navy Rear Admiral with more than 30 years of service, I know the critical importance of our merchant marine to our national defense as well as to our economy. Particularly in a contested environment, it is American mariners who will answer the call—as they always have—to move the supplies we need to defeat any adversary.

I appreciate that my first opportunity to testify as the Maritime Administrator is on the subject of cargo preference. Together with the Jones Act and our Maritime Security Program, our cargo preference programs are essential to the success of our merchant marine.

A few months ago, in the Capitol, MARAD helped unveil the Congressional Gold Medal for the Merchant Mariners of World War II. I thank the many Members of Congress who worked to authorize the medal—including particularly Congressman John Garamendi—for your leadership.

The medal honors the more than 240,000 merchant mariners who sailed the American convoys that President Roosevelt called “the arsenal of democracy.” American merchant mariners and American ships delivered the supplies we needed to defeat tyranny during World War II.

It is important to note, however, that this American fleet was dwindling at the onset of World War II and had to be rebuilt at great urgency to meet our war needs.

In June, we were honored to have the Commander of the U.S. Transportation Command, General Jacqueline Van Ovost, speak at the graduation of the U.S. Merchant Marine Academy. Addressing our graduates—our nation's newest merchant mariners—she said that “as a maritime nation, our national security depends on the Merchant Marine.”

However, General Van Ovost also warned the graduates that they “are about to face challenges our country has not encountered since WWII.” She also warned that, “Contested waters will stress our logistics lines all the way from home port.”

Cargoes paid for by American taxpayers belong on American ships. Cargo preference requirements are not just “Buy America” requirements, they are requirements that also help to strengthen America.

In 2012, there were 106 ships in the foreign trade flying the U.S. flag. Four years later, there were just 77 vessels in international trade sailing under our flag. Today, from that low point, we have grown back to 87 foreign trading ships under the U.S. flag.

However, without cargoes, ships will leave the U.S. flag. Without cargoes, our modest fleet will continue to dwindle. Without cargoes, we risk our ability to move military cargoes on American vessels wherever and whenever needed.

MARAD continuously and directly engages with acquisition officials and contractors throughout the federal sector to assist agencies in complying with cargo preference mandates. Over the entire course of project lifecycles, MARAD actively advises agencies on the practical application of cargo preference, including how to organize supply chains to maximize use of U.S.-flagged vessels.

We are also working with the Biden-Harris Administration's Made In America Office to help agencies understand cargo preference requirements.

In addition, I am in the process of writing to all federal departments and agencies reminding them of their obligations under cargo preference laws and regulations. In my letter, I explain how MARAD can assist them in complying with cargo preference requirements. I also request that they each identify a Senior Accountable Official—consistent with OMB's implementing guidance on Executive Order 14005—who can be a single point of contact with whom MARAD can work to implement cargo preference requirements.

MARAD also works to ensure that agencies make up for cargoes transported on foreign vessels by employing U.S.-flag vessels to carry equal or greater volumes. Requiring make-up cargoes produces revenue opportunities for the U.S.-flagged fleet.

MARAD has been evaluating options for a cargo preference rulemaking. We recognize that a cargo preference rulemaking will be a complex undertaking. We also understand that success will entail addressing multiple priorities, including the critical importance of supporting our U.S.-flagged fleet while also ensuring that urgent aid and supplies are transported with expediency, consistent with America's commitment to those in need and our many foreign policy objectives.

To lay the foundation for a rulemaking effort that navigates this intersection, MARAD plans to issue a Request for Information (RFI) shortly to seek input from all stakeholders.

Under the Biden-Harris Administration, MARAD is also committed to growing our U.S.-flagged fleet. As you know, one of the current challenges with meeting preference requirements is ensuring we have both enough vessels and the wide mix of vessel types to carry the many types of cargoes that the government impels.

To help attract additional vessels to our flag, the Biden-Harris Administration has proposed that Congress eliminate the 3-year period that vessels entering the U.S. flag must currently wait before they are eligible to carry preference cargoes.

Moreover, in the 2023 Presidential Budget Proposal, the Administration requested that Congress fully fund the new Tanker Security Program (TSP) at \$60 million, which would support up to 10 U.S. flagged vessels.

A study required by the 2020 National Defense Authorization Act found a substantial risk to the nation associated with heavy reliance on foreign-flagged tankers, particularly in a contested environment. The TSP, which will be modeled on the highly successful Maritime Security Program, will provide assured access to up to 10 U.S.-flagged tankers available to support the Department of Defense's global operations.

Growing our fleet is also critical to ensuring we have enough mariners with current unlimited tonnage licenses and ratings to meet our sealift needs in a worst-case scenario. In fact, MARAD's most recent study assessing mariner availability—completed in 2017 at the request of Congress—estimated a shortfall of just over 1,800 mariners.

Vessel operators report that mariner availability is still a challenging issue. For that reason, on September 23, I am convening a summit with industry and labor to discuss recruitment and retention challenges.

In closing, I would highlight that these remain challenging times for the entire maritime industry. COVID has made hard jobs harder and has created new stresses that are clearly affecting mariners' well-being and willingness to continue sailing. These new challenges confront us even as world events demonstrate yet again the critical importance of both the U.S.-flagged fleet and American mariners to our national security.

I appreciate this Committee's commitment to our U.S.-flagged fleet and your leadership in support of our cargo preference programs. I also appreciate your support for our merchant mariners, and look forward to working closely with you to continue to meet the requirements of laws reserving government-impelled cargoes for U.S.-flagged vessels.

Mr. CARBAJAL. Thank you, Admiral Phillips.

With that, we will move to hear from Mr. Von Ah. You may proceed.

Mr. VON AH. Chairman Carbajal, Ranking Member Gibbs, and members of the subcommittee, thank you for the opportunity to discuss MARAD's oversight of cargo preference requirements.

The Federal Government ships many types of cargo internationally, such as military supplies, food aid for nations experiencing famine, and Government employees' household goods and personal vehicles.

Cargo preference laws, regulations, and policies require that when cargo owned or financed by the Federal Government is shipped internationally, certain percentages of that cargo be carried on U.S.-flag vessels.

The requirements are designed to ensure the U.S.-flag shipping industry has sufficient vessels and trained mariners to supplement

the cargo-carrying capacity of military ships during times of war and national emergency, among other things.

My statement today discusses the key findings and recommendations in our report issued earlier this week. The statement addresses the extent to which MARAD has monitored and reported on Federal agencies' compliance with cargo preference requirements and the extent to which MARAD has provided direction to Federal agencies on how to meet cargo preference requirements and has enforced those requirements.

MARAD relies on bills of lading submitted by contractors or agencies to monitor agencies' cargo volumes. However, MARAD does not determine whether agencies are in compliance with cargo preference requirements for two reasons.

First, it is not obligated to make compliance determinations under existing laws. Nonetheless, the National Defense Authorization Act for fiscal year 2009 granted MARAD authorities to take certain cargo preference-related enforcement actions, and MARAD would need to issue regulations and make compliance determinations to implement those authorities.

Second, MARAD is unable to validate if it is getting all the bills of lading for cargoes funded or financed by the Government to make comprehensive compliance determinations.

In some cases, carriers have notified MARAD of Government cargoes sent on foreign-flag vessels that were not subsequently reported to MARAD. So, it is likely that there is some amount of cargo not accounted for in MARAD's data.

Nonetheless, the data that MARAD does receive is the best available source of information for Government shipping and can be useful to assess whether agencies are making progress toward their cargo preference requirements.

Furthermore, MARAD has not publicly reported cargo preference data since 2013. For a number of years, MARAD reported agencies' cargo preference data in publicly available annual reports to Congress, but stopped, in part, because Congress eliminated the statutory reporting requirement in 2008.

With respect to MARAD's direction to Federal agencies on how to meet and enforce the requirements, MARAD works collaboratively with agencies and their contractors to make them aware of the requirements, help them to locate U.S.-flag vessels, and provide training where needed.

In cases where MARAD has identified potential instances of non-compliance, MARAD has referred those cases to the relevant agencies and worked with the agencies and contractors to identify additional cargo to be shipped on U.S.-flag vessels to compensate for prior cargo volumes sent on foreign-flag vessels.

However, MARAD has not clarified how agencies should implement two key procedures that we identified: determining the non-availability of U.S.-flagged vessels and calculating agencies' percentages of cargo volume shipped on U.S.-flag vessels.

Without clarification from MARAD on how to implement these procedures, several agencies included in our review developed their own policies for making nonavailability determinations and for calculating compliance that MARAD officials may not always agree with.

Further, MARAD has not taken any enforcement actions as granted by the 2009 NDAA because it has not issued regulations to carry out those enforcement authorities.

The agency began developing regulations in 2009, but terminated the effort in 2017, due to challenges in reaching sought-after consensus with other Federal agencies.

To address these issues, we made two recommendations which MARAD has concurred with. First, we recommended that MARAD publicly report cargo preference data, and second, we recommended that MARAD pursue options for overcoming the challenges to developing cargo preference regulations.

These actions could include such things as using a negotiated rulemaking as a means to help achieve consensus on how to implement cargo preference requirements and also to develop a legislative proposal to address other statutory challenges MARAD has identified.

Absent these steps, MARAD will continue to lack tools that can help it meet its maritime goals and objectives.

Mr. Chairman, this concludes my statement. I would be happy to address any questions you or members of the subcommittee may have. Thank you.

[Mr. Von Ah's prepared statement follows:]

**Prepared Statement of Andrew Von Ah, Director, Physical Infrastructure,
U.S. Government Accountability Office**

Chairman Carbajal, Ranking Member Gibbs, and Members of the Subcommittee:

I am pleased to be here today to discuss our work on the U.S. Maritime Administration's (MARAD) oversight of federal cargo preference requirements. The federal government ships many types of cargo internationally across the ocean, such as military supplies, food aid for nations experiencing famine, and government employees' household goods and personal vehicles. Two "cargo preference" laws, enacted respectively in 1904 and 1954, as well as associated regulations, and policies require that when cargo owned or financed by the federal government is shipped internationally, certain percentages of that cargo be carried on vessels registered in the United States (U.S.-flag vessels).¹ Cargo preference requirements are intended to support the U.S.-flag shipping industry. The requirements are designed to ensure the industry has sufficient vessels and trained mariners to supplement the cargo-carrying capacity of military ships during times of war or national emergency, among other things.²

The Secretary of Transportation, through MARAD, supports the U.S.-flag fleet, in part, by collecting data on federal agencies' cargo shipments and monitoring U.S.-flag cargo volumes. MARAD—as part of the Department of Transportation (DOT)—was granted authorities to take certain cargo preference-related enforcement actions through amendments to the 1954 act made by the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA for 2009).³ Those authorities include assessing civil penalties for noncompliance with cargo preference requirements. To date, MARAD has not issued regulations implementing those authorities.

¹ Pub. L. No. 58–198, 33 Stat. 518 (1904) (codified as amended at 10 U.S.C. § 2631); Pub. L. No. 83–664, 68 Stat. 832 (1954) (codified as amended at 46 U.S.C. § 55305).

² GAO has found, however, that the application of cargo preference in the delivery of international food assistance does not clearly contribute to seafight capacity. GAO, *International Food Assistance: Cargo Preference Increases Food Aid Shipping Costs, and Benefits Are Unclear*, GAO–15–666 (Washington, D.C.: Aug. 26, 2015).

³ Pub. L. No. 110–417, § 3511(b), 122 Stat. 4356, 4769–70 (2008) (codified as amended at 46 U.S.C. § 55305(d)(2)).

My statement today discusses the key findings and recommendations in our report issued on September 12, 2022 entitled *MARITIME ADMINISTRATION: Actions Needed to Enhance Cargo Preference Oversight*.⁴ This statement addresses:

- the extent to which MARAD has monitored and reported on federal agencies' compliance with cargo preference requirements;
- the extent to which MARAD has provided direction to federal agencies on how to meet cargo preference requirements; and
- MARAD's efforts to enforce cargo preference requirements.

In our report we made two recommendations to MARAD, which MARAD agreed to implement. These recommendations are intended to (1) increase transparency into federal agencies' use of U.S.-flag vessels in relation to their cargo preference requirements; and (2) help MARAD and federal agencies move toward establishing regulations to improve the implementation and oversight of federal cargo preference requirements. Both recommendations and MARAD's response are described at the end of this testimony.

In preparing our report, we reviewed relevant cargo preference laws, regulations, and policies. We collected and reviewed cargo preference data received by MARAD for fiscal years 2012 through 2020. We selected seven federal agencies and reviewed the policies and procedures these agencies identified for implementing cargo preference requirements.⁵ We interviewed officials from these agencies and MARAD, as well as selected maritime industry stakeholders. We compared MARAD's cargo preference oversight efforts to *MARAD's 2020 National Maritime Strategy*, federal internal control standards, and our prior work on enterprise risk management practices.⁶ More detailed information on our objectives, scope, and methodology can be found in the issued report.

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

MARAD MONITORS AGENCIES' CARGO VOLUMES BUT DOES NOT ASSESS COMPLIANCE WITH REQUIREMENTS OR PUBLICLY REPORT DATA

The mission of MARAD's Office of Cargo and Commercial Sealift is to promote and monitor the use of U.S.-flag vessels in the movement of cargo, and to oversee the administration of and compliance with U.S. cargo preference laws and regulations. We found that MARAD monitors federal agencies' cargo volumes to calculate the percentage of U.S.-flag shipments and to obtain insight into each federal agency's overall activity. However, MARAD does not use this data to determine an agency's compliance with cargo preference requirements, and MARAD does not publicly report the data it receives. Such reporting would provide an important accountability measure to monitor federal agencies' shipping activities in relation to their cargo preference requirements.

Specifically, MARAD monitors agencies' cargo volumes on U.S.-flag vessels, which generally declined over the time period we reviewed. Federal agency contractors are to submit documentation—in the form of bills of lading—to MARAD for government-impelled cargo,⁷ as required by federal acquisition regulations.⁸ MARAD compiles

⁴GAO, *Maritime Administration: Actions Needed to Enhance Cargo Preference Oversight*, GAO-22-105160, (Washington, D.C.: Sept. 12, 2022).

⁵These federal agencies included the five largest volume shippers in fiscal year 2019: the Department of Defense; the U.S. Agency for International Development; the U.S. Department of Agriculture, the Export-Import Bank, and the Department of State. We also included two lower-volume shippers: the Department of Transportation and the Department of Energy.

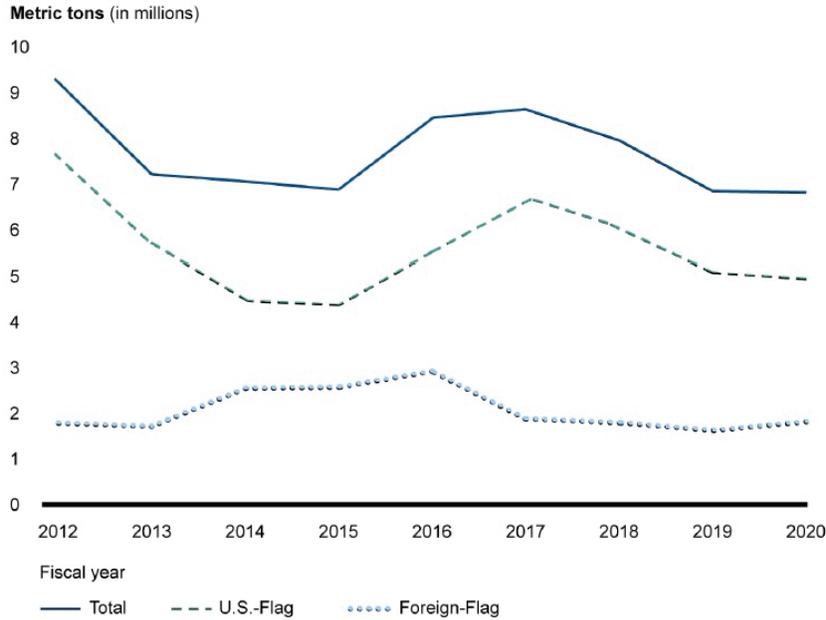
⁶GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: Sept. 10, 2014). GAO, *Enterprise Risk Management: Selected Agencies' Experiences Illustrate Good Practices in Managing Risk*, GAO-17-63 (Washington, D.C.: Dec. 1, 2016).

⁷According to MARAD, cargo preference requirements apply to "government-impelled" cargo—any cargo supported by U.S. government funding, including cargo moving as a direct result of federal government involvement, such as military transportation of supplies by sea; indirectly through financial sponsorship of a federal program, such as USAID supported food aid; or in connection with a loan, grant, loan guarantee, or other financing provided by the federal government.

⁸In general, a bill of lading is a document issued by a carrier to acknowledge receipt of cargo for shipment. For contracts that may involve ocean transportation of supplies, Federal Acquisition Regulation (FAR) and Defense Acquisition Regulation Supplement (DFARS) provisions require that copies of ocean bills of lading containing a range of information, including the spon-

data on U.S.- and foreign-flag cargo volumes and on the commodities shipped by each federal agency. According to data received by MARAD and provided to us, total government-wide cargo volumes in fiscal year 2020 were 27 percent lower than fiscal year 2012, and U.S.-flag volumes were 36 percent lower (see figure).

Figure: Data Received by MARAD on Federal Agencies' Cargo Volumes Shipped Internationally, Including Tonnage on U.S.- and Foreign-Flag Vessels, Fiscal Years 2012 through 2020



Source: GAO analysis of data received by the Maritime Administration (MARAD). | GAO-22-106198

Notes: Data received by MARAD includes the bills of lading that MARAD receives for all federal agencies; data are maintained in MARAD's Cargo Preference Overview System, as well as additional data on military shipments provided by the Department of Defense to MARAD annually.

The declines in cargos carried by U.S.-flag vessels over this time period were largely due to changes in cargo shipments within the Department of Defense (DOD) and in the delivery of food aid for international assistance, according to data received by MARAD. For example, DOD volumes on U.S.-flag vessels declined from 82 percent of DOD's total volume in 2012 to 62 percent in 2015. According to DOD officials, this decline was due, largely, to the limited availability of U.S.-flag tanker vessels during those years. Similarly, the use of U.S.-flag vessels by the U.S. Agency for International Development (USAID) and the U.S. Department of Agriculture (USDA) decreased for both agencies by approximately 46 percent from 2012 through 2020, based data received by MARAD. This decline was due, in part, to a statutory reduction in the minimum percentage of food aid required to be carried on U.S.-flag vessels from 75 percent to 50 percent, beginning in fiscal year 2013.

In addition, USAID and USDA officials told us that the majority of the food aid cargo—bulk commodities such as grain—must be shipped on dry-bulk vessels and that the existing fleet was not sufficient to meet the transportation needs of the two agencies. At the time of our review, there were a total of three U.S.-flag dry-bulk vessels in service.

