NMA REPORT #R-429-S

DATE: June 26, 2009

124 North Van Avenue
Houma, LA 70363-5895
Phone: (985) 851-2134
Fax: (985) 879-3911
www.nationalmariners.org
info@nationalmariners.org

Asserting our right "…to petition the Government for redress of grievances."
Amendment 1, U.S. Constitution, Dec. 15, 1791

LETTER TO CONGRESSIONAL REQUESTERS ON THE GOVERNMENT ACCOUNTABILITY OFFICE (GAO) REPORT #09-498 ON THE COAST GUARD'S ADMINISTRATIVE LAW SYSTEM

[Introduction: Our Association took exception to this GAO report requested by nine Members of Congress and addressed the following letter to each of nine Congressional Requesters.**]**

June 26, 2009

Subject: The Coast Guardøs Administrative Law System

Dear (Senator) (Representative) í .

I am writing to you because you are one of the nine (9) Congressional Requestors who sought the recently published GAO Report #09-498 dealing with the Coast Guardøs õALJ Systemö issued on June 12, 2009. I read the report and am very disappointed in the conclusions that your Congressional researchers reached. I view this report as a whitewash of the Coast Guard Administrative Law and investigative functions that deserve much closer scrutiny by Congress.

I write on behalf of approximately 126,000 õlower-levelö merchant mariners who serve on the nationøs tugs, towboats, offshore supply vessels, small passenger vessels and other commercial workboats of less than 1,600 GRT and for other mariners who have not otherwise had an effective voice.

I respond to this report because our Association must point out forcefully to Members of Congress on both sides of the aisle that the Coast Guard disregarded most of our requests to **investigate** complaints of irregularities we reported going back to the first report we submitted to the Coast Guardøs Chief of Marine Safety in May 2000, specifically our Report #R-201, Mariners Speak Out on Violation of the 12-Hour Work Day.*]*

The Coast Guard routinely bulldozes our cur complaints about work-hour abuses, undermanning, and substandard accident and personal injury reporting by failing to ask Congress to demand accurate logbook entries on the thousands of vessels under 1,600 GRT manned by our lower-level mariners. By not doing so, they guaranteed that the root causes of accidents and injuries could never be adequately investigated. We look forward to changes that the House of Representatives recently proposed in §7 of H.R. 2652 among others.

The Department of Homeland Security, Office of the Inspector General (DHS-OIG), however, did look into Coast Guard Investigations in 2007-08 and issued a report (DHS-OIG-08-51) highly critical of Coast Guard Investigations within the Office of Marine Safety. This report supported two earlier investigations completed a decade earlier, one by an outside agency in 1994 and a later one by the Coast Guard itself in 1996. We published all three government reports and made them available to our mariners on the internet as our Reports #R-429-M, #R-229-A and #R-429-B respectively.

Understanding the overall poor quality of ***investigations*** is a major key to understanding the impact of the Coast Guardøs Administrative Law system has had upon our mariners. õInvestigationsö often involves disregarding information provided by õwhistleblowersö because it was not unearthed by their own investigators. When the Coast Guard catches a mariner in a violation, they hang him out to dry as a horrible example to every other mariner. While these examples demonstrate the raw power of the Coast Guard to discourage future willful violations, they also show their willingness to force or coerce õsettlementö agreements while also trampling upon the rights Congress guaranteed under the Administrative Procedures Act and, more fundamentally, under the Constitution.

This GAO report whitewashes these activities and suggests that all is well within the Coast Guardøs Administrative Law system. We respectfully suggest that this is not the case and that fire remains beneath the smokescreen.