MARAD officials provided several reasons why MARAD does not determine an agency's compliance with cargo preference requirements or publicly report the data.

soring U.S. government agency, vessel name and flag of registry, date of loading, description of the commodity, port of discharge, and the gross weight of the shipment be filed with MARAD. See, FAR provisions at 48 C.F.R. §§ 47.507(a), 52.247-64(c); DFARS provisions at 48 C.F.R. §§ 247.574, 252.247-7023. See also, FAR provisions relating to USAID ocean transportation contracts at 48 C.F.R. §§ 747.507, 752.247-70.

- *Determining agency compliance.* MARAD officials told us they do not determine an agency's compliance with cargo preference requirements because (1) MARAD is not obligated to make compliance determinations under existing laws, and (2) MARAD cannot validate whether it has received all bills of lading for an agency's government-impelled cargo to make such determinations. MARAD officials said they do not know how much data on agencies' shipments they may be missing. Occasionally, carriers will notify MARAD about instances in which cargo was shipped on a foreign-flag vessel, but MARAD did not receive a record of those shipments on a bill of lading, according to MARAD. However, the data that MARAD does receive could provide useful information toward assessing whether federal agencies are making progress toward their cargo preference requirements. MARAD officials also acknowledged that MARAD would first need to make compliance determinations in order to take enforcement actions under the authorities it received in the NDAA for 2009. However, MARAD officials stated that MARAD is not in a position to use those authorities because it has not issued regulations to implement them, as discussed in greater detail below.
- *Publicly reporting data.* MARAD has not publicly reported cargo preference data since 2013. For a number of years, MARAD reported agencies' cargo preference data in publicly available annual reports to Congress. These reports contained data on federal agencies' annual cargo volumes, including metric tons shipped on U.S.-flag vessels. As previously mentioned, MARAD officials told us MARAD no longer reports the data it receives, in part because amendments in the NDAA for 2009 eliminated the statutory reporting requirement. But, the elimination of the reporting requirement does not preclude MARAD from reporting this data, and MARAD continued to issue annual reports that covered shipments through fiscal year 2013. In addition, the NDAA for 2009 amendments require DOT to perform an annual review of agencies' programs subject to cargo preference requirements. MARAD officials told us that MARAD has not completed agency-level annual reviews due to a lack of implementing regulations. However, these required annual reviews could facilitate MARAD's mission of overseeing cargo preference compliance and provide a useful venue for MARAD to publicly communicate the data it receives about federal agencies' cargo volumes. Without public reporting by MARAD, Congress and others lack visibility into federal agencies' cargo shipments, including the amounts shipped on U.S.-flag vessels.

MARAD HAS OFFERED AGENCIES SOME DIRECTION ON REQUIREMENTS BUT HAS NOT CLARIFIED HOW AGENCIES SHOULD IMPLEMENT KEY PROCEDURES

We found that MARAD has offered some direction on cargo preference requirements to federal agencies by providing information on applicable requirements, answering questions related to cargo preference, and sharing available training resources. However, MARAD has not clarified how agencies should implement two key procedures that we identified:

- determining the non-availability of U.S.-flag vessels and sharing related information with MARAD; and
- calculating agencies' percentages of cargo volume shipped on U.S.-flag vessels.

As discussed in greater detail in our report, we found that without clarification from MARAD on how to implement these procedures, several agencies included in our review have developed their own policies for making non-availability determinations and calculating compliance. In addition, we found that MARAD officials do not always agree with those policies.

MARAD has not clarified for agencies how to implement these procedures, in part, because it has not been successful in completing a rulemaking to establish them. A federal statutory cargo preference requirement directs agencies to implement their programs in accordance with MARAD regulations and guidance.⁹ MARAD officials told us that the agency began developing regulations to clarify how agencies should implement cargo preference requirements in 2009. The officials further said that in 2017 MARAD terminated the effort, due in part to challenges reaching consensus with other federal agencies on how to implement cargo preference requirements.

Although MARAD has faced challenges in reaching consensus with agencies, MARAD officials stated that MARAD has not abandoned a cargo preference rule-

⁹Specifically, the NDAA for 2009 amendments to the 1954 Act require each department or agency responsible for a program subject to the 1954 Act cargo preference requirements to administer such programs in accordance with the 1954 Act and regulations and guidance issued by the Secretary of Transportation, as delegated to MARAD.

making and has held internal discussions about advancing a rulemaking. However, we found that MARAD has not fully considered options to reach the interagency consensus sought to complete a rulemaking or otherwise provide direction to agencies on how to implement cargo preference procedures. For example, agencies can supplement the typical informal rulemaking process through a “negotiated rulemaking” as a way of reaching a consensus in the development of a proposed rule. Through this process, an agency considering drafting a rule convenes a negotiated rulemaking committee for negotiations, consistent with the Negotiated Rulemaking Act of 1990.¹⁰

MARAD officials also identified issues related to statutory language in the Cargo Preference Act of 1954 (1954 Act)¹¹ that create challenges for MARAD in overseeing agencies’ compliance with cargo preference requirements. Specifically, the officials stated that language in the 1954 Act related to the calculation of compliance by “vessel type” and “geographic areas” presents challenges for MARAD.¹² In addition, MARAD officials stated that a provision in the 1954 Act, known as the “3-year waiting period,” in effect, limits the supply of U.S.-flag vessels to deliver bulk food aid.¹³ According to MARAD officials, this provision presents a further challenge to MARAD’s efforts to ensure that federal agencies that deliver such aid have sufficient U.S.-flag vessels to meet cargo preference requirements.

In May 2022, MARAD submitted a legislative proposal to Congress to address the 3-year waiting period challenge.¹⁴ This proposal was included in a bill to authorize MARAD programs for fiscal year 2023.¹⁵ However, MARAD has not developed legislative proposals to clarify the challenges it has identified regarding the definitions of “vessel types” and “geographic areas,” largely because it has prioritized developing the current proposal to address the 3-year waiting period challenge.

Without taking steps to evaluate options for developing regulations that could achieve the sought-after consensus with agencies, such as a negotiated rulemaking, MARAD will continue to lack the tools necessary to provide federal agencies with direction on key cargo preference requirements. In addition, action by MARAD to develop a legislative proposal to address the statutory challenges it has identified would help Congress determine whether statutory changes are necessary to enable MARAD to ensure compliance with U.S. cargo preference laws and regulations.

¹⁰Rulemaking at most regulatory agencies follows the Administrative Procedure Act’s informal rulemaking process, also known as “notice and comment” rulemaking, which generally requires agencies to publish a notice of proposed rulemaking in the *Federal Register*, provide interested persons an opportunity to comment on the proposed regulation, and publish the final regulation, among other things. See 5 U.S.C. § 553; Pub. L. No. 101–648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561–570a). If the committee comes to a unanimous consensus on the content of a potential regulation, the agency may use it as the basis of a proposed rule. In passing the Negotiated Rulemaking Act of 1990, Congress made several findings, including that (1) negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, can provide significant advantages over adversarial rulemaking, and (2) negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court.

¹¹Cargo Preference Act of 1954, Pub. L. No. 83–664, 68 Stat. 832 (codified as amended at 46 U.S.C. § 55305).

¹²The 1954 Act’s requirement to ship a minimum of 50 percent of cargo volumes on privately owned commercial U.S.-flag vessels, is to be computed separately for certain “vessel types.” However, MARAD officials noted that the vessel types specified in the 1954 Act do not include container vessels, which became common after the 1954 Act. MARAD officials stated that undefined language related to “geographic areas” in the Act complicates how cargo preference compliance should be calculated, such as by country, region, or otherwise. In 2015, GAO made a matter for congressional consideration addressing the definition of geographic areas. Specifically, GAO stated that Congress should consider clarifying cargo preference legislation regarding the definition of “geographic area” to ensure that agencies can fully utilize the flexibility Congress granted to them when it lowered the cargo preference for food aid requirement. GAO–15–666. To date, legislation to address this matter has not been enacted.

¹³More specifically, MARAD officials also noted that this provision limits the supply of U.S.-flag vessels by requiring foreign-built or foreign-documented vessels that reflag into the U.S. registry to wait 3 years before they are able to participate in the transportation of preference cargo as a U.S.-flag vessel.

¹⁴In 2011, we made a Matter for Congress to consider amending the Cargo Preference Act of 1954 to eliminate the 3-year waiting period imposed on foreign vessels that acquire U.S.-flag registry before they are eligible for carriage of preference food-aid cargos. To date, legislation to address this matter has not been enacted. GAO, *International Food Assistance: Funding Development Projects through the Purchase, Shipment, and Sale of U.S. Commodities Is Inefficient and Can Cause Adverse Market Impacts*, GAO–11–636 (Washington, D.C.: June 23, 2011).

¹⁵See Maritime Administration Authorization Act for Fiscal Year 2023, S. 4357, 117th Cong. § 103 (2022).

MARAD HAS IDENTIFIED POTENTIAL INSTANCES OF NONCOMPLIANCE BUT NOT
TAKEN CARGO PREFERENCE ENFORCEMENT ACTIONS

We found that MARAD has taken steps to identify potential instances of non-compliance with cargo preference requirements but has not taken enforcement actions. For example, MARAD has notified federal agencies and contractors about potential contract violations. MARAD has also worked with federal agencies and contractors to identify additional cargo to be shipped on U.S.-flag vessels to compensate for prior cargo volumes sent on foreign-flag vessels. However, according to MARAD officials, MARAD has not taken any enforcement actions, in part, because it has not issued regulations to carry out the enforcement authorities granted by the NDAA for 2009. The NDAA for 2009 amendments to the 1954 Act authorized MARAD to take certain enforcement actions, including: (1) assessing civil penalties “against any person” for violations of cargo preference requirements, (2) requiring “make up” cargoes if federal agencies fall short of the percentage of cargo required to be shipped on U.S.-flag vessels, and (3) taking other measures under the Federal Acquisition Regulation.

According to MARAD officials, regulations are required for MARAD to impose civil penalties and could facilitate MARAD’s use of other enforcement actions. Specifically, DOT policy requires certain procedural requirements governing enforcement actions initiated by DOT, including civil penalties, to be set forth in procedural regulations to satisfy the principles of due process.¹⁶ The officials said regulations would allow MARAD to address issues such as what constitutes a violation for which a civil penalty may be imposed. MARAD officials also noted that for MARAD to assess civil penalties, MARAD would need to make defensible compliance determinations based on regulations.

MARAD’s maritime goals and objectives establish the importance of enforcing cargo preference requirements. More specifically, MARAD’s 2020 *National Maritime Strategy* established the objective of improving the capability of U.S.-flag vessels through a combination of efforts including enforcement of cargo preference requirements.¹⁷ Without additional efforts by MARAD to develop regulations to assist with its oversight and to enforce compliance with cargo preference requirements, MARAD will continue to lack the tools necessary to meet its maritime goals and objectives.

GAO RECOMMENDATIONS AND MARAD’S RESPONSE

In our report, we made two recommendations to MARAD:

- The Administrator of MARAD should publicly report, on an annual basis, the cargo preference data it receives to provide information on the total cargo volumes and amounts shipped on U.S.- and foreign-flag vessels for each federal agency.
- The Administrator of MARAD should take steps to develop regulations to oversee and enforce compliance with cargo preference requirements. These steps should include evaluating options for overcoming challenges to developing such regulations, such as: (1) using a negotiated rulemaking as a means to address challenges achieving consensus on how to implement cargo preference requirements, and (2) developing and communicating a legislative proposal to address statutory challenges MARAD has identified.

In its written response to our report, MARAD concurred with our two recommendations. MARAD noted that it recognizes the critical importance of federal laws requiring that government-impelled cargoes be carried on U.S.-flagged vessels to support and sustain an economically viable and militarily useful U.S.-flagged fleet in international trade. MARAD added that it has started evaluating options to advance a rulemaking related to cargo preference. MARAD stated that it intends to discuss the ideas that result from that effort with other federal agencies and the Office of Information and Regulatory Affairs, the office within OMB that reviews Executive Branch regulations. We are encouraged by this response and will monitor MARAD’s progress implementing our recommendations.

¹⁶Department of Transportation, *Procedural Requirements for DOT Enforcement Actions*, Memorandum for Secretarial Officers and Heads of Operating Administrations (Feb. 15, 2019).

¹⁷The Howard Coble Coast Guard and Maritime Transportation Act of 2014 directed DOT in consultation with the Secretary of the department in which the U.S. Coast Guard is operating to submit to Congress a national maritime strategy that included the identification of federal regulations and policies that reduce the competitiveness of U.S.-flag vessels in international transportation as well as recommendations to make U.S.-flag vessels more competitive and to ensure compliance by federal agencies with cargo preference laws. Pub. L. No. 113–281, § 603, 128 Stat. 3022, 3061 (2014).

Chairman Carbajal, Ranking Member Gibbs, and Members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

Mr. CARBAJAL. Thank you, Mr. Von Ah. With that, I am going to move into questions. I will recognize myself first.

In 2020, former TRANSCOM Commander Lyons called for 100 percent cargo preference on all Government-impelled cargoes. Given that cargo preference is subject to the availability of vessels at fair and reasonable rates and that Department of Defense cargo already has the requirement, how would an increase to 100 percent in civilian cargo preference affect the U.S.-flagged fleet?

Rear Admiral Phillips, the U.S.-flagged fleet is responsible for carrying less than 2 percent of America's foreign cargo. After witnessing supply chain issues over the past 2 years, what are the risks associated with that dynamic? How important is cargo preference, which helps maintain a U.S.-flagged fleet, to addressing that concern?

Admiral PHILLIPS. Mr. Chairman, thank you for that question. I can summarize the impacts, I think, in a rather succinct way, which would be that additional cargo, more cargo, will drive more ships into the U.S.-flag fleet, and more ships to carry more cargo will work to expand mariners and certainly drive a need for additional mariners into the U.S.-flag fleet and provide them with paying jobs.

So, in the context of, should Congress decide to make any decisions in that context which we are not asking for, but certainly more cargo will drive the need for more vessels which will drive the need for more mariners.

In the context of how a strong and vital U.S.-flag fleet could influence and might have had an influence, I would say, an additional influence, on the challenges we faced during the past several years with COVID and our supply chain challenges, I can say that Buy America and Ship America is a way to think about it.

We would have much more control with a larger and more vibrant U.S.-flag fleet on our exports in particular and also on our imports. In fact, we would have much more control over our supply chain, which is so vital to our economy.

So, you can make that tie, that U.S.-flag vessels and our U.S. merchant marine provide vital economic and national security support for this country, and that is the vital nature of why having a merchant marine is so important, and why having U.S.-flag vessels is so important to this country. Thank you, sir.

Mr. CARBAJAL. Thank you. Mr. Von Ah, if you can answer the first question. I will just reiterate the last part of it. How would an increase to 100 percent in civilian cargo preference affect the U.S.-flag fleet?

Mr. VON AH. Yes, thank you for that question, Chairman Carbajal. So, all cargoes, as the admiral mentioned, help sustain the fleet. I think it is a little bit unclear as to the extent to which it would drive additional vessels into the U.S. flag for a couple of reasons.

First, just setting aside food aid cargo, the amount of cargo shipped by civil agencies is typically a fairly small percentage of

the overall Government cargoes shipped. We are talking, like, between 1 and 5 percent typically.

So, I am not sure that if that were 100 percent that would provide enough incentive to bring additional vessels into the U.S.-flag fleet, but it would be speculation on my part.

If you talk about food aid, we are talking about a much larger amount of cargo that would be available for U.S.-flag vessels. However, there are only three current dry bulk cargo vessels in the fleet.

So, here is where the 3-year waiting period becomes a bit of a barrier, right? That would provide an incentive for carriers to bring those vessels into the fleet, but they have a 3-year waiting period where they would have to be willing to hold on to those vessels for 3 years.

So, for at least those 3 years, you wouldn't see any additional vessels. But at that time, I would just point out that at that point, you would be bringing dry bulk cargo vessels into the fleet. Those are vessels that DoD has, sort of, determined to be perhaps the least militarily useful for their purposes.

And you would also be starting to raise costs to ship food aid, so, those food aid agencies would certainly have some concerns about the amount of food that they would be able to ship to those countries in need.

Mr. CARBAJAL. Thank you. Mr. Von Ah, after President Biden took office, he signed Executive Order 14005, which, among other things, strengthened oversight and enforcement over cargo preference laws in order to maximize the utilization of U.S.-flagged vessels and encouraged shipper agencies to go above the statutory minimum.

The Executive order further created a Made in America Office to help ensure that the policies were being followed.

Given the current level of compliance and enforcement, has this Executive order been successful? If not, who is to blame?

Mr. VON AH. So, our review didn't review the Made in America Office specifically, but I would say that during the course of our review, we didn't hear from any agencies that desire to increase their use of U.S.-flagged vessels. Put it that way.

Early on in our engagement, we did talk to the Made in America Office. Their plan was to partner with MARAD to work with agencies to designate points of contact, as the admiral mentioned in her opening statement, that the MARAD and the Made in America Office could work together to understand, sort of, where cargo preference stood within the agencies.

And so, that is as much as we know at this point. I am sure there is a status update that we could provide to you at a later date.

Mr. CARBAJAL. Thank you. It sounds like the President needs to have his Made in America Office do a little bit more work. Thank you very much.

With that, I will recognize Representative Gibbs.

Mr. GIBBS. Thank you, Chairman.

Rear Admiral, in 2009, Congress, as you know, enacted legislation led by then subcommittee chairman Elijah Cummings, to assure that MARAD had the final say on which Government-impelled

cargo shipments were subject to Federal cargo preference requirements.

Unfortunately, MARAD has had difficulties in implementing that.

And then the GAO report released this week recommends that MARAD look at innovative ways to complete the rulemaking, including possibly a negotiated rulemaking process.

What actions does MARAD plan to take to find a way through the regulatory thicket that is the interagency review process, and then also, is a negotiated rulemaking a possibility, or does it threaten MARAD's decisionmaking role as provided in statute?

Admiral PHILLIPS. Ranking Member Gibbs, thank you for that question, sir. As I have stated in my opening statement, MARAD has and is in the process of sending a letter to agencies and departments that outlines our current regulatory processes, requesting agencies' assistance in complying with and fulfilling their responsibilities under those current processes.

In addition to that, in the context of rulemaking, we intend to issue, very soon, a Request for Information to stakeholders so that we can understand what their particular challenges are with the regulation as it exists, with the law as it exists, so that we can then begin to move forward ultimately into a rulemaking process.

So, our first step is the letter requesting their compliance and also requesting they designate a senior accountable official under the auspices of—as has also been requested by the Made in America Office under Executive Order 14005, a Request for Information from our stakeholders so that we can gather their information and move forward, and then from there, move into a rulemaking process ultimately.

Mr. GIBBS. OK. Director Von Ah, has GAO found other circumstances in which negotiated rulemaking helped break loose interagency regulatory logjams on complex issues? Have you had that experience with other agencies?

Mr. VON AH. Yes, thank you for that question, Ranking Member Gibbs. Yes, it has worked in a number of instances: with EPA, with OSHA, with the Nuclear Regulatory Commission, with FAA. Actually, I think FAA was one of the first to use negotiated rulemaking for pilots and pilot issues that were being worked through.

So, it is a useful tool. Particularly when, in a regular rulemaking process, it can be adversarial when there are some difficult issues to work through. Usually you have got parties taking extreme viewpoints on either side, usually in anticipation of some kind of litigation down the road.

So, a negotiated rulemaking allows those parties to come around the table with a mediator, work through some difficult issues, and come up with some innovative solutions to avoid those kinds of things down the line.

Mr. GIBBS. Yes, it makes sense.

Admiral, in H.R. 7900, the National Defense Authorization Act of 2023, as passed by the House, requires the Maritime Administration to issue a final rule where having a statutory deadline for completion of these rules to assist MARAD in including the rules. Is that going to be helpful, that passage of the law, and that statutory deadline?

Admiral PHILLIPS. Ranking Member Gibbs, can you repeat your question, sir? I can't quite hear you.

Mr. GIBBS. OK. The NDAA bill, 2023, that passed the House, requires a final deadline, a statutory deadline for completion of these rules [audio malfunction].

Admiral PHILLIPS. Thank you for that question, sir, regarding a deadline. Deadlines are always helpful, provided they are realistic, sir. So, I think the challenge there would be, what exactly is the deadline being considered, and in this context, as you are well aware, this is a very complex challenge.

Rulemakings have been attempted in the past, they have failed, and so, in the context of how we would move forward with a rule-making, and even in the initial Request for Information from agencies, that will take some time and review to ensure—

Mr. GIBBS [interrupting]. I think the point, Congress just wants to get it done, and I think that is part of the deadline in my opinion.

Admiral PHILLIPS. Yes, sir, thank you. I understand that.

Mr. GIBBS. Director, in our next panel, Dr. Clark is proposing that DoD ship oil from U.S. depots rather than foreign depots, and, as was mentioned, there has been a drop in shipments from U.S.-flagged vessels, mainly oil tankers.

Would his proposal—do you think it would claw much of it back, his recommendation to claw back to U.S. ships, and in the case of having to ship out of U.S. depots, would there be additional costs that would be significant or not?

Mr. VON AH. Thanks for that question, Ranking Member. If I understand it correctly, I am not sure I would be able to comment on whether or not that would get more cargo onto U.S. vessels.

It is always going to be a question of the availability of vessels at the given time and place that they are looking to ship those cargoes. And so, I believe that would help, but it is hard for me to say not knowing the specifics of the situation.

Mr. GIBBS. Well, I guess one of the questions I might have for him is, you know, having to go back to U.S. depots versus more accessibility, what that might do to the cost. I don't know if that would be a question, but—

Mr. VON AH [interposing]. Sure.

Mr. GIBBS. I yield back. Thank you for being here.

Mr. CARBAJAL. Thank you, Mr. Gibbs. I will now move on to the rest of the Members, recognizing them for 5 minutes. First, I will move to Representative Larsen.

Mr. LARSEN OF WASHINGTON. Thank you, Mr. Chair.

Administrator Phillips, with regards to the hurdles that GAO outlined in this report to get to regulations, are there any other reasons that MARAD has not developed regulations and began issuing civil penalties to enforce cargo preference?

Admiral PHILLIPS. Thank you for that question, Congressman Larsen. As you are well aware, the cargo preference requirements are quite challenging, they are quite complicated, and within them, pivotal language is not defined.

They also, in some instances, predate existing, current types of ships. We do a lot of container shipping now. Look at the 1954 act, there were no containerships at that point in time. So, there are

things that have changed over time that make this a complicated situation.

Within the context of our authority under the law to issue citations or to issue any particular enforcement actions, the agencies are charged with compliance, 50 percent or more, and this is for civilian agencies, but the law specifically applies or describes fines against persons. And so, part of the challenge in that context is, OK, which persons, how might we find them, what is the requirement, what is the statutory level of violation.

The law refers to, for example, a willful and knowing violation. That is a very high level of culpability, my counsel tells me, so, how might we enforce that, how would we determine it.

All of these things are reasons for a regulatory process so that we can determine how we might enforce such regulations in the future. Again, getting back to the complexity of the regulations as they currently exist. Thank you, sir.

Mr. LARSEN OF WASHINGTON. You noted in your testimony, and I think it answered a question here about the timing of the RFI and you said soon. Is there a more specific date than soon?

Admiral PHILLIPS. There is not yet a defined date, sir, and I appreciate your interest in that and understand it. In order to issue an RFI, we will have to review carefully the nature of the questions that we ask, so that we don't wander into rulemaking territory yet, and that will require legal review and regulatory review.

But we are certainly interested in expediting the process, and I will commit to doing so. Thank you.

Mr. LARSEN OF WASHINGTON. Do you feel or believe or have a view on whether or not MARAD has strong enough singular authority over other agencies on cargo preference?

It seems that looking back at the failure of establishing the rule-making in the past, it reads as if the agencies walked away, and MARAD didn't have the ability to keep them at the table.

Admiral PHILLIPS. Thank you for that question, sir. MARAD has the authority of the law behind it, and the law has been in place since 1954. It has been reinvigorated in 2009 and in subsequent additional actions, but we do have the power of the law behind us.

I can't speak, and there certainly were challenges addressed by previous agencies and under previous circumstances, but at this point in time, we believe the authority of the law is what we have and what we need to be able to move forward in this context, to move a regulatory process.

Mr. LARSEN OF WASHINGTON. The Infrastructure Investment and Jobs Act invested \$450 million in MARAD this year. Are you using any of those dollars to enforce cargo preference laws and regulations?

Admiral PHILLIPS. Thank you for that question, sir. The Bipartisan Infrastructure Law did indeed provide \$450 million to the Maritime Administration under the Port Infrastructure Development Program, for port infrastructure development in particular. And so, those funds are very specifically targeted at port infrastructure development.

Mr. LARSEN OF WASHINGTON. Director Von Ah, your testimony states that MARAD monitors Federal agencies' cargo volumes to

calculate a percentage of U.S.-flag shipments but does not use this data to determine agencies' compliance.

As these compliance determinations are necessary for even contemplating civil penalties for lack of compliance, can MARAD use the data more effectively in your view?

Mr. VON AH. Thank you for that question, Congressman Larsen. So, there are a couple of difficulties in determining compliance, and it stems from some ambiguities in the original law that make it, sort of, more difficult, and those things are things that GAO has talked about in prior reports and recommended that Congress address.

One of them is to deal with, sort of, ambiguities about what is meant by a geographic area, because compliance is also supposed to be determined by geographic area. And another is by vessel type, supposed to be determined by vessel type as well.

But as the admiral mentioned, some of the vessel types don't exist, or didn't exist at the time when the law was originally written. So, those would need to be clarified, first and foremost, for MARAD to start to make compliance determinations.

The other issue is that there is a difficulty in knowing whether or not MARAD has all of the bills of lading for all of the shipments that agencies have made. And so, that is a little bit more of a difficult problem there's, sort of, a "we don't know what we don't know" there.

There is a certain amount that may not be being reported to MARAD, and there are ways that MARAD is considering looking at certain kinds of customs data and other databases to investigate whether there are shipments out there that are not being reported to them. But that is another one of the challenges in terms of determining whether the agency is in compliance or not.

Mr. LARSEN OF WASHINGTON. Thank you.

Thank you, Mr. Chairman.

Mr. CARBAJAL. Thank you, Mr. Larsen, and next I will recognize Mr. Weber for 5 minutes.

Mr. WEBER OF TEXAS. Thank you, Mr. Chairman.

Rear Admiral Phillips, a couple questions for you. I am from the gulf coast of Texas, starting at Louisiana, and border that other foreign country. And I have got the Port of Beaumont and Sabine-Neches Waterway in my district, and so, MARAD has some facilities out there. Are you familiar with those facilities?

Admiral PHILLIPS. Yes, sir, I am familiar with them in that we do have a regional office in that area. I have not yet had the opportunity to visit, and I hope to do so very soon.

Mr. WEBER OF TEXAS. Well, we do want you to come out there and spend lots of money in my district just so you know. Are you aware that Beaumont moves more military personnel and equipment than any other port in the United States?

Admiral PHILLIPS. I am aware that it is an extremely busy port in the context of moving military requirements, yes, sir. Thank you.

Mr. WEBER OF TEXAS. OK. We want to make sure that that is on our radar. In your opinion, Admiral, what is the best thing that MARAD could do—we are talking about getting more flagged vessels—with the supply chains already stretched to the max? What

is the best thing that MARAD could do to facilitate that? Money is no object.

Admiral PHILLIPS. Thank you, sir. If only that were true. I appreciate your interest in that question, and I think some things that we are already doing, that are already underway, pending certainly in legislation for the Biden administration, would be eliminating the 3-year wait which we described earlier in the testimony today. That will give more options for more vessels to join the U.S.-flag fleet, particularly in cases where we have only a few of a certain type, bulk carriers being one of them, which would then provide additional options for agencies who are shipping food aid in particular, and perhaps give them more opportunities to more easily comply with the requirement.

Certainly, that is a way to expand the U.S.-flag fleet, and then in addition, under the Tanker Security Program, we have an appropriation for that. We requested that again in 2023. That will bring 10 tank vessels, petroleum product carriers, into the U.S.-flag fleet as well. So, those are two ways, near term, that we can, and hope to expect, that we will see growth—

Mr. WEBER OF TEXAS [interrupting]. Well, let me break in if I may. You mentioned earlier I think in getting the rulemaking actually going off of dead center, for lack of a better term, you had counsel looking at it. Do I remember that correctly? Or you will have legal counsel looking at it? You didn't want to get into the rulemaking process—what were your comments? I came in a little late.

Admiral PHILLIPS. Right. Certainly I think the discussion actually, sir, was in the context of how soon an RFI could be issued. We would certainly want counsel to review that.

Mr. WEBER OF TEXAS. Got you.

Admiral PHILLIPS. And then the next step would be a rulemaking process.

Mr. WEBER OF TEXAS. How many people, would you say, in that office are working on that?

Admiral PHILLIPS. Sir, are you asking how many people are in the Office of Cargo and Commercial Sealift?

Mr. WEBER OF TEXAS. Yes, ma'am, that would help move this process along.

Admiral PHILLIPS. Well, I would say that the administration more broadly is going to be involved in moving this process along. So, I probably have between 20 and 25 in the Office of Commercial Sealift—

Mr. WEBER OF TEXAS [interrupting]. But how many in your office are interacting with the administration—that is really the heart of my question—about that process?

Admiral PHILLIPS. Well, I would—

Mr. WEBER OF TEXAS [interrupting]. Do you have 1 person, 2 people, 3 people, 7 people?

Admiral PHILLIPS. I have a full legal staff. My counsel is here with me today. She and her staff would be supporting this. The Office of Cargo and Commercial Sealift is here. The administrator of that is here as well. So, we are talking, I don't know, 20, 30 people at times involved in this.

Mr. WEBER OF TEXAS. OK. I am just trying to get a handle on what kind of attention, what kind of manpower is available to actually follow this through.

And we talked about the lack of rules hurting you because you have more American-flag vehicles, so, it is important to us, especially important to our ports—I also have seven ports in my district, more than any other Member of Congress. Some have four, we have seven.

The Sabine-Neches Waterway is the second longest waterway in the Gulf of Mexico, second only to the Mississippi River. So, a lot—and by the way, the Port of Houston is not one of my seven ports. It comes through Galveston Bay up into the Houston Ship Channel.

We have a lot of traffic that moves in and out, so, we are only wanting to make sure that we can get as much of this done as quickly as we can, to facilitate America staying on top and in getting back on top of the supply chain crisis and—and—being ready should a military excursion be necessary.

And with that, Mr. Chairman, I will yield back.

Mr. GARAMENDI [presiding]. Thank you, Mr. Weber.

The gavel was passed. I will do my best to follow on here from the chairman who had to go to another classified meeting.

Our next questioner is Mr. Lowenthal.

Mr. LOWENTHAL. Thank you, Mr. Chair. You are doing already an excellent job there.

My question first is to Mr. Von Ah. Your report and your testimony clearly show a disturbing trend, and I was particularly surprised to see your finding on page 19 of your report, that USAID seeks a blanket waiver for dry bulk cargo vessels because it believes these vessels do not have military use.

I think this really—and I know—this really fails to understand the value of the U.S.-flag fleet.

Vladimir Putin has made Ukrainian grain exports into a weapon to coerce the world during his war of aggression. The lesson is clear: Losing control over critical global supply chain can be dangerous.

A U.S.-flag fleet gives us options in the event of contingencies like a future global commodity crisis.

So, I want to switch now to Admiral Phillips. I am very concerned that USAID's mistaken rationale reflects the absence of clear guidance, let alone regulations, from MARAD on the importance of these Federal laws.

I want to join my colleagues in urging you to consider implementing the GAO recommendation to consider a negotiated rulemaking. We have already discussed that. I just want to join in supporting the negotiated rulemaking.

I want to ask you, Admiral Phillips, do you believe that the existing laws are strong enough to enable you to overcome resistance from agencies like I just mentioned—USAID—to uphold congressional intent?

Admiral PHILLIPS. Thank you, Congressman Lowenthal, for that question. I believe that existing law is strong enough to allow us to execute a rulemaking and move through this process, working with our sister and our fellow agencies, as described.

With the force of the law behind us, we have the authority to do this and to work with our fellow agencies to move forward and also to ensure that they understand the force of the law that is behind this.

That said, I am a realist, I understand this is a challenging process, and it has been tried before and has failed. However, I believe that with the interest in global shipping and U.S.-flag shipping that we have certainly seen in the last 2 years under the COVID crisis and the supply chain challenges we have had, that we are in a different position now, and we may have more attention to this need than we might have had in the past.

So, yes, sir, I think we have sufficient authority under the law, and we will put that to the test as we move forward with this process. Thank you.

Mr. LOWENTHAL. Well, thank you for that answer, and I am going to yield back. Thank you, Mr. Chair.

Mr. GARAMENDI. Thank you, Mr. Lowenthal. We now turn to Mr. Van Drew for 5 minutes.

Mr. Van Drew, are you somewhere around?

[Pause.]

Mr. Van Drew, you are about to lose your place.

[No response.]

Mr. Auchincloss, you have 5 minutes.

Mr. AUCHINCLOSS. Thank you, Chair.

This question is about MARAD's mandate to support the military and how the Marines' force readiness plans will streamline MARAD's support capability, and it is for you, Rear Admiral.

Cargo preference, coupled with other programs, such as the Maritime Security Program and Voluntary Intermodal Sealift Agreement, are intended to support the U.S.-flag shipping industry so that the United States is a fleet capable of supplementing the capacity of the U.S. military with U.S.-flag vessels and trained mariners during times of war and national emergency, while also providing transportation for the Nation's maritime commerce.

The Commandant of the Marine Corps 2030 Force Design includes significant ground force reductions, and the Marines' plan includes pursuing new capabilities to increase littoral maritime ability and resilience.

With this recalibration, it would follow that this would lessen MARAD's requirement that it has the ship capability to support a national security emergency. What impact do you foresee the Commandant's Force Design 2030 plan having on MARAD's operating costs?

Admiral PHILLIPS. Mr. Auchincloss, thank you for that question. We, as you are aware, work very directly with the U.S. Transportation Command, who is responsible for overseeing military transportation broadly. In that context and in support of your specific question, the Marine Corps changes and challenges, which I am aware of, we would work with TRANSCOM to understand what the needs are and what they will be in the future.

I would add that the Transportation Command is very interested in additional merchant capacity for other reasons, including support of product tankers, in the Pacific in particular, and other additional requirements.

So, I would revert back to TRANSCOM to work with their fellow Services to ensure that they support the needs of the Marine Corps and to understand what those impacts might be more broadly, which then we respond to and provide the services that they request from us in that context.

Mr. AUCHINCLOSS. Can you continue on that thread, Rear Admiral, because I think it is worth pushing on, the fact that, if I am correct, our merchant marine number of ships has actually declined since World War II.

And yet as we are pivoting from a transatlantic requirement, like we had in World War II really to support our European Allies, towards an Indo-Pacific one, where the distances are much greater and the need for maritime transportation potentially much greater, do you feel like we are in a position where we can support, with the merchant marine, an Indo-Pacific strategy?

Admiral PHILLIPS. So, thank you for that question, sir. That is actually the point of working with Transportation Command to understand the need and, in particular, their identification of a shortfall in the—I just lost my microphone—in the ability to handle the needs in the context of product tankers and tank vessels to support scenarios that would be of interest in the Pacific and the Indo-Pacific theater.

Mr. AUCHINCLOSS. Thank you for that. And can you talk as well about—and this might be more for you, Mr. Von Ah—about how coordinated sanction implementation on Russia, either global price cap in the maritime insurance regulations that we are putting into place in conjunction with the European Union, at the end of 2022, might affect the maritime industry?

Mr. VON AH. I am not sure our work spoke to that, Representative Auchincloss. I am not sure if the rear admiral has any points of view on that.

Admiral PHILLIPS. Thank you, sir, I don't in particular. I will say that we certainly have been asked, and have supported, with Ready Reserve Force vessels, and provided assistance in the Ukraine context, as directed by TRANSCOM, and we will continue—

Mr. AUCHINCLOSS [interrupting]. Has cargo preference impacted our ability to send aid abroad to countries like Ukraine?

Admiral PHILLIPS. That is an interesting question. Our work in the context of supporting Ukraine is directed through the Transportation Command, to be able to move military cargo to this point, which is 100 percent compliance.

Mr. AUCHINCLOSS. Chairman, I yield back.

Mr. GARAMENDI. Thank you, Mr. Auchincloss.

Mr. Van Drew, how nice of you to join us. You have 5 minutes.

Dr. VAN DREW. Thank you. Thank you and good morning, and I appreciate you holding today's hearing on the enforcement of maritime Buy American laws.

The supply chain crisis has shown that we need to invest in America [inaudible] to strengthen our economic position. This includes cargo handling infrastructure, like cranes, which are not currently made in the United States of America.

Unfortunately, a neglected manufacturing base and burdensome regulations have put our country in a difficult position when it comes to improving our port infrastructure.

These factors have led to a situation where the cost of ocean shipping actually sometimes exceed the value of the cargo that we are shipping out. This arrangement is economically unsustainable for the United States of America.

Administrator Phillips, could you explain how current regulations are impeding ports' ability to use DOT grant funds to decrease cargo backlogs, prepare for increased trade, and stay competitive?

Further, what actions can we take to align the economics of maritime shipping with the value of American exports?

Admiral PHILLIPS. Congressman, thank you for that question, sir. In the context of port infrastructure and support for port infrastructure, as you are aware, the Maritime Administration supports the Port Infrastructure Development Program, which, as discussed earlier in testimony, has received \$450 million under the Bipartisan Infrastructure Law, this year, bringing our total, including appropriations in fiscal year 2022, to about \$680 million.