To our mariners, the Coast Guard Administrative Law system has the power to act as investigator, prosecutor, judge, jury and executioner ó all of which takes place in the setting of a military tribunal. The õexecutionö involves the Coast Guardøs ability to use its power, access to legal talent, and its ability to bottle a case within its ALJ system for years if necessary in order to destroy a marinerøs reputation, career by depriving him of the means of making a living, and reducing him to poverty for even trivial violations. While the Coast Guard may have maintained õdisciplineö within the maritime industry, we believe that this GAO report covers up the fact that the Coast Guard wields too much power indiscriminately. Above all, this Agency that has become oriented more and more towards the military, needs to be held accountable for their abuse of that power over the nationøs 210,000 credentialed merchant mariners.

Above all, we assert that it is necessary to remove the Coast Guardøs authority to appeal an adverse decision by one of its own Administrative Law Judges that the agency arrogated to itself in 1999 in 33 CFR §20.1001. Our Association tried to make this point seven years ago as revealed in a petition that appears in Docket #USCG-2002-12578 and is available on the internet under www.regulations.gov.

Last year, representatives of the GAO called me and notified me of their intent to look into complaints about problems with the Coast Guardøs ALJ system that surfaced in June 2007 and subsequently led Congressman Cummings to convene a hearing on July 31, 2007. I attended that hearing in the Rayburn Building.

As a result, I wrote at length to Mr. Stephen L. Caldwell, the GAOøs Director of Marine Security and Coast Guard Issues. **[Enclosure #1]** I was surprised and shocked to find (on p.42 of his report) that õBecause the input we received from the various mariner associations and attorneys was varied and did not have a consistent message, we were unable to draw any conclusions from their input, and ***so we did not include their comments in the report***.ö Consequently, we find our information relegated to the trash can because our message was not õconsistent message.ö Consistent with which other unnamed responders? ***This treatment on the part of the GAO discourages citizens to come forward when they observe problems with government programs.***

I ask you, directly, as one of the requestors of this GAO report, whether the following evaluation attributed to Attorney Bill Hewig, who specializes in Coast Guard legal aid matters and reported by Masters, Mates, and Pilots is correct. He believes that this report so completely missed its mark because (quote): "The GAO report did not address the serious charges of improper agency influence and coercion raised by Judge Massey because its authors were not asked to do so." I believe that a copy of the letter that formally requested the GAO report would answer this question and respectfully request such a copy.

My message to you is that we encountered a number of very serious problems with the ALJ system that the Coast Guard failed to address. The GAO report overlooks these problem areas and concentrated on an õarmchairö approach of evaluating the õprogramö and the regulations that govern it. We perceive the result as a whitewash, an attempt to mask the offending sights and odors.

The problem exploded on the stage in June 2007 in a series of articles in the Baltimore Sun. At Congressman Cummingsø July 31, 2007 hearing the issue was framed by Professor Abraham Dash in his written testimony. The outstanding problems were presented ably in both oral and written testimony at the 2007 hearing by retired ALJ Rosemary Denson, ALJ Jeffie Massey, and attorney William Hewig. Subsequently, in April 2008, H.R. 2830 ***proposed*** in Title X to make substantive changes that would correct deficiencies revealed in the July 31, 2007 hearings. Although H.R. 2830 never became law, I understand that the effort to make substantive changes continues in the 111th. Congress. Our Association encourages the work by the House Transportation and Infrastructure Committee and has full confidence in the fairness and leadership of both Representative Oberstar and Representative Cummings to reach a reasonable resolution of the outstanding problems. .

Aside from background material in the GAO report, much of it quite well done, and the most of the statistics in the report that I must stipulate to as being accurate (having no direct evidence to the contrary but with some reservations noted), I will set out a number of specific points cited by page that I believe stand in opposition to many of its conclusions.

On April 20, 2009, I wrote to the U.S. Attorney General about abuses to merchant mariners within the Coast Guardøs administrative law system, providing background information similar to that previously provided to the GOA and asked him to look into the matter. **[Enclosure #2].**

In early June 2009, I received a 142 page document from Captain Murray R. Rogers, a member of our Association addressed to the FBI Civil Rights Division (et al.) that filed a criminal complaint against certain Coast Guard officials. I subsequently learned that the Senate Commerce, Science and Transportation Committee and the House Transportation and Infrastructure committees also received copies of this complaint. I will be pleased to make a copy available to you upon request as well as any numbered report mentioned in this letter.