That grant program which will assist ports in improving their infrastructure and improving the capacity and resilience and their ability to move cargo, is under review now, and is moving forward, and we expect to announce awards later this fall. So, that will help ports nationwide improve their capacity to move cargo.

In the context of shipping and commercial shipping and pricing and our ability to regulate that, we do not have an ability to regulate that. I would defer those questions, I believe, sir, to the Federal Maritime Commission in the context of the commercial world more broadly.

Certainly U.S.-flag shipping with more capacity to ship on U.S.-flag vessels would allow us more control, in particular of our exports as I stated earlier, which we have been challenged to deal with under COVID and the many challenges to our supply chain infrastructure, which, of course, we are all so well aware of and, sir, which you are describing in your question, I believe. Thank you.

Dr. VAN DREW. Thank you. Just a followup. I have a couple minutes. So, do you think we are well on our way to getting this under control, or do you feel that we are still pretty much in the thick of it and have some pretty serious problems here?

I mean, this is something that is obviously important for the economy, important for the future, just important in every aspect. So, what are we not doing that you would like to see us do, what are we doing that you like, and how can we do better?

Admiral PHILLIPS. Thank you for that question, sir. I will defer on the costs of foreign-flag vessel shipping, which certainly has been a challenge across the COVID pandemic and the supply chain challenges.

I would say in the context of improving our port infrastructure, under the Bipartisan Infrastructure Law, and PIDP in particular but other grants as well administered by the Department of Transportation, we have a generational opportunity to make change, to build resilience into our ports and our supply chains, and to improve our capacity to move cargo and keep cargo moving.

Of course, from our perspective, it is all about getting cargo on ships, on U.S.-flag vessels, but in the broader context, certainly

under the Bipartisan Infrastructure Law, the grants that have been approved and are underway in the Department of Transportation, and particularly in MARAD PIDP, will be of significant value in improving our port infrastructure over the next 5 years. Thank you, sir.

Dr. VAN DREW. So, you see that, and through that bipartisan infrastructure bill, you see that as a positive, obviously, and your sense is that we are going in the right direction, and that this should be helpful, and we should see noticeable improvement in the future?

Admiral PHILLIPS. Yes, sir, in the context of being able to improve our port infrastructure, something that we have long needed and not done, this is a generational change and a generational opportunity, sir. Thank you.

Dr. VAN DREW. Thank you for your time and commitment and, Chairman, thank you for yours.

Mr. GARAMENDI. Thank you, Mr. Van Drew. I now turn to myself.

I believe, Admiral Phillips, you are the fourth Administrator in the last decade. I believe that to be accurate. And over that period of time, every Administrator has failed to be able to fully implement the cargo preference laws.

Given your testimony today, your determination to achieve what others have not been able to do is meritorious, hopeful, but I don't think you are going to be able to do it. As good as you are, as much experience as you have—and I am familiar with the previous folks that held your office—the problem is the law itself.

While you do have authority, I am not sure you have the ability to actually, under the law, force the other American shippers to meet the requirements of the law. A lot of discussion about TRANSCOM here. I am going to write a letter to TRANSCOM, who is responsible to my subcommittee, the Readiness Subcommittee, and ask her for specific information about just how well she is doing in carrying out the law.

Bottom line here is, we need to change the law, and I would like to have your specific thoughts about several of the specific things that we really must do, if we are going to maintain our maritime industry.

So, here we go. You have the authority, responsibility, to write regulations. Why have your predecessors been unable to do that? Can they force the negotiations? Do you have the power to actually force negotiations? That is, say, it is my way or the highway?

Admiral PHILLIPS. So, Mr. Chairman, thank you for that question, and thank you for your interest in cargo preference and enforcing the law.

As I have said before, we have the power of the law behind us, and the law has been in place for a number of years. Certainly the complexities in the law and pivotal language, which is not clearly defined, as we have deferred to earlier in this hearing, the kinds of ships that we use today that weren't in existence when the 1954 law was put in place, all add to the challenge.

In addition to that, agencies interpret the law differently. They argue with us, and they argue amongst themselves.

But setting all that aside, we have an opportunity here, I think, particularly in the context of the understanding and incredible need for our supply chain—

Mr. GARAMENDI [interrupting]. Excuse me. I understand all that, the committee has heard that already, so, I am going to interrupt you and ask you, if you had the power, in the new law, to be the arbitrator of the cargo preference, that the agencies—USDA, DoD, USAID—had to get your authority to ship on other-than-American ships, could you carry that out? In other words, you had the power.

Admiral PHILLIPS. So, Mr. Chairman, are you asking me if I have the power now to determine a nonavailability?

Mr. GARAMENDI. No. We must write a new law. This simply has not worked. We are well into two decades of failure. And so, if you, MARAD, had the authority, period, and DoD had to get your permission to ship on other-than-American ships, USAID and Department of Agriculture, could you carry that out?

Admiral PHILLIPS. So, hypothetically speaking, sir, in the context of what Congress may or may not decide to do, we believe that we have—in the context of civilian authority now, the ability to make a determination as to whether or not ships are available, which in that case would allow agencies to ship U.S. flag if they are available or not if they are not. Anything that strengthens that authority certainly is helpful.

However, I defer to Congress in actions they might choose to take in that context, sir.

Mr. GARAMENDI. Of course.

Should we increase the cargo preference back to 75 percent? Would that expand the merchant marine?

Admiral PHILLIPS. Again, I defer to Congress on their decisions in this context, sir. However, back to my original statement, more cargoes will tend to drive more ships which will also drive the need for more mariners.

Mr. GARAMENDI. Very good. My time has expired. I will simply share with the committee here that I intend to introduce legislation, look forward to working with the committee and with you and the other American shippers to make it clear that the cargo preference laws are the laws and that the ambiguity, confusion, and total disregard for the law by many is terminated. We are going to work on that.

I do not believe we have a second round of questions.

Ah, Mr. Maloney. Sean Patrick, you are out there somewhere.

[Pause.]

Did you just quit on us again, Mr. Maloney?

[Pause.]

Hello, Mr. Maloney. If you would like to participate, this is your moment, and it is rapidly disappearing.

[Pause.]

Last call. Mr. Maloney?

[No response.]

I believe we have completed the review.

Admiral Phillips, I look forward to working with you. Thank you for being here today, and congratulations on your appointment. You may be able to overcome the current inability of the past Ad-

ministrators, but I think if you had the power clearly defined, I would have confidence you could carry it out.

Mr. Von Ah, thank you very much for your continued investigations and the clarity of reports. Thank you. We appreciate your attendance here.

We now move on to the second panel.

The committee will come back to order.

Our second panel is now in place. The chairman may be able to return, in which case I will move on.

So, I would like to welcome the next panel of witnesses.

Mr. Bryan Clark, senior fellow and director of the Center for Defense Concepts and Technology at the Hudson Institute. Thank you very much for joining us, Mr. Clark.

Mr. Eric Ebeling, president and chief executive officer of American Roll-on Roll-off Carrier Group, on behalf of USA Maritime.

And, Captain Don Marcus, president of the International Organization of Masters, Mates & Pilots.

Gentlemen, thank you very much for being here today. I look forward to your testimony.

Without objection, the witnesses' full statements will be included in the record.

Captain Marcus, would you like to lead us? After all, you are the captain of mates and masters.

TESTIMONY OF CAPTAIN DONALD J. MARCUS, PRESIDENT, INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, AFL-CIO; ERIC P. EBELING, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN ROLL-ON ROLL-OFF CARRIER GROUP, ON BEHALF OF USA MARITIME; AND BRYAN CLARK, SENIOR FELLOW AND DIRECTOR OF THE CENTER FOR DEFENSE CONCEPTS AND TECHNOLOGY, HUDSON INSTITUTE

Mr. MARCUS. Thank you very much. Mr. Chairman and members of the subcommittee, good morning. I am Don Marcus, president of the International Organization of Masters, Mates & Pilots, AFL-CIO. Thank you for the opportunity to be here today to represent America's seagoing labor and Transportation Trades Department and Maritime Trades Department of the AFL-CIO.

Collectively, our unions represent the vast majority of American professional mariners employed aboard U.S.-flag vessels to carry cargo preference cargoes in foreign trade, civilian, and defense cargoes. The strict enforcement and enhancement of the U.S.-flag cargo preference shipping requirements are essential to provide the base of cargo necessary to sustain U.S.-flag vessels in foreign commerce. Without cargo, there are no merchant ships. Without U.S.-flag ships, our military and economic independence cannot be guaranteed.

Men and women operate these vessels. They do so at all times and in all conditions, in peace and war. During the present pandemic and through all the daily hazards and personal hardships inherent in their occupation, they support their families through employment in good family-wage jobs, union jobs. An attack on cargo preference, however, is more than simply another attack on middle-class livelihoods.

The consistent support of U.S.-flag shipping from you, Mr. Chairman, and many of your colleagues is especially important today. The war in Europe could escalate into direct military involvement at any time by the United States. It is with unwelcome irony that a few months ago in this building, World War II merchant marine veterans finally received a Congressional Gold Medal in recognition of their wartime service. And yet, at the same time, there are those in and out of Government who are trying to weaken, if not destroy, cargo preference with no regard for its impact on our fourth arm of defense, or our maritime workforce.

What the opponents of cargo preference refuse to comprehend is that the mariners who operate U.S.-flag vessels that carry cargo preference cargoes are the same mariners who operate surge and sustainment vessels that are necessary for our military.

With the European conflict raging and an aggressive China supporting a national-flag merchant fleet of over 4,000 oceangoing vessels, now is not the time to withdraw Government cargo and undermine the commercial viability of the 80 to 85 U.S.-flag vessels that are currently operating in foreign trade.

To this end, Congress must reject the concurrent resolutions introduced in the House and Senate that attempt to leverage the war in Ukraine to justify a waiver of cargo preference. If these resolutions are enacted, our fleet will be diminished, and our sealift readiness grievously compromised.

Secondly, Congress should reverse the arbitrary reduction in cargo preference for food aid that was enacted in 2012. Beginning in 1985 and through 2012, at least 75 percent of the gross tonnage of international food aid cargoes was to be carried aboard U.S.-flag vessels when available at fair and reasonable rates.

In addition, the law stipulated that the Department of Transportation would reimburse the food aid programs for any cost premium associated with the use of U.S.-flag vessels for more than 50 percent of the food aid cargoes. This 75 percent minimum and the reimbursement mechanism should be reinstated.

Finally, we ask that Congress provide the Maritime Administration with whatever additional authority it needs to fully administer and enforce the cargo preference statutes as set forth in section 3511 of the Duncan Hunter National Defense Authorization Act of 2009, P.L. 110-417. The full exercise of this authority by the Maritime Administration will help to minimize, if not eliminate, inter-agency disputes over the applicability and implementation of cargo preference.

American merchant mariners have served with distinction and courage in every international conflict since our country declared independence. It has never hesitated to sail in war zones anywhere that U.S. troops are deployed. Too often, merchant mariners have sacrificed their lives in this process.

Today's American seafarers should not be sold down the river while their predecessors are given Congressional Gold Medals some 75 years after the fact. Full compliance with cargo preference laws is an investment in the U.S. Government that it must make to strengthen our commercial sealift readiness, to support our national security, and protect our national economy.

Thank you again for the opportunity to express the views of America's seafaring and transportation labor organizations. We stand ready to provide additional information and work with you and your colleagues to strengthen and grow the U.S.-flag merchant marine.

[Mr. Marcus' prepared statement follows:]

Prepared Statement of Captain Donald J. Marcus, President, International Organization of Masters, Mates & Pilots, AFL-CIO

Mr. Chairman and Members of the Subcommittee:

Good morning. I am Captain Donald Marcus, President of the International Organization of Masters, Mates & Pilots, AFL-CIO. I am pleased to appear today and to submit this statement on behalf of the International Organization of Masters, Mates & Pilots as well as the following seafaring and transportation labor organizations: American Maritime Officers, American Radio Association, Marine Engineers' Beneficial Association, Marine Firemen's Union, Maritime Trades Department, AFL-CIO, Seafarers International Union, Sailors' Union of the Pacific, and Transportation Trades Department, AFL-CIO. The full enforcement and enhancement of America's U.S.-flag cargo preference shipping requirements are critically important to our organizations and to the jobs of the thousands of American mariners we represent. Our labor organizations are united in our vigorous support of the U.S.-flag cargo preference shipping requirements, and we thank this Subcommittee for holding this hearing and giving us the opportunity to express our views.

Together, our maritime labor unions represent the vast majority of United States Coast Guard (USCG) licensed and unlicensed American maritime personnel who work aboard commercial vessels of all types and who are among the most highly trained and qualified mariners in the worldwide maritime industry. Our unions and the licensed and unlicensed American merchant mariners we represent have never turned away from the challenges that must be faced to preserve the democratic way of life at home and overseas. As they did at the founding of our nation, during World War II and in every conflict before and since, the men and women of the United States-flag merchant marine stand ready to sail into harm's way whenever and wherever needed by our country to enhance America's military and economic interests and to support and supply our armed forces deployed overseas.

Without the U.S.-flag vessels and U.S. citizen licensed and unlicensed merchant mariners ready and available to provide the commercial sealift readiness capability needed by the Department of Defense, our nation would be forced to entrust the support, supply, and security of our forces overseas to foreign flag vessels and foreign crews who may not support U.S. defense operations and objectives. To do so would be to jeopardize the lives of American servicewomen and men who will no longer be guaranteed the supplies and equipment they need to do their job in support of our country.

As stated by United States Transportation Command (USTRANSCOM) Commander General Stephen Lyons in November 2020, "With 85 percent of our forces based in the continental United States, nearly 90 percent of our military equipment is expected to deploy via sealift in a major conflict. In order to deploy those forces, we require safe, reliable and ready U.S.-flagged vessels [and], mariners to crew those ships . . ."

We thank you, Mr. Chairman, the members of this Subcommittee and Committee, and numerous other members of the House of Representatives for your strong support for the U.S.-flag maritime industry and for your efforts to preserve and create jobs for America's maritime workforce. We especially appreciate the action taken by this Committee to enact legislation requiring the Comptroller General to perform an independent audit regarding the enforcement of existing cargo preference shipping requirements by all Federal agencies and departments. We are hopeful that this audit will provide a clearer understanding of the degree to which Federal agencies may be, for whatever reason, acting contrary to the law and bypassing U.S.-flag, U.S.-crewed vessels in favor of foreign flag, foreign crewed vessels to move U.S. government cargoes. To fully achieve the goals and objectives of the U.S.-flag cargo preference shipping requirements, it is essential that the maximum amount of government generated cargoes move on U.S.-flag vessels consistent with the requirements of law.

We also appreciate President Biden's recognition of the importance of the maritime industry, and his Administration's commitment to a greater adherence to

America's domestic Made-in-America and Buy American laws and policies as reflected in his Executive Order 14005 issued January 25, 2021. We are especially pleased that this Executive Order includes within its scope the domestic preference laws for maritime transport. This Administration has made clear that Ship American is a key component of our Nation's Buy American and Hire American policies and should be treated as such. As the President has stated, "I understand that merchant ships do not sail, and U.S. merchant mariners do not work, unless they have cargo to carry. I strongly support America's cargo preference laws."

Significantly, Executive Order 14005 strengthened the oversight and enforcement over the implementation of our cargo preference requirements and created a Made-In-America Office (MIAO) to help ensure his Administration's policies were being followed.

More specifically, the guidance issued by the White House to supplement the President's Executive Order states that the Made In America Office "will work with relevant agencies to review how best to ensure agency compliance with cargo preference requirements in order to maximize the utilization of U.S.-flag vessels, in excess of any applicable statutory minimum, to the greatest extent practicable." The guidance also notes that "cargo preference is necessary for the U.S. to encourage and aid the development and maintenance of an American merchant fleet (and mariner base) ... to serve as a naval and military auxiliary in time of war or national emergency." We applaud President Biden for acting to ensure that Ship American requirements are implemented and enforced throughout his Administration.

It is interesting to note that this action by President Biden is the most significant step taken to ensure full compliance with the spirit and letter of our nation's cargo preference shipping requirements since the April 1962 Presidential Directive issued by President John F. Kennedy. That Directive, a response to the "worldwide economic and defense burdens facing the United States," directed all executive branch agencies to comply fully "with the purpose of our various cargo preference laws."

President Kennedy's Directive, like President Biden's Executive Order, reflects the fact that the cargo preference statutes were not being "implemented in a manner to achieve fully their purpose," which is that "U.S. government generated cargoes move in privately-owned U.S.-flag commercial vessels whenever such vessels are available at fair and reasonable rates." In response, President Kennedy's Directive makes clear, as does President Biden's Executive Order, that the 50 percent requirement for U.S.-flag vessels in the law "is a minimum, and it shall be the objective of each agency to ship a maximum amount of such cargoes on U.S.-flag vessels."

As this Subcommittee knows, existing U.S.-flag cargo preference shipping requirements mandate that a percentage of U.S. taxpayer financed government exports and imports be transported on privately-owned U.S.-flag commercial vessels, to the degree such vessels are available at fair and reasonable rates. The Cargo Preference Act of 1954 as amended requires that no less than 50 percent of government financed civilian cargoes shall move on privately-owned U.S.-flag commercial vessels. The Cargo Preference Act of 1904 (10 USC 2631) requires that all defense cargo be transported on U.S.-flag ships to the extent such vessels are available at fair and reasonable rates as does Public Resolution 17 which requires 100 percent of certain Export-Import Bank financed cargoes be carried on U.S.-flag ships also if available at fair and reasonable rates.

Reductions in cargo preference requirements and the failure by U.S. government agencies to fully enforce these cargo preference laws result in less cargo for U.S.-flag ships which means fewer U.S.-flag ships in operation and fewer U.S. mariners. In fact, since U.S.-flag cargo preference shipping requirements for food aid cargoes were arbitrarily slashed from 75% to 50% in 2012, the U.S.-flag fleet has plummeted by 26% according to the Maritime Administration—more than triple the impact initially forecast—contributing to the current maritime manpower shortage which has been exacerbated by the direct and indirect impacts of the COVID 19 pandemic on our industry.

The cargo preference statutes and policies, taken in conjunction with the Maritime Security Program and the soon-to-be-implemented Tanker Security Program, provide U.S.-flag vessels with a critical base of cargo, and thereby give U.S.-flag vessels the opportunity to stay active while they compete against lower-cost and oftentimes tax-free foreign flag vessels for the carriage of commercial cargoes in the U.S. foreign trades. This in turn helps to ensure that the U.S.-flag vessels and their American crews remain available to the Department of Defense in time of war or other international emergency.

It is important to understand that every U.S.-flag oceangoing vessel regardless of type and regardless of whether it is enrolled in the Maritime Security Program, has important military utility by providing the employment base necessary to maintain the cadre of American merchant mariners needed by the Department of Defense.

Consequently, the full implementation of all cargo preference requirements applicable to the carriage of all types of U.S. government cargoes helps guarantee that American maritime jobs will not be outsourced to the benefit of foreign maritime workers and that the dangerous decline in the number of available American merchant mariners will not worsen.

To reiterate: Without the capability provided by the U.S.-flag international fleet and its civilian American mariner workforce, the Department of Defense would be forced to either dedicate its resources to replicate, at significant cost to the American taxpayer, the commercial sealift readiness capability provided by our industry or to entrust the security of our Nation and the safety and supply of American troops to foreign flag of convenience vessels crewed by foreign nationals who cannot be counted on to support U.S. defense operations. To do so would be to jeopardize the lives of American servicewomen and men who will no longer be guaranteed the supplies and equipment they need to do their job in support of our country.

We can begin to address this shortfall in the American maritime manpower pool by rejecting misguided and unwarranted attempts to weaken or repeal existing U.S.-flag cargo preference shipping requirements and by ensuring that greater amounts of government-generated cargoes move on U.S.-flag ships, thereby increasing the size of the U.S.-flag fleet and the number of American merchant mariners to crew the vessels needed to meet Department of Defense requirements. As stated in 2015 by General Paul Selva, former Vice Chairman of the Joint Chiefs of Staff: “A strong mariner base is critical to not only crewing the merchant fleet in peacetime, but our DOD surge capacity in wartime ... the mariner base is at the point where future reductions in U.S.-flag capacity puts our ability to fully activate, deploy, and sustain forces at increased risk.”

Therefore, we call on Congress to forcefully reject the Concurrent Resolutions introduced in the House of Representatives and Senate that attempt to leverage the war in Ukraine to justify a waiver of cargo preference. These resolutions not only ignore the impact such a waiver would have on America’s commercial sealift readiness capability, but totally disregard the impact it would have on the jobs of American merchant mariners. The reality is that if these Resolutions were enacted, the Federal government will relinquish all control over the carriage of U.S.-taxpayer financed food aid cargoes to foreign flag foreign crewed ships.

Most importantly, contrary to what the sponsors of these Resolutions would have us believe, existing U.S.-flag cargo preference shipping requirements are not impeding our government’s efforts to export food aid. If and when the United States Agency for International Development (USAID) begins to utilize the funding made available by Congress to respond to the worldwide food aid crisis and either the volume of food aid cargo exceeds available U.S.-flag tonnage or U.S.-flag vessels are not available at fair and reasonable rates, existing law already allows for the waiver of the cargo preference Ship American requirements. In short, the resolutions are completely unnecessary.

Secondly, despite the efforts of the late Congressman Elijah Cummings and numerous members of this Committee, Congress has failed to undo the damage caused our industry through the arbitrary reduction in cargo preference shipping requirements for food aid cargoes enacted in 2012. Beginning in 1985, no less than 75 percent of the gross tonnage of international food aid cargoes was reserved for U.S.-flag vessels to the degree such vessels are available at fair and reasonable rates. In addition, the law at that time further stipulated that the Department of Transportation would reimburse the food aid programs for any cost premium associated with the use of U.S.-flag vessels for more than 50 percent of the food aid cargoes. In this way, we would be maximizing the use of U.S.-flag vessels while minimizing the impact on the budget for the food aid programs.

It is time to rectify this situation and restore, at a minimum, the requirement in place from 1985–2012 that at least 75 percent of the gross tonnage of international food aid cargoes be carried on U.S.-flag vessels in conjunction with the reinstatement of the reimbursement mechanism. As stated in 2018 by General Darren McDew, then-Commander, United States Transportation Command: “a higher cargo preference requirement may incentivize increased government use of existing U.S.-flag vessels and stem the current decline of the fleet.”

Thirdly, we ask that Congress provide the Maritime Administration with whatever additional authority may be necessary to enable the Maritime Administration to fully administer and enforce the cargo preference statutes. Section 3511 of the Duncan Hunter National Defense Authorization Act of 2009 (P.L. 110–417) clarifies that the Department of Transportation through the Maritime Administration is the lead Federal agency responsible for the administration, interpretation, and enforcement of the cargo preference requirements. The primary purpose of this provision is to minimize if not eliminate interagency disputes over the applicability of cargo

preference by clarifying the authority of the Department of Transportation/Maritime Administration to be the final arbiter.

The need for such authority within the Maritime Administration is best illustrated by the unilateral refusal by USAID to use U.S.-flag vessels to carry food aid to Yemen. Since P.L. 480 cargoes are the single largest source of civilian agency cargoes, and the Yemen program now accounts for 40% of the P.L. 480 budget, this is a serious and pressing matter for our industry.

Compounding the arbitrariness on the part of USAID is the lack of transparency in its application of waivers that exclude U.S.-flag carriers from participating in the Yemen program. The agency initially stated that it had excluded American carriers from the program because it believed American carriers are unreliable and then claimed that the carriage of cargoes to Yemen is too dangerous for American vessels and American crews—despite the fact that U.S.-flag vessels and their American crews are the only vessels that can be consistently relied upon by our government and that American mariners have never refused to sail into dangerous waters in support of a United States policy or objective.

Most recently, and most disturbingly, USAID stated that it would no longer discuss with our industry potential avenues to restore U.S.-flag participation in the program and indicated that American carriers would be excluded from participation based on cost relative to foreign carriers, contrary to the fair and reasonable rate requirements in the law.

In conclusion Mr. Chairman, we would again emphasize that the dangerous decline in the American maritime manpower pool must be reversed as we re-examine our critical national security supply chain. Congress and the Administration must focus on ways to stop the further loss of U.S.-flag vessels and the resultant outsourcing of American maritime jobs, and actively work to increase the number of vessels operating under the U.S.-flag to create and support more maritime job opportunities for Americans. It is imperative to ensure that our country has the U.S.-flag commercial sealift capability and trained American mariners needed to support the Department of Defense throughout its supply chain.

The full implementation of the cargo preference requirements to transport U.S. government cargoes helps guarantee that American maritime jobs will not be outsourced and lost to foreign maritime workers. Congress and the Administration should expand the application of cargo preference for non-defense U.S. government impelled cargoes. Additionally, the Department of Defense should regularly and actively ensure compliance with current U.S. cargo preference laws by Department of Defense entities, including contracting officers, as well Department of Defense contractors and subcontractors.

A strong, viable, privately-owned United States-flag maritime industry serves as a critical line of defense against the total domination of the world's oceans and the carriage of international trade by those nations that do not adhere to our commitment to fair trade and open seas. From the founding of our Nation to today, American merchant mariners have served with distinction and courage, never hesitating to sail into war zones to supply and support American troops deployed anywhere in the world, and too often sacrificing their own lives for our protection. We submit that full compliance with cargo preference laws is an investment the U.S. Government must make to maintain and increase the commercial sealift readiness capability necessary to support our national security and to protect our national economy.

Thank you again for the opportunity to express the views of America's seafaring and transportation labor organizations on the importance of our nation's U.S.-flag cargo preference shipping requirements. We stand ready to provide whatever additional information you may require and to work with you and your colleagues to strengthen and grow our U.S.-flag merchant marine.

Mr. GARAMENDI. Thank you, Captain Marcus. We stand ready to stand with you.

Mr. Ebeling, if you will present your testimony.

Mr. EBELING. Thank you for the opportunity to appear before you today. My name is Eric Ebeling, and I am testifying today on behalf of USA Maritime, which is committed to ensuring the U.S. merchant marine will always be available to support our warfighters, enhance our economy through trade, and provide great jobs to thousands of Americans across the country.

As president and CEO of American Roll-on Roll-off Carrier, it is my honor to lead the largest U.S.-flag Ro-Ro operator, a longtime participant in the Maritime Security Program, committed to investing in the U.S.-flag fleet and U.S. merchant marine.

While we have only had a short time to digest the GAO's report, "Actions Needed To Enhance Cargo Preference Oversight," the recommendations made by GAO that MARAD should publicly report on cargo preference data and that MARAD should take steps to develop regulations to oversee and enforce compliance with cargo preference requirements are excellent.

The U.S.-flagged commercial fleet in international trade is vitally important to U.S. economic and national security, but that U.S.-flag fleet is at a crossroads with declining cargoes, resulting in a shrinking fleet and a shortage of qualified mariners.

According to data received by MARAD and provided to GAO, U.S.-flag volumes decreased 36 percent from 2012 to 2020. This impacts national defense readiness but also impacts the Nation's ability to pursue generous overseas economic and agricultural assistance programs.

As detailed in my written statement, cargo preference is the key incentive for U.S.-flag operators in international trade to remain under U.S. registry and provide the vital cargo base to help offset the cost advantages of operating a foreign-flag ship, such as regulatory tax and crewing costs.

The most enduring and effective legislation supporting the U.S.-flag fleet has often come in the wake of the Nation's wars. The lack of any significant new maritime legislation after Afghanistan and Iraq is telling. Not coincidentally, the U.S.-flag fleet has fallen from a recent high of 107 ships in international trade in 2011 to a recent low of 77 ships in 2016 due to major decreases in preference cargoes before restabilizing primarily due to the reauthorization and stabilization of MSP.

According to the GAO report, DoD compliance varied from 82 percent in 2012, declined to 62 percent in 2015, before increasing again to 85 percent in 2020. The GAO report also stated Government-owned reserve cargo vessels are held in reduced operating status with minimal crew in peacetime. When put in full operating status, the Government can add additional trained and qualified mariners to operate them. That is only so because of the continued existence of a commercial fleet that provides the mariners, that crew, those reserve ships.

As the commander of USTRANSCOM, General Jacqueline Van Ovost noted in a December 2021 speech, quote, "as a seafaring Nation, our country has been, and is, and will continue to be reliant on the strength of the maritime industry and the many mariners," also pointing to the importance of the U.S.-flag fleet and merchant marine as, quote, "America's economic lifeline during peacetime."

Civilian agency cargoes include such diverse cargoes as USDA and USAID support and food aid, Federal Transit Administration projects, Department of State cargoes, Department of Energy projects, and many other nonmilitary cargoes shipped or sponsored by the various departments and agencies of the U.S. Government.

According to the GAO report, USAID compliance was 79 percent in 2012 but fell to 41 percent by 2019, while USDA compliance fell

from 86 percent in 2012 to 47 percent in 2020. One might reasonably ask why such gamesmanship and noncompliance is allowed to persist. The reason has to do with the combination of lax enforcement mechanisms and unclear and nonexistent consequences for violators, be they commercial entities or Government agencies.

As has been touched on, the shortcoming was intended to be addressed by the fiscal year 2009 NDAA, and if there were any doubt of the intent of that language, it was clarified by one of the sponsors of that language, Senator Daniel K. Inouye, in a 2009 letter to President Barack Obama. In relevant excerpts, quote:

“One of the most important elements in sustaining our U.S.-flag fleet is its continued ability to carry certain Government-impelled cargo. . . . [T]his provision is intended to provide much needed clarity that the Department of Transportation is the lead Federal agency for the administration, interpretation, and execution of our cargo preference requirements and guidelines. . . . It . . . does not change the application of existing law but will resolve many of the jurisdictional overlaps that exist with current shipper agencies, and ultimately help fashion a more coherent policy regarding the application of cargo preference laws,” close quote.

Whether by legislation or Executive order, 100 percent of all Government owned or financed cargoes should be required to move on U.S.-flag ships. This will help eliminate any gamesmanship. Without cargo, carriers will not invest in ships, and without those ships, there will not be jobs for our merchant mariners who also crew those Government reserve ships in time of need.

Congress should ensure that the DOT and MARAD are directed and fully resourced to fully enforce the cargo preference laws, and Congress and the administration should consider policies that encourage shippers of all kinds to prioritize U.S.-flag shipping as part of their global supply chains, to include Government contracting policies and an incentive, such as a tax credit, for shippers to utilize U.S.-flag carriers.

GAO was spot-on in its two conclusions on cargo preference. USA Maritime stands ready to work with the Congress and the agency on achieving these objectives.

Thank you.

[Mr. Ebeling’s prepared statement follows:]

Prepared Statement of Eric P. Ebeling, President and Chief Executive Officer, American Roll-On Roll-Off Carrier Group, on behalf of USA Maritime

INTRODUCTION

Chairman Carbajal, Ranking Member Gibbs, and members of the Committee—Thank you for the opportunity to appear before you today to discuss the state of the U.S.-flag international fleet and in particular the Cargo Preference laws of the United States. My name is Eric Ebeling and I am testifying today on behalf of USA Maritime, a coalition consisting of American-flag vessel owners and operators, trade associations, and maritime labor. USA Maritime is committed to ensuring the U.S. merchant marine will always be available to support our warfighters, enhance our economy through trade, and provide great jobs to thousands of Americans across the country.

As President and CEO of American Roll-On Roll-Off Carrier (ARC), it is my honor to lead an incredibly talented team of men and women at the largest U.S.-flag Ro-Ro operator. ARC has long been a participant in the Voluntary Intermodal Sealift Agreement (VISA) and Maritime Security Program (MSP) and we are committed to

investing in the U.S.-flag fleet and U.S. merchant marine to support our armed forces around the world. We have re-flagged seven large Ro-Ro vessels into U.S. registry since 2016, including most recently M/V ARC COMMITMENT in December 2021 and M/V ARC DEFENDER in January 2022.

The U.S.-flag fleet operating in international trade primarily consists of the militarily useful and commercially viable MSP fleet of 60 ships and attendant global networks, as well as a handful of vessels operating in international trade outside the MSP fleet. Without the ships, networks and mariners provided by the MSP fleet, it would cost the government tens of billions of dollars to attempt to try to replicate the capabilities provided. The U.S.-flag fleet in international trade is at a crossroads, with declining cargoes resulting in a shrinking fleet and a shortage of qualified mariners. These factors in turn impact national defense readiness in terms of sealift and logistics support available to support the needs of the Department of Defense (DoD), but also impact the nation's ability to pursue generous overseas economic and agricultural assistance programs.

OVERVIEW OF CARGO PREFERENCE LAWS

Cargo preference is the reservation by law for transportation on U.S.-flag vessels of all, or a portion of all, ocean-borne cargo which moves in international trade either as a direct result of the Federal Government's involvement, or indirectly because of the financial sponsorship of a federal program or guarantee provided by the Federal Government. It is relevant and appropriate at the outset to emphasize that these are *laws*, not policy recommendations or suggestions. A further note for clarity: USA Maritime is anxious to see the recommendations from the forthcoming Government Accountability Office (GAO) study on the cargo preference laws that is in part the impetus for this hearing. While the study was not made available to USA Maritime in advance, and we are not able to address its specific findings or recommendations in this written testimony, we are hopeful and expectant that the GAO study will demonstrate similar robust support for, and clear enforcement of, the cargo preference laws. The following overview and recommendations are therefore independent of the GAO study.

The U.S. cargo preference laws are part of the overall statutory program to support the privately-owned and operated U.S.-flag fleet and merchant marine. Cargo preference requires that U.S. Government-financed cargoes be shipped on U.S.-flag vessels, provided that such vessels are available at fair and reasonable rates. Preference cargoes are the key incentive for U.S.-flag operators in international trade to remain under U.S. registry and provide a vital cargo base to help offset regulatory, tax, crewing cost, and other cost advantages of operating a foreign-flag ship. The primary U.S. cargo preference laws are set forth in the Military Transportation Act of 1904 [Public Law 58–198, approved 28 April 1904 (33 Stat. 5187), as amended (10 U.S.C. 2631)], often also referenced as the Cargo Preference Act of 1904; Public Resolution 17 [73rd Congress, approved 26 March 1934 (48 Stat. 500), as amended (46 App. U.S.C. 1241–1)]; and the Cargo Preference Act of 1954 [Public Law 83–664, approved 26 August 1954, (68 Stat. 832) as amended (46 U.S.C. 55305)].

The 1904 Act requires that 100% of all military cargoes purchased for or owned by U.S. military departments be shipped exclusively on vessels of the United States or belonging to the United States. The structure of the 1904 Act applies to all supplies for which the military has contracted, including supplies to which it does not have title at the time of shipment. Congress' overriding purpose is to protect and promote a sufficient merchant marine capable of providing sealift in time of war or national emergency. In general, well over 90% of all overseas military equipment is shipped by sea because of the cost efficiency of moving it by sea versus air as well as the scale and scope of such cargoes.

Public Resolution 17 (1934) requires that all cargoes generated by the U.S. Export-Import (Ex-Im) Bank be shipped on U.S.-flag vessels unless a waiver is granted by the Maritime Administration, and the Cargo Preference Act of 1954 requires that at least 50% of civilian agency cargoes be transported on U.S.-flag vessels to the extent those vessels are available at fair and reasonable rates. Every Department or Agency is required to administer its programs in compliance with the 1954 Act's 50% requirement and is further subject to regulations issued by the Secretary of Transportation. This 50% shipment requirement may only be waived under the specific terms of the statute by the "President, the Secretary of Defense, or Congress (by concurrent resolution or otherwise) . . . temporarily . . . by declaring the existence of an emergency justifying the waiver". To USA Maritime's knowledge, no such waiver has ever been issued with respect to the 1954 Act.

U.S. cargo preference laws are crucial to the continued existence of the active, commercially viable, privately-owned U.S.-flag commercial shipping fleet—the most

cost-effective sealift capability available to the U.S. Government. Proper enforcement by the Maritime Administration and vigilant adherence by the Department of Defense, Export-Import Bank, and all civilian departments and agencies is critically important not only to the American international fleet, but also to the survival of the U.S. merchant marine, who provide the loyal, well-trained crews for such vessels. Although less than 2% of the nation's waterborne trade moves on U.S.-flag ships, the cargo preference laws ensure that the oceans are not completely dominated by foreign-flag ships whose interests may not align with those of the United States.

The existence of a U.S.-flag fleet ensures that the United States can implement any national security policy necessary without having to rely on the fleets of foreign nations. The U.S.-flag fleet is vital to U.S. national security, providing essential sealift in peacetime and wartime, and the ships that carry these cargoes provide important jobs for American seafarers who are available in time of national emergency to crew the sizeable fleet of reserve government vessels. By guaranteeing the availability of certain cargoes to U.S.-flag ships, the U.S. cargo preference laws help ensure that the vessels and attendant intermodal systems, terminals, commercial IT systems, trained crews, and vessel service industries continue to exist.