On June 15, 2009 our Association recommended that the House conduct a hearing on specific merchant mariner complaints on Coast Guard investigations and the administrative law system. [**Enclosure #3]**

I will make the following õFourteen Pointsö about the GAO report that trouble me and our Association with my apologies to former President Woodrow Wilson for usurping the title of his famous presentation to the League of Nations in 1919.

Specifications.

Point #1. **Decisional Independence of ALJs**.

One question posed in Objectives, Scope and Methodology on page 42 of the GAO report is: õTo what extent does the Coast Guard ALJ Program contain elements designed to foster the decisional independence of ALJs?ö

While the Office of Personnel Management (OPM) regulations governing the ALJs õí are designed to foster decisional independenceö is that what they do in actual practice? While the explanation is good, the real question is whether these regulations really are õ***effective***ö in doing so. ***This important question remains unanswered***.

Chief ALJ Ingoliaøs controversial õhemp oilö decision in DRESSER apparently caused Judge Brudzinski to express fear for losing his job. ALJ Massey reported that ALJ Brudzinski made this comment in the presence of staff members. This comment indicates that, at least in this case, the OPM regulations were ***not effective*** in guaranteeing ***his*** decisional independence. He altered his decision conform to the implied wishes of the Chief ALJ. The Federal district court in New Orleans will have to decide this issue in DRESSER and ROGERS later this year as both cases recently were re-filed. Quite significantly, I believe, GAO avoided the issue ó although *perhaps* in deference to a possible future court decision. If so, they should have stated this in their report and in their subsequent press release. **[Enclosure #5].**

Further, we believe that GAO should have attempted to determine whether these õelementsö (which they describe in detail) were ***effective*** in fostering the decisional independence of the Coast Guardøs ALJs. To do this, GAO should have explored the problems the Baltimore Sun brought to the attention of the public, Congress as well as to the Coast Guard, Department of Homeland Security Inspector Generaløs Office in lieu of merely conducting a programmatic analysis as was done.

On page 2 of the report, the GAO stated: õWe did ***not,*** however, assess whether the structural elements are ***effective*** at ensuring the ALJsø decisional independence.ö

We believe õDecisional Independenceö of ALJs continues to be the outstanding problem in the outstanding and unresolved incident Judge Massey reported in her deposition presented at the House hearing on July 31, 2007 and should have been addressed in this report. Without assessing this matter, we find the GAO report deficient.

On page 8, GAO stated: õWe did not perform a case review file of the other agencies (i.e., NTSB, USDA, SEC) to determine whether their procedures were being followed or ***evaluate the effectiveness*** of their adjudicatory processes.ö This is understandable, since these agenciesø practices were never in question. While this analysis of comparative adjudicative practices was helpful, the ***effectiveness of the Coast Guard's adjudicative processes*** is critical to this report and is absent.

Point #2. Settlement Agreements. (p.8)

In the graph in its Executive Summary and throughout its report, GAO clearly states that the majority (62%) of the cases it studies (which are a small proportion of the total cases) were closed with õSettlement Agreements.ö

While not contesting that mariners do violate laws and regulations, the GAO ***could*** have surveyed a ***representative sample*** of the 1,035 mariners who õvoluntarilyö signed a settlement agreement to determine if, in spite of their signature, they believed they received unfair treatment from Coast Guard officials that investigated the incident that each mariner was involved in.

The Coast Guard prefers settlement agreements because it keeps their investigators, many of whom are not fully qualified (as shown in the DHS-OIG COSCO BUSAN report in 2008) from having to prepare for extensive formal courtroom proceedings where their lack of legal training may become evident and where the outcome of their prosecution of mariners is much less certain. Perhaps this could explain some of the 9 percent of cases where the Coast Guard decided to withdraw its charges.