MILITARY CARGOES

U.S.-flag commercial shipping is critical for the global movement of U.S. forces and sustainment, and it generally holds that when the U.S. Military is most active, the cargo base is larger and therefore the U.S.-flag fleet sizes up accordingly. The most enduring and effective legislation supporting the U.S.-flag fleet has often come in the wake of the nation's wars. This includes the 1904 Military Transportation Act in the wake of the Spanish-American War; the 1920 Merchant Marine Act after World War I; the 1954 Cargo Preference Act following World War II and the Korean War; and the 1996 Maritime Security Act post-Gulf War. The lack of any significant new maritime legislation after Afghanistan and Iraq is telling. Not coincidentally, the U.S.-flag fleet fell from a recent high of 107 ships in international trade in 2010–2011 to a recent low of 77 ships in 2016 due to major decreases in defense, agricultural and other preference cargoes, a failure of the MSP stipend to keep pace adequately with rising costs generally, and a widening discrepancy between U.S.-flag operating and foreign-flag costs.

The MSP fleet has stabilized over the past several years due to an increase in the MSP stipend that took effect in FY17. In December 2019, Congress wisely reauthorized MSP through 2035, which provides much needed longer-term stability as carriers invest in new assets and their networks for the long term. Having only just stabilized over the past several years, the U.S.-flag fleet has faced imploding government cargo markets during the pandemic, impacting carriers' ability to maintain service, and in turn negatively impacting U.S.-flag fleet and mariner readiness and by extension DoD readiness. As the Commander of U.S. Transportation Command (TRANSCOM) General Jacqueline Van Ovost noted in a December 2021 speech, "(a)s a seafaring nation, our country has been, and is, and will continue to be reliant on the strength of the maritime industry and the many mariners" also pointing to the importance of the U.S.-flag fleet and merchant marine as "America's economic lifeline during peacetime."

Since all U.S. military cargo is required to move on U.S.-flag vessels, policymakers should consider other segments and policies for potential sources of reinvigoration for the U.S.-flag commercial fleet in international trade. One area adjacent to defense cargoes is foreign military sales, which can include shipments involving direct DoD credit sales, sales without such credit guarantees, offset purchases, purchases under co-production agreements, and excess defense articles. Such cargoes may not always entail a U.S.-flag shipping requirement, but could be considered for coverage, and would provide a further base of cargo to ensure the success of the U.S.-flag fleet and merchant marine. In addition, government contracting policies and procedures could prioritize U.S.-flag carriers that invest in owning and operating essential assets and networks in other government contracts involving transportation, logistics and supply chains.

EXPORT-IMPORT BANK CARGOES

Ex-Im Bank, the national export credit agency (ECA) of the United States, seeks to create and maintain U.S. jobs by financing the sales of U.S. exports, primarily to emerging markets throughout the world, providing loan guarantees, export-credit insurance and direct loans. P.R. 17 of the 73rd Congress requires that all cargoes generated by the U.S. Export-Import Bank be shipped on U.S.-flag vessels unless a waiver is granted by the Maritime Administration. These cargoes not only help

support and sustain thousands of well-paying jobs for the U.S.-flag merchant marine, but shipping on U.S.-flag vessels also counts towards the Ex-Im Bank's U.S. content requirement.

As defined by Ex-Im Bank, the following transactions are covered by P.R. 17: direct loans, regardless of term or amount; and guarantees in excess of \$20,000,000 (excluding the Ex-Im Bank Exposure Fee) or a repayment period of greater than seven (7) years. In theory, 100% of all covered cargoes generated by Ex-Im Bank are required to move on U.S.-flag bottoms, although waivers are commonplace for the movement of goods on recipient nation's flagged fleets, where applicable.

Ex-Im generated cargoes were major sources of cargo for the U.S.-flag international fleet in the 1990s during the post-Cold War rebuilding efforts in the former Soviet Union, and again for several years following the National Export Initiative of 2010. Soon thereafter, however, after nearly 75 years of relative stability, the Bank lost its charter for several years, and was unable to approve projects above *de minimis* values due to the lack of a Board quorum. The Bank has restabilized in the past several years, although without generating much in the way of meaningful export volumes for U.S.-flag carriers.

Nevertheless, the U.S. shipping community is supportive of the Bank for global economic competitive purposes. There are at least 25 countries that require support from an export credit agency before they will even consider a bid from an international company for a given project, and there are over 80 ECAs offering such financing. Such ECAs collectively exceed the size of the entire World Bank Group and fund more private sector projects in the developing world than any other class of financial institution. The U.S. Export-Import Bank levels the playing field for American companies competing for such international projects. Absent such an ECA, the United States would have effectively unilaterally disarmed from participating in these trades and markets. The U.S.-flag shipping and merchant mariner jobs should be considered just as critical as the industry and manufacturing jobs that are supported by Ex-Im financing.

CIVILIAN AGENCY CARGOES

Civilian agency is a catch-all term that include such diverse cargoes as USDA and USAID agricultural support and food aid, Federal Transit Administration projects, Department of State personal property and official fleet vehicles, Department of Energy projects, and many other non-military cargoes shipped or sponsored by the various departments and agencies of the U.S. Government. While often not as voluminous as military cargoes, civilian agency cargoes often move on different cycles and to a broader range of geographies than military cargoes, and thus help keep ships and mariners fully employed. These cargoes also move on all U.S.-flag vessel types, including container, roll-on/roll-off, heavy lift, and bulker vessels. A minimum of 50% of such cargoes are required to move on U.S.-flag bottoms, and while some agencies aim for more, others are less scrupulous.

For nearly 30 years following the passage of the 1985 Food Security Act, 75% of agricultural cargoes were required to ship U.S.-flag, before the law was changed to 50% about a decade ago. In FY21, USAID shipped only 31% of P.L. 480 "Food for Peace" bulk cargoes on U.S.-flag ships using a variety of administrative waivers currently available to Federal agencies. More recently, concurrent resolutions proposing the total elimination of civilian cargo preference for three years have surfaced in Congress, citing non-existent need arising out of the Ukraine invasion despite the availability and widespread use of such administrative waivers. USA Maritime calls upon Congress to reject the concurrent resolutions that attempt to leverage the war in Ukraine to eliminate civilian cargo preference for three years. The Federal government should not relinquish control over the carriage of U.S.-taxpayer financed food aid cargoes to foreign-flag and foreign crewed ships, and it is precisely for instances such as the present one that we maintain a robust U.S.-flag fleet and merchant marine.

One might reasonably ask why such gamesmanship and non-compliance is allowed to persist. The reason has to do with a combination of lax enforcement mechanisms and unclear or nonexistent consequences for violators, be they commercial entities or government agencies. The Maritime Administration, the agency tasked with administering the cargo preference laws, is not traditionally an enforcement or regulatory agency but rather a promotional agency.

Congress has sought to address this matter multiple times over the decades. The Merchant Marine Act of 1970 provided the Secretary of Commerce (MARAD was then part of the Department of Commerce) with the responsibility and authority to promulgate cargo preference regulations and to monitor the administration of cargo preference legislation. As the legislative history explains, "There is a clear need for

a centralized control over the administration of preference cargoes. In the absence of such control, the various agencies charged with administration of cargo preference laws have adopted varying practices and policies, many of which are not American shipping oriented.” The 1970 act states that each agency involved in shipments of cargo that come under the Cargo Preference Act of 1954 is responsible for administering the program under regulations issued by the Secretary of Commerce, and the Secretary of Commerce is in turn responsible for reviewing the administration of the total program and for reporting annually to the Congress. These authorities were subsequently delegated by the Department of Transportation to the Maritime Administration.

This shortcoming was also intended to be addressed by Section 3511 of the Duncan Hunter National Defense Authorization Act of 2009 (P.L. 110–417), which provides clarity that DoT, through MARAD, is the lead Federal agency responsible for interpretation and enforcement of the cargo preference laws, including providing for fines and debarment. Unfortunately, although arguably self-executing, MARAD never completed a rule making and the non-compliance has persisted.

If there were any doubt about the intent of the FY09 NDAA language, it was clarified in a letter of October 8, 2009 from Senator Daniel K. Inouye to President Barack Obama:

I am writing to personally express my strong support for the enforcement of U.S. cargo preference laws. The U.S.-flag merchant marine fleet is not only important to the efficient flow of commerce, but also, as history has shown, is critical to our national security. Our merchant fleet provides our nation with critical, dependable sealift capability at a fraction of the cost and, among other things, is instrumental in supplying U.S. troops stationed abroad, as well as starving people around the globe in times of war, peace, and natural disaster.

One of the most important elements in sustaining our U.S.-flag fleet is its continued ability to carry certain government impelled cargo. For this reason, I authored a statutory provision which was enacted into law as Section 3511 of the Duncan Hunter National Defense Authorization Act of 2009 (P.L. 110–417) to ensure that U.S. cargo preference laws are legally applicable to all shippers. Further, this provision is intended to provide much needed clarity that the Department of Transportation is the lead federal agency responsible for the administration, interpretation, and execution of our cargo preference requirements and guidelines. For too long, interagency disputes between the U.S. Department of Transportation, the U.S. Department of Agriculture, and the United States Agency for International Development have hampered the efficiency of our food aid programs.

It is important to note that Section 3511 does not change the application of existing law but will resolve many of the jurisdictional overlaps that exist with current shipper agencies, and ultimately help fashion a more coherent policy regarding the application of cargo preference laws. As these agencies work toward improving our export-based food aid programs, it is essential that the clear authority of the Department of Transportation over cargo preference laws is maintained, and that any decisions, rules, and regulations are consistent with current law.

Given your strong support for the U.S. maritime industry and your recognition of the importance of our nation’s cargo preference laws, I would appreciate your assistance with the full implementation and enforcement of Section 3511. I look forward to working with you in support of our nation’s merchant marine fleet.

More recently, on January 25, 2021, the Biden Administration issued Executive Order 14005 to strengthen the oversight of and enforcement over cargo preference requirements, including creating a “Made in America Office” (MIAO). The guidance echoed previous efforts by stating that MIAO “will work with relevant agencies to review how best to ensure agency compliance with cargo preference requirements in order to maximize the utilization of U.S.-flag vessels in excess of any applicable statutory minimum, to the greatest extent practicable”.

RECOMMENDATIONS

Whether by legislation or executive order, 100% of all government-owned or financed cargoes should be required to move on U.S.-flag ships. It is a rather simple equation: without cargo, carriers will not invest in ships, and without ships, there will not be jobs for merchant mariners. Without those merchant mariners, the Gov-

ernment-owned reserve sealift fleet cannot be crewed. Given declining government cargoes over the past decade, the impacts of the Covid-19 pandemic, and the already critical shortage of maritime labor available to crew the U.S.-flag commercial and government sealift fleets, this would provide a critical boost to U.S.-flag shipping and the American merchant marine. In a letter addressed to this Committee dated May 15, 2020, signed by then-Commander of TRANSCOM General Stephen Lyons called for requiring “100 percent of all government-impelled cargoes to be transported on U.S. flagged vessels”. USA Maritime strongly endorses the recommendation.

Congress should ensure that the Department of Transportation and Maritime Administration are directed and fully resourced to finally enforce the cargo preference laws, including through the implementation of the FY09 NDAA enforcement language. In addition to its MIAO effort, the Administration could also reissue or reinstate the April 1962 Directive by President John F. Kennedy, a response to the “worldwide economic and defense burdens facing the United States”, that directed all executive branch agencies to fully comply “with the purpose of our various cargo preference laws”, to help meet the geopolitical and strategic great power competition challenges of today just as we did during the Cold War.

Similarly, another way to expand the available cargo base for the U.S.-flag fleet is to allow for NATO member countries to meet their 2% defense spending commitment by shipping military or commercial cargo on U.S.-flag vessels. In a time of increased geopolitical risk in Europe due to the Russian invasion of Ukraine, the NATO alliance is perhaps more relevant than at any time since the end of the Cold War. Allowing NATO member nations to meet their spending commitments by supporting the U.S.-flag fleet would be a tangible way for the allies to support the essential asymmetric advantage that is the U.S.-flag sealift fleet.

Lastly, Congress and the Administration should consider shipping policies that encourage shippers of all kinds, whether beneficial cargo owners, freight forwarders, non-vessel operating common carriers (NVOCCs) or otherwise, to prioritize U.S.-flag shipping as part of their global supply chains. Less than 2% of the nation’s commerce moves on U.S.-flag ships, a figure that has more than halved in the last 50 years. It is right and proper that government-financed or generated cargoes are set aside for U.S.-flag carriers as part of the overall statutory framework, but more could be done, including prioritizing asset-owning/operating companies in government contracts. As for non-government cargoes, an incentive such as a tax credit for shippers to utilize U.S.-flag carriers could provide an additional source of cargo for U.S.-flag ships while providing an ancillary benefit to cargo shippers seeking to access the American market.

CONCLUSION

General Darren McDew, then-Commander of U.S. Transportation Command, noted in an October 2017 speech, “We don’t know when, but someday the nation is going to come calling. When she does, she will need us, she will need our ships, she will need our mariners ... if we do nothing now, the strength of the maritime fleet that brought the nation to war throughout history ... that strength will not be here. It’s already in decline.” Alongside the Maritime Security Program, the cargo preference laws of the United States constitute the most important historical policy plank to ensure that this crown jewel capability continues to be available to TRANSCOM and DoD, and the nation writ large. Thank you for the opportunity to offer my views on the critical factors pertinent to the cargo preference laws and maintaining a strong U.S.-flag international fleet. I look forward to your questions.

Mr. GARAMENDI. Thank you, Mr. Ebeling.

We will now turn to Mr. Clark.

Mr. CLARK. Thank you, Mr. Chairman, Ranking Member Gibbs, for the opportunity to testify here today about the importance of cargo preference. I am a retired Navy officer and a tank tanker today, so, I am going to talk a little bit more strategically about the challenge posed by noncompliance with cargo preference.

Today, China dominates the global shipping industry. Six thousand vessels are owned by Chinese companies. More than 4,500 are under Chinese flag. We have heard discussion today about the fact of the U.S. fleet only has about 85 vessels under U.S. flag that are oceangoing international shipping vessels.

That is a disparity that would ordinarily not be that big of an issue in a globalized economy operating under the rule of law. But today we are seeing evidence where countries like Russia, like China, are weaponizing their supply chains against their opponents. We could find ourselves in the United States in the position of being the victim of supply chain warfare being imposed upon us by a company like China with this enormous reach in the global shipping industry.

To avoid America suffering the fate that we see our European allies suffering today under the threat of Russia cutting off gas supplies, we need to improve and expand our own U.S. shipping fleet to provide a hedge against the potential for supply chain warfare and this weaponization of shipping against us. But there is a challenge in doing that, and I guess the cargo preference operating under U.S. flag is more expensive than operating under foreign flags of convenience. We have stricter safety rules. Labor requirements require us to have more people to ensure for the safety of the vessel, and also its security in foreign ports, and we are required that our mariners be U.S. citizens or residents.

Carriers that are facing these higher costs cover those costs by carrying preference cargo that is at a premium compared to the price that they might receive in the open market, and by getting stipends from the Maritime Security Program and Tanker Security Program. These programs operate in conjunction, though. The stipends from the Maritime Security Program and TSP, the Tanker Security Program, aren't sufficient to cover the higher cost, so, preference cargo is absolutely essential.

To be able to expand the fleet to support U.S. shipping needs and hedge against supply chain warfare, we are going to need to both expand the use of those stipends but also ensure that preference cargo is actually provided to the shippers that are charged with carrying it and that are operating under U.S. flag and incurring these higher costs for doing so. That larger fleet is also extremely important to supporting our maritime sealift demands that the military has during wartime or crisis.

The most severe shortfall we are facing right now in our maritime sealift capacity for wartime demands is in tankers. Today, as Admiral Phillips mentioned, the Tanker Security Program is aiming to provide stipends, and, hopefully, preference cargo for up to 10 tankers that could be U.S.-flagged and operating international trade.

The requirement that has come out of the most recent mobility capabilities requirements study from TRANSCOM is for 84 tankers. So, we have an enormous shortfall in the number of tankers available under U.S. flag to support U.S. military needs in a crisis or conflict. You could see a situation in which that same set of tankers could also be employed to help provide for U.S. shipping needs for fuel in the event of China employing supply chain warfare against us and using their shipping industry dominance against the United States.

There are opportunities to improve that, though. Obviously, we need to improve compliance with cargo preference, and MARAD needs to be charged with being able to do that. We could also, as I mentioned in my written testimony, require that U.S. DoD fuel

being provided overseas be sourced from U.S. refineries, which would increase the number of tankers required to carry that fuel, increasing the cargo available, and potentially allowing for an expansion of the Tanker Security Program and providing for more tankers under U.S. flag.

But we're going to have to make these changes if we want to be able to have our sealift capacity that we need for wartime mobilization, as well as be able to insulate ourselves from the potential for the weaponization of supply chains and shipping against the United States against a China that is going to be increasingly belligerent and willing to use a lot of tools available to it in a hybrid approach to deter U.S. intervention on behalf of Taiwan or other U.S. allies overseas.

So, again, thank you for the opportunity to speak with you today, and I hope that we can have a discussion about these improvements going forward.

[Mr. Clark's prepared statement follows:]

**Prepared Statement of Bryan Clark, Senior Fellow and Director of the
Center for Defense Concepts and Technology, Hudson Institute**

Russia's actions to reduce gas exports to Europe show the risk of allowing an opposing power to gain control of essential contributors to a nation's economy. America's NATO allies are now scrambling to establish alternative sources of energy and revisit policies, such as Germany's decision to sundown its nuclear generating capacity, that led to an increased dependence on Russian gas.

The United States could find itself in a similar situation regarding its maritime industry. Since the nation's founding, Americans have gone to sea for trade, to harvest resources from the oceans, and to advance the country's interests. By building and repairing ships, training mariners, operating shipping networks, and sustaining ports and waterways, the U.S. maritime industry makes possible the economic benefits of access to the sea.

Recognizing the value of a strong maritime industry, China undertook a methodical effort—supported by more than \$15 billion annually in government support—to establish the world's largest navy, coast guard and shipping fleet, gain control of ports worldwide, and become the world's largest shipbuilding nation. Today, Chinese companies own more commercial ships than any other country, almost doubling second place Greece. More than 7,000 large commercial ships are registered in China, just slightly below first-place Panama. China holds more than half the global orderbook for constructing large commercial ships and builds nearly all the world's shipping containers. Through its Belt-and-Road initiative, China has access and significant control over marine terminals and other infrastructure around the world.

China's domination of the maritime industry has benefitted U.S. consumers by lowering prices for imported goods and subsidizing infrastructure improvements at overseas ports. However, it also creates vulnerabilities. During a confrontation between the United States or its allies and China, Beijing could use its control over the maritime shipping and transportation sector to impose costs and punish its opponents. Outside of military conflict, China's government could direct its companies, which lack the independence of U.S. firms, to discriminate in favor of Chinese interests through pricing, scheduling, insurance, or quality of service. The gas shortfalls being experienced today by Europe and recent supply chain backlogs may pale in comparison to the impact from a concerted effort by the Chinese maritime industry to disrupt the U.S. economy.