Mariners we have spoken with reported that some Coast Guard investigators will go to almost any length to obtain a settlement to close a case including ***coercion and threats***. An important question for GAO to determine what kind of pressure, if any, did Coast Guard investigators place on individual merchant mariners to obtain their signatures on settlement agreement? This would have required GAO to actually contact up to 1,035 merchant mariners (or a meaningful random sample thereof) to determine the true ***effectiveness*** and ***fairness*** of the settlement agreements they signed. By simply making a programmatic analysis, GAO avoided õrealö mariner input. This issue really concerns us because it avoids touching upon those individuals most affected by the administrative law program ó our working mariners. It is time that both the Coast Guard and members of Congress find out what is really going on out in the field.

We submit that the ROGERS case is a sordid example of inappropriate conduct by Coast Guard investigating officers and one that was subsequently sanctioned by ALJ Massey. The ROGERS case reeks of impropriety and missed opportunities that our Association presented to two Commanding Officers ó both of whom we respected ó to settle the dispute amicably instead of allowing their staff to destroy the marinerøs career as was done! Captain Rogers, a licensed merchant marine officer, deserved to be afforded the opportunity to speak with the unitøs Commanding Officer in person when he requested to do so.

On pages 21 and 22, even though the GAO report writers made no effort to assess marinersø perceived fairness of Settlement Agreements, the report leads us to believe their õlogical explanationö is that a settlement agreement will give a mariner a sanction other than outright revocation. In fact, 46 U.S. Code §7704(b) extends this ***possibility of "suspension"*** rather than outright revocation in certain õdrug casesö even without a settlement agreement.

While this explanation might be ***one factor*** in some cases, we do not believe it is the only explanation. While Congress recently changed 46 U.S. Code §7704(b), it is noteworthy that its companion regulation at 46 CFR §5.59(b) to this date has never been changed to reflect the change in the statute. It is reasonable for Congress to ask why this has not been done. The regulation is titled õOffenses for which a ***revocation of licenses, certificates or documents is mandatory***.ö In other words, the existing regulation fails to reflect the changed statute. Our Association has seen one such case (TRAHAN) where the local Coast Guard Marine Safety Office insisted in enforcing the harsher penalty of õrevocationö provided by regulation in place of the statute that allows for the possibility of õsuspension.ö This cost one mariner two years of gainful employment at an estimated cost to the family of $150,000 to $200,000. Our Association brought this matter to the attention of Chief Administrative Law Judge Ingolia by letter ó to no avail.

Point #3: The Number of ALJ Decisions.

The Executive Summary and graph show that only 3% of cases are resolved by an ALJøs Decision and Order.

We concede that this is a relatively small number, but recognize that the entire ALJ process very elaborate, time-consuming, and expensive. Three percent amounted to a total of 45 cases in the limited timeframe covered in the GAO report. Nevertheless, I feel it necessary to state that our principal complaints with the ALJ system center on this relatively small number of cases.

During the past 10 years, I have attended approximately 20 ALJ hearings ***as an observer*** before most of the Coast Guardøs sitting ALJs. I am not a lawyer, but received my postgraduate training as a secondary teacher in Social Studies. I have held a lower-level Masterøs license for 53 years.

Several years ago, I was told by its Commanding Officer and its current Chief of Investigations that the Morgan City, LA, Marine Safety Office tried more cases before ALJs than any other office in the country. The Chief of Investigations is a retired Coast Guard Lieutenant Commander and lawyer who trains uniformed active duty investigators including officers, warrant officers, and petty officers ó and works hard at it. I have attended many of these hearings in recent years as an observer after being discouraged by former Coast Guard officials for several years at that office. By contrast, I am now õinvitedö to attend the hearings both by the Coast Guard and the new ALJ for this area. I accept most invitations when my schedule permits.