U.S. policy decisions since the end of World War II contributed to this vulnerability. Fewer than 200 large commercial ships now fly the U.S. flag and fewer than 10 commercial ships are under construction in U.S. shipyards. American shipping companies faced tax and other regulatory disadvantages that led the largest to sell out to foreign buyers decades ago.

To effectively compete, the United States will need to break with maritime strategies that assume commercial and national security contributions of the maritime industry are largely distinct. Instead, the United States should adopt a new approach that recognizes the inherent linkage between the two and fosters a healthier com-

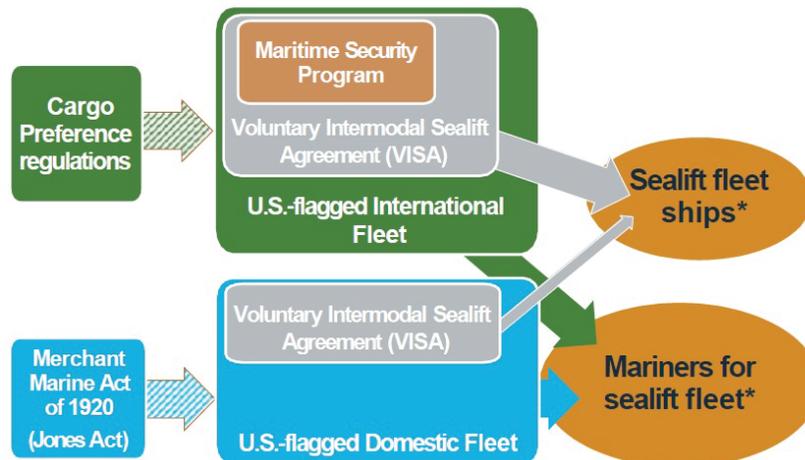
mercial industry that can support U.S. national security. A new comprehensive strategy is even more important now given the growing threat posed by Chinese maritime power, the urgent need for new approaches to shipbuilding and the repair of U.S. government ships, and the need for viable solutions for strategic sealift gaps.

RESTORING SEALIFT CAPACITY

A framework of regulation, law, and government programs governs and shapes the U.S. maritime industry. Most relevant to this hearing is the shipping fleet and its ability to support U.S. sealift demands during a crisis or conflict, including the potential of Beijing reducing U.S. access to Chinese flagged or owned vessels. By supporting the U.S. shipping fleet, the United States can insulate itself from Chinese pressure.

As depicted in the figure below, in the U.S. domestic commercial shipping fleet, the Merchant Marine Act of 1920, also known as the Jones Act, requires ships conducting commerce between U.S. ports to be U.S.-built, U.S.-owned, and operated by crews of U.S. citizens or permanent residents. In the international commercial fleet, the Maritime Security Program (MSP) provides stipends to U.S.-flagged ship operators to help cover the higher cost of following U.S. regulations, and Cargo Preference rules require that U.S.-flagged ships carry all DoD and 50 percent of other U.S. government cargoes. Ships participating in MSP are enrolled in the Voluntary Intermodal Sealift Agreement (VISA), which requires participating vessels to be made available for surge sealift operations during wartime or other crises. VISA also includes other vessels from the domestic and international fleets, but they do not receive a stipend.

CONTRIBUTORS TO U.S. SURGE SEALIFT CAPACITY



Shipping operators are reticent to operate under U.S. flag due to higher costs and a resulting lack of competitiveness that reduces cargo throughput. Outdated taxes and regulations—especially related to mariner wages and repair duties—should be reformed to help reduce expenses. To improve efficiency and encourage shipping, the government should also fund enhancements to intermodal links and deter cargo diversion. And because shipping companies will need more sailors to operate a larger U.S.-flagged fleet, merchant marine recruiting and retention should be improved through new initiatives to ease of credentialing and licensing and establishment of a Merchant Marine Reserve.

Maritime Security Program and cargo preference

The current MSP offers a stipend to about 60 U.S.-flagged ships. At a relatively low cost compared to acquiring, crewing, and maintaining additional government ships, the MSP provides DoD access through VISA to commercial vessels, mariners, and associated global intermodal networks. By supporting the operation of U.S.-flagged ships in commerce around the world, the MSP also contributes to U.S. tax

revenue and commercial access. However, the government could improve the program's effectiveness by stabilizing the MSP stipend, expanding MSP to cover sealift shortfalls and replacement of aging government-owned ships, and bringing specialized ship types into the MSP that are expensive for the government to buy and maintain.

However, the MSP stipend is generally not sufficient to cover the costs of maintaining a ship under U.S. flag. Preference cargo, which generally can command higher rates compared to commercial cargo, makes up the difference. While government vendors and agencies are required to comply with Cargo Preference rules, avoidance is rampant.

For example, defense contractors have difficulty identifying how all the elements of their supply chain arrive in the United States for manufacturing or assembly. This is a challenging problem, but recent efforts by the Department of Defense (DoD) to understand its supply chains should help identify the methods being used to move materials and parts from overseas suppliers to U.S. defense contractors.

The Defense Logistics Agency (DLA) often circumvents Cargo Preference rules to save costs in the name of national security. While in general this would allow more funding to go to other defense programs and logistics needs, as a working capital fund, the DLA is also incentivized to reduce costs and reallocate the savings to internal priorities.

Food aid is sometimes shipped on foreign-flagged ships to allow more dollars to be spent on aid, but this undercuts the purpose of the Cargo Preference program, which is to support the U.S. shipping industry. Circumventing cargo preference merely privileges one industry at the expense of another.

By reducing the circumvention of cargo preference rules, the U.S. government could make operating under U.S. flag more attractive for carriers. With a larger base of preference cargo to ship, the MSP fund could eventually be applied to a larger number of carriers and expand the size of the program, and the U.S. flag fleet.

Tanker security program and cargo preference

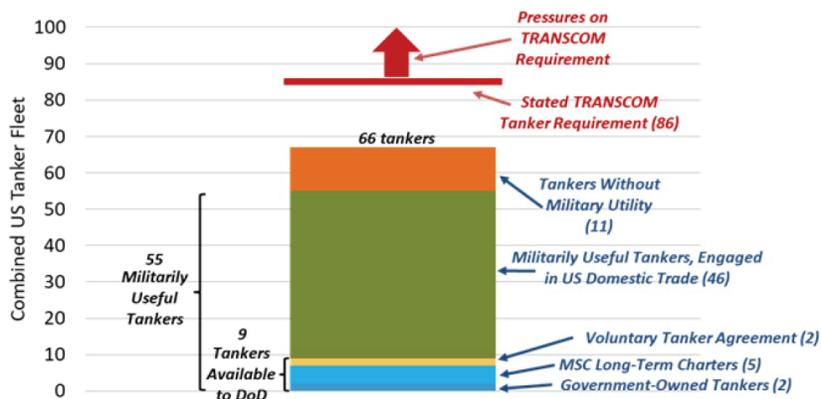
In the 2016 Mobility Capabilities Requirements Study, the U.S. Transportation Command (USTRANSCOM) identified a requirement of 86 tankers necessary for the strategic sealift of fuel in a large contingency.¹ Additional tankers are necessary to support U.S. Navy Consolidated Logistics (CONSOL) tanker at-sea fuel transfer requirements.² However, DoD only has access to about 9 U.S.-flag militarily useful tankers that it could call upon in a contingency, exclusive of tankers in the domestic trade.³

¹ Lieutenant General Stephen Lyons, U.S. Army, Deputy Commander of USTRANSCOM, "Logistics and Sealift Forces," statement before House Armed Services Committee Subcommittee on Seapower and Projection Forces, March 22, 2016, p. 3.

² U.S. Navy forces require lightering, CONSOL, or Modular Fuel Delivery System-equipped tankers to transfer fuel afloat to other tankers, to Combat Logistics Force ships, and to other vessels, respectively. For more information on this demand, please see: Timothy A. Walton, Ryan Boone, Harrison Schramm, *Sustaining the Fight: Resilient Maritime Logistics for a New Era* (Washington, DC: Center for Strategic and Budgetary Assessments, 2019), pp. 41–43, 77–83, https://csbaonline.org/uploads/documents/Resilient_Maritime_Logistics.pdf. and Bryan Clark, Timothy A. Walton, and Seth Cropsey, *Seapower at a Crossroads: A Plan to Restore the U.S. Navy's Maritime Advantage* (Washington, DC: Hudson Institute, 2020), pp. 40, 41, 44, https://s3.amazonaws.com/media.hudson.org/Clark%20Cropsey%20Walton_American%20Sea%20Power%20at%20a%20Crossroads.pdf.

³ Figure 32 in Timothy A. Walton, Ryan Boone, Harrison Schramm, *Sustaining the Fight: Resilient Maritime Logistics for a New Era* (Washington, DC: Center for Strategic and Budgetary Assessments, 2019), p. 78, https://csbaonline.org/uploads/documents/Resilient_Maritime_Logistics.pdf.

CURRENT U.S.-FLAGGED FLEET IS FAR LESS THAN TRANSCOM REQUIREMENT



Source: Figure 32 in Timothy A. Walton, Ryan Boone, Harrison Schramm, *Sustaining the Fight: Resilient Maritime Logistics for a New Era* (Washington, DC: Center for Strategic and Budgetary Assessments, 2019), p. 78, https://csbaonline.org/uploads/documents/Resilient_Maritime_Logistics.pdf

The DoD faces a gap of approximately 76 fuel tankers to meet surge sealift requirements. The newly established Tanker Security Program (TSP) will help address this gap. But like the MSP, tankers participating in the TSP require preference cargo to be economically viable. Moreover, the TSP is small and would require more cargo if it is to expand to meet the 76-tanker gap.

DLA Energy purchases the majority of its bulk fuel contracts for deliveries to Defense Fuel Support Points (DFSPs) Outside the Continental United States (OCONUS) from foreign refineries. Purchasing fuel from foreign refineries closer to DFSPs allows DLA Energy to buy fuel that is not only in some cases slightly less expensive than fuel from U.S. refineries, but also allows DLA Energy to minimize transportation costs, as the fuel can come from closer refineries than farther, U.S. ones. This approach has allowed DLA Energy, a working capital fund organization, to minimize costs passed on to the U.S. military services and defense agencies.

DLA's approach has also had the unintended pernicious effect of reducing the amount of preference cargo available to U.S.-flag tankers and in turn reducing the number of U.S. tankers and crews available to support critical U.S. Department of Defense (DoD) requirements. It also creates a peacetime business environment misaligned with the threat environment. For example, DLA Energy has historically purchased most of the bulk fuel contracts for the Western Pacific solicitation from refineries in Japan, the Republic of Korea, and Singapore—refineries that would likely be subject to Chinese business control, coercion, or attack in a potential conflict with the People's Republic of China.

Hoping requisite numbers of foreign tankers and their crews will be available in a conflict to substitute for U.S. tankers is imprudent. Global spare tanker capacity significantly fluctuates, and a large and growing portion of commercial tanker fleets are Chinese controlled or subject to Chinese coercion or might not want to participate in a Sino-American confrontation.

To start to address this major gap in U.S. tankers, one of the easiest and lowest-cost options is to source a greater proportion of DLA Energy bulk fuel contracts from U.S. refineries and to continue to require that fuel be transported to the greatest degree possible on U.S.-flag tankers participating in the Maritime Administration Voluntary Tanker Agreement (VTA).⁴

⁴The Voluntary Tanker Agreement (VTA) is an agreement that facilitates cooperation between tanker operators and the government (and grants shipowners anti-trust immunity for cooperating amongst themselves) if the government determines it necessary to requisition tankers in contingencies. Another complementary option to increase the number of U.S.-flag tankers is to increase the number of Tanker Security Fleet slots, increase their stipend to match the operating differential between U.S. and foreign-flag vessels, and eliminate regular Tanker Security Fleet participants' access to preference cargo fuel to have these tankers operate in international trade, while other U.S.-flag tankers transport preference cargo and meet domestic trade requirements. As another option, DoD can long-term charter additional tankers to serve as prepositioned reserves afloat that can move to areas of need. And lastly, the U.S. Congress could

This requirement would end the current penny-wise, pound-foolish approach of purchasing most OCONUS bulk fuel contracts from foreign refineries and would provide three major benefits. First, more U.S.-flag tankers could join the U.S. commercial fleet since there would be more preference cargo to support their operations. By participating in the VTA, these tankers could engage in commerce in peacetime and be requisitioned, if necessary, by the U.S. government during contingencies. Second, the proposed approach would provide more jobs to U.S. mariners and their supporting maritime industry personnel and provide additional revenues to U.S.-flag tanker companies (and tax receipts to the U.S. government from those companies and from their personnel). Third, the proposed approach would increase sales of fuels by U.S. refineries and in turn support jobs, revenues, and tax receipts at these refineries.

RECOMMENDATIONS

The U.S. Congress should introduce legislation that mandates that DLA Energy, starting in FY 2023, purchase no less than 50 percent of tanker-delivered OCONUS bulk fuel contracts from U.S. refineries and that all tanker-delivered fuel be transported on U.S.-flag tankers participating in the Voluntary Tanker Agreement. The requirement should increase to eventually mandate that DLA Energy purchase no less than 100 percent of tanker-delivered OCONUS bulk fuel contracts from U.S. refineries, and no less than 25 percent of pipeline-delivered OCONUS bulk fuel contracts from U.S. refineries, and that all tanker-delivered fuel be transported on U.S.-flag tankers participating in the Voluntary Tanker Agreement.

To reduce circumvention of Cargo Preference rules, the U.S. Congress should require that DoD complete a survey of defense contractors to determine how well they understand the shipping used within their supply chains. The report should include a plan to gain a complete understanding of the overseas materials and part used in U.S. weapon systems and the shipping used to obtain them. The Congress should also require that DLA provide a report on its use of foreign-flagged vessels, the reasons for doing so, and how the resulting savings were repurposed.

CONCLUSION

In a future military or diplomatic confrontation against China, the United States could experience economic disruptions like those imposed by the Covid-19 pandemic's impact on supply chains or the energy shortfalls befalling Europe today. Some of these effects may be unavoidable, given the Chinese maritime industry's size and influence. However, the best insulation against the worst disruptions is to improve the health of the U.S. maritime industry, which depends on effective enforcement of cargo preference rules.

Mr. CARBAJAL [presiding]. Thank you very much, Mr. Clark.

Now, I will proceed with allowing all of the Members to ask your questions for 5 minutes. I will start by recognizing myself.

This is to the entire panel. In the wake of the Russian invasion of Ukraine, there have been legislative efforts to waive cargo preference. What effect would that proposal have on the mariner base, the number of U.S.-flag vessels, military search capability, and readiness?

[No response.]

Don't all jump in at one time.

Mr. MARCUS. I will answer that, Mr. Chair, and thank you for the opportunity.

I would say it would certainly diminish the amount of vessels available and crewmembers available to support any kind of sus-

mandate a requirement in which a gradually growing proportion of U.S. energy exports would need to be lifted on U.S.-flag tankers. For a further discussion of this topic, please see: Timothy A. Walton, "Resilient refueling beyond Red Hill", *Real Clear Defense*, March 14, 2022, https://www.realcleardefense.com/articles/2022/03/14/resilient_refueling_beyond_red_hill_821616.html; and Timothy A. Walton, Ryan Boone, Harrison Schramm, *Sustaining the Fight: Resilient Maritime Logistics for a New Era* (Washington, DC: Center for Strategic and Budgetary Assessments, 2019), pp. 81–82, 118, https://csbaonline.org/uploads/documents/Resilient_Maritime_Logistics.pdf.

tained military sealift. If you cut the program to—you said you would cut the program, is that correct? Or did you say you would bring it to 100 percent?

Mr. CARBAJAL. Cut or 100 percent—

Mr. MARCUS [interrupting]. Well, obviously, if you cut it—and I am sorry. If you cut it, the amount of sealift would go down. The amount of available mariners would go down. You are cutting a program from 75 percent to 50 percent. In 2012, we saw the number of ships available decrease, at least 10 or 15 ships. We saw members permanently leave the industry. So, you would have a crew shortage, and you would have a shortage of tonnage.

And on the other side, if you increase the program from the current 50 percent to 100 percent, you would increase your sealift capability. You would increase your manpower and opportunities to grow the U.S. merchant marine.

Mr. CARBAJAL. Thank you.

Mr. EBELING. Yes, thank you for the question.

Just to maybe expand on that a little bit, any reduction in cargo will have a detrimental impact on the U.S.-flag fleet. As Captain Marcus alluded to, that impacts not just the ships, but the mariner pool, and that mariner pool also crews the Government reserve ships.

This kind of circumstance is precisely why we have a U.S.-flag fleet so that we can pursue any national security or economic policy that we so choose.

Thank you.

Mr. CARBAJAL. Thank you.

Mr. CLARK. And just to add to what my colleagues have said, the ships right now cannot operate cost effectively under just the Maritime Security Program stipend. They need the cargo preference cargo to augment that income and be able to operate in the black. So, you are going to see a continued erosion of the size of the U.S. fleet without preference cargo, and waiving this requirement would be devastating to that cargo amount.

Mr. CARBAJAL. Thank you.

Mr. Clark, the GAO report issued on Monday provides important information on the decline of the size of the fleet of U.S.-flag vessels engaged in international trade. In 1990, there were 199 U.S.-flag vessels in the fleet; but as of 2021, the fleet was down to 84 vessels. What can be done to stabilize the U.S.-flag vessel fleet in addition to obviously not cutting it, the preference?

Mr. CLARK. Right. Obviously not cutting cargo preference. So, making sure that preference cargo is carried by U.S.-flag ships is really important. So, compliance with cargo preference rules is essential. Going after the agencies that have been avoiding using U.S.-flag ships for preference cargo will be important. There are agencies that are obviously avoiding that for the purpose of saving money. Also defense contractors, including defense vendors, are sometimes not using U.S.-flag ships to move their cargo, and it is partially a result of not understanding their supply chain, but it is also a result of inadequate oversight. So, making sure that preference cargo is shipped on U.S. ships is one.

The other part would be looking at expanding the Maritime Security Program, but to expand the Maritime Security Program and

its associated stipend, we are going to need to have more preference cargo to make those ships viable economically. So, it goes back to cargo preference.

Mr. CARBAJAL. Thank you.

Mr. Ebeling, you mentioned foreign military sales as a way to invigorate the market. Can you provide more detail on what the Federal Government can do there to stabilize the cargo markets for U.S.-flag carriers?

Mr. EBELING. Sure. So, foreign military sales, there are different types of that, some of which, such as foreign military financing, or FMF, are subject to U.S.-flag shipping requirements. Other types of FMS may not be. One way to potentially support the U.S.-flag fleet is to require all types of FMS, or a larger percentage of such, to move on U.S.-flag ships.

Mr. CARBAJAL. Thank you very much.

Captain Marcus, in your testimony you brought up the administration's emphasis and prioritization of implementing cargo preference requirements. And yet, there are agencies such as the USDA, USAID, and DoD who are not following the President's Executive order. What would this mean to the maritime industry should these agencies comply for a change?