I am troubled by Footnote #2 (p.1) that states in pertinent part: õIn addition to the approximately 600 suspension and revocation cases Coast Guard ALJs hear each year, the ALJs hear other types of casesí ö This, along with the Executive Summary and graph indicates that 600 is 3% of some much larger number. By simple Algebra, that number would be 20,000 ó a number totally out of line with the total of 1,675 S&R cases opened during the three-year timeframe of this report. Something appears out of order.

Point #3. Limited Time Frame of the GAO Report.

GAO limited its review to cases ***opened and closed*** between Nov. 30, 2005 and Sept. 30, 2008. The Judge Massey episode occurred in March 2005. The Baltimore Sun article was written in June 2007. The Congressional hearing was held July 31, 2007. The time frame the GAO examines is before many of the major cases our Association follows had their origins (i.e., ***before*** Nov. 30, 2005) and some of these cases still have not been resolved today! ***We question why GAO did not they look into these major cases as we suggested that they do.***

On page 3 of the GAO report: õDue to a change in policy regarding disposition of cases involving convictions for violations of drug laws that was effective from Nov. 10, 2005, we limited the time frame of our case file reviews to those cases that were opened from Nov. 10, 2005 through Sept. 30, 2008.ö We note that the GAO report fails to mention or explain of the nature of this õchange in policyö in the report and why it should truncate the scope of the report to three years.

One question posed under Objectives, Scope and Methodology (pages 40, 41) is: õWhat is the disposition of Coast Guard ALJ suspension and revocation cases that were opened and closed between Nov. 10, 2005 through Sept. 30, 2009?ö

The statistical results presented by this GAO report may be accurate within this narrow and artificial three-year time frame. However, as our Association reported to GAO in 2007, and the articles in the Baltimore Sun in June 2007 indicated, most of the individual cases we brought to their attention preceded or overlapped the time frame that their report covers and conveniently overlooks. We are not certain as to what the nine Congressional Requesters of this GAO were really looking for. However, we are concerned that they received a whitewash and a green signal for the Coast Guard to continue to conduct business as usual. We encourage Congress to proceed on the path of making those basic changes proposed in H.R. 2830 in the 110th. Congress!

We believe it was unfortunate that the GAO failed to examine the problems and, instead, chose to examine the structure of the program itself. The problem appears to be not so much with the program but, rather, whether it is carried out ***effectively*** and with ***fairness*** to our merchant mariners.

The changes that Congress proposed in H.R. 2830 dealt with ***changing certain aspects of the appeal process*** because the existing program was not conducted fairly as indicated in Congressional testimony and in widely circulated newspaper reports in the Baltimore Sun. The GAO freely admits on page .40 that ***"We did not, however, assess whether the structured elements are effective at enduring the ALJ's decisional independence."*** Our Association believes they should have done so and that the GAO report is deficient in that respect.

In our letter to Congress **[Enclosure #3]** we listed seven (7) cases where careers, reputations, and fortunes were ruined by prosecutorial excesses that we believe mariners should be afforded an opportunity to tell their stories to Members of Congress in a public forum. The appearance of this GAO report only reinforces our belief that Coast Guard will bury these abuses using the GAO report as cover for doing so.

Point #4: Protection for Mariners.

Another question posed under Objectives, Scope and Methodology (pages 40, 41) is: õTo what extent does the Coast Guardøs ALJ Program include protections for mariners, and do complaints and decisions include elements required by the programsø regulations?ö

Although the õALJ programö may ***appear*** to contain mariner protections, in actual practice many of these so-called õprotectionsö are illusory at best.

Discovery

On page 1 of the GAO report: õALJs preside in administrative proceedings that provide mariners the right to be represented by counsel and cross examine witnesses.ö ROGERS and PERIMAN both reported encountering insurmountable problems with in facilitating the ***discovery*** process.

On page 14, the APA õprotectionsö listed do not even mention discovery. In addition, based on my observations, the idea that many of our 126,000 lower-level credentialed mariners are capable of preparing written õfindings of fact or conclusions of lawö unaided by a trained attorney is patently ridiculous. Our mariners are boat handlers, not lawyers!

On page 29 of the GAO report: õFor example, the agencies have different procedures governing discovery, or the exchange of information between parties prior to adjudication. The Coast Guard and SEC require the parties to exchange certain information ***in all cases*** whereas for USDA and NTSB proceedings, all discovery is discretionary.ö

On page 32: õAn ALJ may also order further discovery, such as depositions, interrogatories, and requests for documents.ö We point out that these specific problems appeared in ROGERS, PERIMAN, and SHINE cases..

Appeals

On page 15 of the GAO report: õOther protections include the ***appeals*** processí .ö Most of our mariners could not be expected to successfully prevail in this daunting process without the help of a trained attorney. Attorneys are expensive; to engage them in repeated remands and protracted court actions is prohibitively expensive. ROGERS is the perfect example.

On pages 29 and 36: õThe appeals process also differs across the agencies. The Coast Guard is the only agency that has a ***two-step appeals process*** after the ALJ decision, with one of the appeals to a separate agency.ö We view this process as bewildering in its complexity to most mariners, especially considering that some, like SHINE, could not afford to be represented by counsel. Although I understand that the GAO auditors were contacted directly by the plaintiff, GAO simply chose to ignore the SHINE case.

The very limited issues subject to the appeal process, and the task of preparing a formal appeal can be confusing, even daunting to respondents with limited legal background, educational achievement, or writing experience ó that includes the vast majority of õlower-levelö mariners. In contrast, under USDA: õThe decision, or any part of the decision, or any ruling by the ALJö can be appealed.

On page 30: õAt NTSB, a party may appeal an ALJ decision to the full board.ö Appealing to a board of ***civilian human beings*** with a true interest in marine safety may be more attractive than framing an appeal to the Commandant. The Commandant has an entrenched interest in supporting and defending what has become a substandard and often unreliable investigation system. This reflects more than a personal opinion, and is reinforced by DHS report #OIG-08-51 that was published last year. Most mariners believe that the Commandant is predisposed to supporting his staff of military martinets over our civilian mariners that occasionally have the temerity to contest his attempt to discipline them.

Furthermore, (p. 38): õNTSB may not review an ALJ decision on its own initiative.ö Why does is the Coast Guard allowed this freedom to continue to destroy the lives of our mariners? Our Association asserts that 33 CFR §20.1001 must be withdrawn (as previously cited in our 2002 petition to the Coast Guard above).

On page 15: õThe Coast Guard ALJ programøs appeal process is designed to protect the marinersø interests.ö Footnote 36 (p.15) states: õ33 CFR §20.1001. A party may request that an ALJ disqualify himself or herself for personal bias or other valid cause. If the ALJ denies the request, the party may appeal that decision to the Commandant.ö We submit that this õprotectionö is more illusory than real. SHINE cited bias by ALJ Brudzinski to no avail. Ms. Janine Sullada, who attended the last SHINE hearing verified the perceived bias in a formal deposition. Nevertheless, the GAO report skirts the SHINE case and other cases we brought to its attention in their report.

It is very difficult for us to view NTSBøs decision to õremand a case to the Commandantö in any way as õdesigned to protect the marinerøs interest.ö The outcome in DRESSER has been protracted for many additional years as a result.

Hire a Lawyer and Dispute Allegations

Page 14: õí the ALJ program allows mariners to dispute any allegations at administrative hearings, provides that mariners be represented by attorneys, at the hearings, and allows mariners to appeal ALJsø decisions.ö

There is nothing unique about these Coast Guard õprotectionsö that are affirmed by the Administrative Procedures Act. They are what an American citizen should expect in the twenty-first century.