Mr. MARCUS. Well, I think it would certainly mean there would be more cargo carried aboard U.S.-flagged vessels, and there would most likely certainly be more vessels entering service under the U.S. flag and more bulk carriers to carry these commodities.

Thank you.

Mr. CARBAJAL. Thank you.

I now will go to Representative Gibbs.

Mr. GIBBS. Thank you, Mr. Chair.

Mr. Clark, we were talking about your proposal because of the 82-percent drop in U.S.-flag vehicles. I've got the law here, and I just want to—for clarification, it says, "Supplies bought for the Army, Navy, Air Force, Marine Corps, or space force, or for a defense agency, or otherwise transported by the Department of Defense, may only be transported by sea in a vessel belonging to the United States or a vessel of the United States." And it has another definition. But then it goes on, there is a waiver provision: "The Secretary of Defense may waive the requirement."

I assume that is what has happened?

Mr. CLARK. Yes. So, what will happen, internal to the Department of Defense, they make a determination that there is not an available U.S. ship at an acceptable cost or reasonable cost and schedule. And then they will choose a foreign-flag ship to make the shipment. And that happens a lot because in a perverse sort of cycle, because we have reduced the amount of cargo that we are sending to U.S. ships, the size of the U.S. fleet shrinks, and then it makes it harder to schedule. So then the agencies can say, well, I can't get a ship at an acceptable schedule or cost. But that is because they have not been using the ships and, therefore, the fleet has been shrinking. So, they have waived that internally.

Mr. GIBBS. I believe that provision is not in our jurisdiction. I think it is probably Armed Services Committee jurisdiction.

Mr. CLARK. That is an internal discussion inside the DoD, but the—

Mr. GIBBS [interposing]. I understand.

Mr. CLARK. Right. But MARAD can enforce those rules under the existing law. So, it is just that DoD has chosen to establish its own waiver provisions, but under the existing law, MARAD is supposed to be administering the cargo preference rules.

Mr. GIBBS. OK. That is interesting.

If they did—in your proposal to ship oil from U.S. depots rather than foreign depots, how much do you think that we would be able to claw back of that 82 percent?

Mr. CLARK. It is hard to tell when you look at the math, but it looks like you would be able to at least get three more, and probably more than that, tankers under U.S. flag to source that, because it is obviously not going to be completely efficient. So, if all of that fuel was put on the smallest number of tankers possible, you are looking at 3, maybe 10.

Mr. GIBBS. Yes, I thought that the efficiency is probably lost.

Mr. CLARK. Right, right. But the cost would be minimal, and it would expand the amount of, obviously, fuel being shipped on U.S. ships substantially.

Mr. GIBBS. OK. I guess to the other two panelists, President Biden's Executive Order 14005 strengthens the oversight and enforcement, but MARAD has been unable to promulgate the rules. Are you working with the Biden administration to assure that MARAD is getting cooperation in the interagency review process to be able to promulgate these long-delayed regulations? What's your involvement with the Biden administration?

Mr. EBELING. Yes. USA Maritime has had productive discussions with the administration. It hasn't moved the needle much in terms of tangible action yet. Those discussions are ongoing, and we would be happy to work with the administration and the Congress on further tangible action.

Mr. GIBBS. Mr. Marcus?

Mr. MARCUS. Yes. I will follow up in the same way. The AFL-CIO Transportation Trades Department, the Maritime Trades Department, the labor unions, we have been working for a number of years to try to get regulatory mechanisms in place that are necessary to actually make this happen. And as has been said earlier in this testimony, it has gone year after year, Administrator after Administrator, and there needs to be some change, hopefully in the law, to make this more likely.

Thank you.

Mr. GIBBS. Yes. Mr. Marcus, I have a question. It is a little off topic, but I think it is timely. We are looking at a possible railroad strike, strike of freight rail. And since you represent the AFL-CIO, can you tell us any involvement that you have had with the railroad industry to try to mitigate, prevent a strike happening? Because the impact on your members is going to be significant if it happens, I believe.

Mr. MARCUS. Well, it is significant for the supply chain, and we have been working closely with the Transportation Trades Department supporting the railroad workers who have been under the thumb and experienced some horrifying job losses, working conditions, and safety problems for decades.

So, we are supporting the railroad workers. And hopefully a just and fair resolution to their labor issues and the supply chain issues that plague the railways can be found.

Mr. GIBBS. Are you hopeful?

Mr. MARCUS. I would have to say that I think it is going to have to get pushed further to get some real actions, but I am optimistic at the end of the day that a resolution will be found.

Mr. GIBBS. Because I hope the kind of resolutions—we just went through a major bottleneck at the ports, especially on the west coast, and we saw that. We are slowly digging our way out of that. And I have always said, when one leg of the intermodal system breaks down, it has a tremendous catastrophic effect on the rest. And this could be—after just coming out of COVID and the supply chain issues, to have this happen at this time puts us on a very tight, precarious position. I am worried about that. So, I hope everybody is trying to work together to resolve the issue.

Mr. MARCUS. Yes, sir, I believe they are. Thank you for the inquiry.

Mr. GIBBS. I yield back, Mr. Chairman.

Mr. CARBAJAL. Thank you, Mr. Gibbs.

I will now recognize Representative Lowenthal, the distinguished gentleman from California.

Mr. LOWENTHAL. Thank you, Mr. Chairman. Great to see you back on the committee.

This has been a very interesting discussion, and I want to elaborate on points that have already been made, but we are going in this vicious cycle. On one hand, agencies are arguing that existing U.S.-flag fleet cannot adequately meet their demands. This is used to justify lax enforcement and mandates which weaken the demand for critical services that are provided by U.S.-flag carriers, and it hinders the expansion of the fleet. And I believe the only response to this is to make sure that the fleet is big enough and flexible enough to meet congressional requirements. And, clearly, MARAD is not ensuring that agencies are following the law. We need to change that and to guarantee demand for U.S.-flagged vessels.

But there are two sides of the equation, and I think we have already heard some of the responses about what else we can do besides MARAD ensuring demand for U.S. And I want to ask Captain Marcus and Mr. Ebeling, can you weigh in also on additional measures that we should be considering to help ensure that U.S.-flag vessels meet the demand for vessels and mariners? What else should we be doing?

Mr. MARCUS. Thank you, Congressman, for the inquiry.

I think there is a lot that could be done. I think the starting point is clearly to have a national maritime policy. We lack a national maritime policy. We have a handful of programs to keep a minimal baseline of shipping afloat under U.S. flag, but we don't have a comprehensive national maritime policy.

Specific things that could be done besides expanding the Maritime Security Program or the Tanker Security Program would be things like bilateral trade agreements, export quotas, which Congressman Garamendi and others have suggested over the years, and certainly a national program such as we saw in 1936. I mean, when there were war clouds in Europe in the thirties, U.S. Con-

gress and President Roosevelt got together. They developed a merchant marine policy called the Merchant Marine Act of 1936, and what we have left is basically the remnants of those policies, a few new things added to keep us on the lifeline. But there is plenty of things that could be done. It requires national will, and it requires financial investment.

Thank you.

Mr. LOWENTHAL. Thank you, Captain Marcus.

Mr. Ebeling, anything that you would like to add?

Mr. EBELING. Yes. Thank you.

And I certainly echo Captain Marcus' remarks there. I was reflecting on the chairman's remark earlier about the decline of the fleet from the 1990s through the present, and I think it is important maybe to take a step back and look at the goals for the U.S.-flag fleet. And I think we have really emphasized the national security requirements. For example, Mr. Clark alluded to the mobility capability requirements study earlier. That has stayed pretty consistent at 19 to 20 million square feet of capacity needed to pursue the national security objectives for sealift.

I think we need to expand the conversation beyond national security. Of course, defense sealift should be prioritized, but we should be looking at other programs as well, and maybe taking a little bit more of a holistic approach, looking at our global supply chains, looking at our contracting policies, looking at potential tax credits, so, we are really kind of elevating the discussion a little bit.

So, thank you.

Mr. LOWENTHAL. Thank you.

And I yield back, Mr. Chair.

Mr. CARBAJAL. Thank you, Mr. Lowenthal.

I will recognize now Mr. Garamendi for 5 minutes.

Mr. GARAMENDI. First, Mr. Chairman, thank you for holding the hearing. It is very, very important.

The maritime industry is exceedingly important. We do need what I would call a national maritime security policy that would go beyond the subject matter of this issue, of this hearing, one that would provide usually the Jones Act to meet the national military security. That is another hearing and another day.

I believe that we need a new law. As I said previously to the admiral about her power, four Administrators have failed to carry out the law. We need an explicit requirement—for each of you gentlemen, does it make sense that the Administrator, MARAD Administrator, have the authority and that the agencies must seek her permission, or the Administrator's permission, to waive the current requirement of 50 percent?

Mr. EBELING. In a word, yes. And I think that that has been Congress' intent going back at least to the fiscal year 2009 NDAA, but even further, probably back to the 1970 act as well.

Thank you.

Mr. GARAMENDI. Mr. Clark?

Mr. CLARK. Yes, I agree.

Mr. GARAMENDI. Captain Marcus?

Mr. MARCUS. Absolutely, we need a new law, and it needs to be effective. It needs to be implemented, yes, sir.

Mr. GARAMENDI. Should we restore the 75 percent requirement?

Mr. MARCUS. Certainly speaking for labor, absolutely. It would bring more cargo. It would require more vessels and improve and increase the industry for the better of the Nation.

Thank you.

Mr. EBELING. We would support that, but I would also argue perhaps to consider 100 percent, which would also take some of the gamesmanship out of it.

Thank you.

Mr. GARAMENDI. Very good.

Mr. CLARK. I agree, and I think 100 percent is the appropriate number because it does open up a lot of interpretation otherwise. And I think it also requires stepping back and saying what is the purpose of this program, which is fundamentally to ensure that we have a U.S.-flag fleet to support both our national security needs and insulate us against potential supply chain warfare. And we need to start thinking of it in a strategic approach as opposed to being just tactical.

Mr. GARAMENDI. And if there was a reasonable waiver associated with 100 percent, could we get past that argument that we would undoubtedly hear about 100 percent?

Mr. CLARK. A waiver, but that would be something that MARAD should be agreeing to rather than something the agencies independently decide.

Mr. GARAMENDI. So, a tight waiver, well-understood waiver?

Mr. CLARK. Right.

Mr. GARAMENDI. Administered by MARAD?

Mr. CLARK. Correct.

Mr. GARAMENDI. Yes?

Mr. EBELING. Just to add, I think that is correct, but I would also argue that it should be subject to availability and fair and reasonable rates as well. And that is part of the existing law and that, I think, even if it were 100 percent, that should probably stay as part of the existing law.

Thank you.

Mr. GARAMENDI. Captain Marcus, anything to add?

Mr. MARCUS. No. I would just echo what was said, but also say with the question of availability, which has been noted earlier in this hearing, the less cargo, the less ships are available. So, as was said earlier by Mr. Von Ah, if you are down to the last three boat carriers in the U.S.-flag fleet, there is not going to be a whole lot of availability. So, you need a larger number of vessels to have the availability to use the program.

Thank you.

Mr. GARAMENDI. That goes to my next series of questions about waiving into the American-flag fleet ships that are presently not. Should we allow foreign-flag ships to be reflagged into the American fleet? For example, the current 3-year law makes that almost impossible. Should we modify that in such a way as to allow those ships to be flagged in to be available more quickly, and then requirements that they not be in and out? Does it make sense to do that?

Mr. MARCUS. Yes. Certainly, the 3-year wait, as has been noted earlier, is a problem in the current law for flagging in vessels. And

I do think there should be some mechanism to require the vessels, once flagged in, to remain in service for the defined period of time.

Thank you, sir.

Mr. GARAMENDI. Mr. Ebeling?

Mr. EBELING. I would just add that removing the 3-year wait, while it may have some short-term positive impacts, would not necessarily generate any new cargo. And so, I think that is an important consideration to bear in mind as well.

Thank you.

Mr. CLARK. Yes. And I agree. I think the one thing to note is that there are several requirements that you have to meet in order to be U.S.-flagged that make it so that it is not just a jumping in and jumping out sort of operation. It will take some time for a ship to be qualified and have the appropriate crew. So, there is still a requirement in place. It is just not a time requirement.

Mr. GARAMENDI. My time having expired, but my questions not, I yield back.

Mr. CARBAJAL. Thank you, Mr. Garamendi.

That concludes our hearing for today.

I would like to thank the witnesses for your testimony. Your contributions to today's discussion have been very informative and helpful.

I ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitted to them in writing.

I also ask unanimous consent that the record remain open for 15 days for any additional comments and information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection, so ordered.

The subcommittee stands adjourned.

[Whereupon, at 11:42 a.m., the subcommittee was adjourned.]

SUBMISSIONS FOR THE RECORD

Prepared Statement of Hon. Peter A. DeFazio, a Representative in Congress from the State of Oregon, and Chair, Committee on Transportation and Infrastructure

Thank you, Chair Carbajal, for calling this very important hearing on compliance with and enforcement of cargo preference requirements. Oversight of cargo preference laws is long overdue, and this hearing could not come at a better time with the release of the Government Accountability Office's (GAO) report on cargo preference enforcement on Monday.

I'd like to acknowledge Rear Admiral Phillips' first appearance before this subcommittee in her new role as Maritime Administrator. It is great to see you again and I look forward to hearing how the Maritime Administration (MARAD) plans to better enforce cargo preference compliance.

The U.S. depends on a robust merchant fleet not only for economic purposes but also for national security. This past year, we've seen the negative effects of an industry dominated by foreign companies and interests wreaking havoc on our supply chain. It is counter to U.S. interests to increase reliance on foreign-flagged vessels. For decades we've seen the U.S.-flag fleet shrink, dropping from 199 vessels in 1990 to 84 presently. The flags of convenience system has exacerbated this issue, allowing companies to flag their vessels under countries that lack labor, safety, and environmental standards.

Cargo preference provides a backbone to support the dwindling internationally sailing U.S.-flag fleet, especially when coupled with other incentive programs like the Maritime Security Program. Cargo preference refers to the various laws requiring government-impelled cargo to be carried on U.S.-flagged vessels. Without it, the U.S. would not have the means to carry defense cargo overseas in times of war and would instead rely on foreign-flagged vessels.

There's an old saying: "cargo is king." By providing a baseline of cargo for U.S.-flagged ships, we incentivize more vessels to join the fleet. Without guaranteeing cargo for U.S. vessels, we lose demand for U.S. owned and crewed ships. The 2012 Moving Ahead for Progress in the 21st Century Act reduced the cargo preference minimum for non-military government impelled cargo from 75 percent to 50 percent. Since then, we've witnessed a 36 percent drop in total government cargo transported on U.S.-flagged vessels and the number of U.S.-flagged vessels. That is why it is vital that cargo preference requirements not only be restored to the 75 percent requirement for non-military cargo, but also that existing statutory requirements be fully enforced.

Over the years, we've heard of agencies working to defy or subvert the statutory requirements of cargo preference through the overutilization of "notwithstanding" exemptions and individual agencies making their own determinations of availability without seeking assistance from MARAD. But we haven't been able to track this due to the lack of public reporting by MARAD.

The compliance rates reported to MARAD and provided by GAO in their report paint a false picture of what is occurring. While on the surface it seems as if these federal agencies are in full compliance, in reality the percentage is inflated to include instances where "notwithstanding" or non-availability exemptions are granted. If you look at the strict amount of cargo carried on U.S.-flagged vessels not taking the exemptions into account, it is far lower than the 100 percent for military cargo and 50 percent for non-military government-impelled cargo mandated by statute.

In addition, MARAD has yet to complete a rulemaking on cargo preference guidance to determine availability or procedures for determining agency compliance. Without completing this rulemaking, MARAD cannot and has not used enforcement powers granted to them in the National Defense Authorization Act for Fiscal Year 2009. We will continue to see agencies pad their numbers and not provide full data until MARAD moves forward with a rulemaking.

The report released Monday by the GAO highlights the frustrating position MARAD is in and recommends they move forward with a rulemaking. It is my understanding that MARAD concurs with the recommendations of the report. While they may agree with the recommendations, they're presently blocked from publishing a rulemaking by the Office of Management and Budget and the agencies subject to cargo preference requirements. Today I expect to hear more on how MARAD can move forward with a rulemaking and enforcement.

We cannot wait any longer while MARAD is bullied into a position of non-compliance with the law. That is why we included a provision in this year's House National Defense Authorization Act which would require MARAD to report cargo preference data again and move forward with a rulemaking.

I thank GAO for their work on this insightful report and look forward to our witnesses' comments on the findings and the current state of cargo preference compliance.

Prepared Statement of Hon. Sam Graves, a Representative in Congress from the State of Missouri, and Ranking Member, Committee on Transportation and Infrastructure

Thank you, Chair Carbajal, and thank you to our witnesses for being here today.

Cargo preference is one of the key policy mechanisms the United States uses to maintain U.S.-flag vessels and U.S. mariners. These vessels and mariners will support national defense sealift surge operations when such operations become necessary.

It's unfortunate that Federal agencies that are subject to cargo preference have blocked MARAD from even writing, much less implementing, the cargo preference enforcement regulations Congress mandated in 2009.

I look forward to hearing from the witnesses today about how we can help MARAD enforce cargo preference laws on uncooperative Federal bureaucrats.

Thank you, Chair Carbajal. I yield back.

U.S. Government Accountability Office, "Maritime Administration: Actions Needed To Enhance Cargo Preference Oversight," GAO-22-105160, Sept. 12, 2022, Submitted for the Record by Hon. Salud O. Carbajal

The 49-page report is retained in committee files and is available online at <https://www.gao.gov/assets/gao-22-105160.pdf>.

APPENDIX

QUESTION FROM HON. BOB GIBBS TO BRYAN CLARK, SENIOR FELLOW AND DIRECTOR OF THE CENTER FOR DEFENSE CONCEPTS AND TECHNOLOGY, HUDSON INSTITUTE

Question 1. Dr. Clark, does the Department of Defense make non-availability determinations when making decisions regarding preference cargo carried in accordance with section 2631 of title 10, United States Code?

ANSWER. DoD, via the commander of Military Sealift Command (MSC) and commander, Military Surface Distribution and Deployment Command (SDDC), can make its own non-availability determinations.¹ These determinations, however, are required to consult, as appropriate:

- (i) Published tariffs;
- (ii) Industry publications;
- (iii) The U.S. Maritime Administration; and
- (iv) Other available sources.

The DoD appears to have a process for consulting MARAD on non-availability determinations that is used regularly, based on our research and that of the Government Accountability Office.

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¹U.S. Government, Defense Acquisition Regulation, PGI 247.5—OCEAN TRANSPORTATION BY U.S.-FLAG VESSELS, October 28, 2022, <https://www.acquisition.gov/dfarspgi/pgi-247.5-ocean-transportation-u.s.-flag-vessels>.