However, GAO does not touch on the fact that many mariners cannot afford representation by an attorney that may start with a retainer of $5,000 to $10,000. Our Association is well aware of this obstacle as a serious impediment. This, in itself, may explain the overwhelming prevalence of õsettlement agreements.ö Nor does the GAO mention that many civilian attorneys choose not to appear in Coast Guard ALJ hearings. For example, the former District Attorney of Terrebonne Parish who eloquently defended one of our mariners in state court, refused to speak on his behalf in a Coast Guard hearing. The thought that these procedures somehow protect our marinersø interests often are misplaced.

In the past, the Coast Guard stated that it would be more attentive to the merchant mariners it superintended. In a hearing before the Senate Judiciary Committee, CAPT A. C. Richmond, later Commandant of the Coast Guard, testified in pertinent part:[1]: õShould the person desire counsel but have no means of securing it, the Coast Guard supplies an officer to act in his defense.ö This certainly is not the practice today if it ever was! However, ALJ Bruce T. Smith expressed to me that he would much rather see a mariner adequately represented by an attorney in his courtroom than attempt to defend himself. This judge has, on his own volition, sought assistance from several law schools in assisting our mariners. This effort is commendable and deserves recognition. *[[1] 79th Congress, 2nd. Session, June 14-27, 1946, p. 217.]*

When an ALJ asks for õbriefsö before issuing a written order, this places an unfair burden on any mariner who is not represented by counsel. Most mariners do not have the faintest idea how to prepare an adequate legal brief. On the other hand, ***Coast Guard investigators always have access to free legal counsel***.

Todayøs merchant mariner is clearly outgunned by the Coast Guard with its college-educated officer corps and ready access to free legal counsel. Only one sitting ALJ, Judge Bruce T. Smith, has raised a finger to assist merchant mariners to obtain legal counsel. On behalf of our mariners, I praise him for these efforts and for his limited but growing success in soliciting assistance from university law schools in the Eighth Coast Guard District.

Following Published Procedures

On page 18 of the GAO report under the heading õSelect Mariner Protections We Assessed Are Being Followed,ö in ROGERS the Coast Guard never filed a formal initial complaint against the mariner. However, mistakenly believing they had done so, Captain Rogers subsequently protested the unfairness he encountered by writing Members of Congress and the Eighth District Commander. As a result, the Coast Guard increased the extent of the proposed sanctions against him. The temerity of his response outside the Coast Guardøs chain-of-command brought upon this vindictive action without any other compelling reason. Court papers show that ALJ Massey, who subsequently adjudicated the case, was well aware of this.

On page 14: õALJ proceedings are designed to protect the integrity of the credentials rather than to discipline or penalize merchant mariners.ö Unfortunately, the vindictiveness of the Coast Guardøs investigators are plainly visible in the SHINE transcript as well as in the ROGERS case ó neither of which were addressed in the GAO report.

Restrict Coast Guard Ability to Appeal an Adverse ALJ Decision

On Aug. 7, ***2002***, our Association protested the Final Rule 33 CFR §20.1001 (at 64 FR 28060, May 24, 1999) that allowed the Coast Guard to appeal an adverse ALJøs decision to the Commandant. Before 1998, Coast Guard regulations did not allow the Agency to appeal adverse ALJ rulings. Consequently, in 1999 they Coast Guard simply changed the rules. It is worth noting that there were only 5 comments to the entire rulemaking package that created the entire 33 CFR Part 20. Unfortunately, our response came several years after the closing date for comments and was occasioned by the sting of the practical application of the new rule.

Our Association protested the change following our experience with the PERIMAN case. That was mentioned in the 2007 Baltimore Sun article. You can find our petition in Docket #USCG-2002-12578 and the Coast Guardøs dismissal of it. We believe that this is the crux of the Coast Guardøs current problems and their ability to remand cases and tie a mariner in litigation forever.

The Coast Guard constantly remands troublesome cases to their ALJs for re-hearings until it exhausts our mariners both spiritually and financially. See PERIMAN, ROGERS, KINNEARY **[Enclosure #3]** as well as HENSLEY (2008)**.**

Although the Coast Guard summarily denied our petition filed in Docket #USCG-2002-12578, we assert that Congress should protect our mariners from remands of adverse ALJ decisions that are unfavorable to the Coast Guard. This would protect a judge that is willing to take a stand against a Coast Guard investigator if he/she finds the Coast Guard argument is not persuasive. We further cite DRESSER, ROGERS, SHINE and HENSLEY (2008) as abuses of this regulation the Coast Guard uses to the detriment of our mariners.

Whitewash

On pages 24 and 47: õIn addition to the technical comments, the Department of Homeland Security and the Coast Guard jointly provided an official letter for inclusion in the report.ö We strongly disagree with the following statements in the letter on page 47: õThe program works as intended ó marinersø rights are protected as noted while the safety at sea is promotedöí and õGAO also found that the program contains protections for mariners and that regulations for protecting these interests are being followed.ö

Point #5: Statistics.

While we do not challenge the statistics used in the GAO report, we note this statement on page 2: õIn particular, the data base was designed to function as a case tracking system and was not designed to capture the type of information that we were seeking.ö

We note that the articles in the Baltimore Sun brought to the attention of Congress in July 2007 dealt heavily with statistics gleaned by reporter Robert Little from the ALJ Docketing Center in Baltimore. The Coast Guard promptly disputed those statistics ***and now limits all access to formal FOIA requests*** that take weeks or more to

process. The GAO report makes no mention of the Baltimore Sunøs statistics, but we note that those statistics dealt with a much longer time frame than the recent statistics presented in the GAO report. While we are left with no alternative but accept the GAO statistics, we believe ***a much more extensive review should have reconciled the widely divergent statistics*** presented by a highly respected professional research journalist and released after extensive scrutiny by the newspaperøs editorial staff than those apparently assembled in rebuttal by the Coast Guard in defense of its embattled ALJ program.

Point #6. Reports of Coast Guard Interference or Undue Influence of ALJs.

Page 13 of the GAO report states: õCoast Guard officers, agents and employees who investigate for, or represent the Coast Guard in any administrative proceeding, are prohibited from participating or advising in the decision of the ALJ, except as a witness or counsel in the proceeding.ö

On page 13, in footnote 25: õThe APA provides that an ALJ may not engage in communications relevant to the merits of the proceeding with ***interested parties outside of the Agency***.ö

By refusing to examine the DRESSER case (that fell outside its narrow time frame from Nov. 10, 2005 through Sept. 30, 2008), GAO overlooked a prime example where CALJ Ingolia permitted former ALJ Boggs to proceed with DRESSER even after the NTSB found that ALJ Boggsø son, a lawyer who represented a firm with a significant financial interest õhemp oilö discussed in that case brought before his father had ***ex parte communications*** with his father dealing with the case then in litigation.

Apparently GAO also chose not to look into the meeting in New Orleans on Feb. 25, 2005 where the Coast Guard Eighth District investigators as well as staff from the ALJ Docketing Center and the appellate staff reportedly ***ganged up*** on ALJ Massey in ***early 2005***. If the OPM regulations are designed to ***guarantee*** decisional independence, it is clear that these regulations were grievously violated by this meeting as reported by ALJ Massey.

We believe that GAO should have examined this incident. Possibly, by limiting itself to a very constricted time period, and avoiding individual cases, GAO avoided looking into this issue that is an outstanding fact in ROGERS.

Along the same lines, when Commander Simon of Eighth District Legal Staff reportedly paid an unannounced visit to ALJ Massey to conduct an ***ex parte communication*** with Judge Massey as recited by ROGERS in his complaint to the FBI, these regulations were violated again. To the best of our knowledge and belief, ***the Coast Guard has taken no effective action against the perpetrators from within their own ranks***. We believe that this warrants additional Congressional scrutiny not only by the House but also by the Senate during the 111th. Congress.

ALJ Masseyøs verbal testimony on July 31, 2007 presented as an example of her experiences serving as an ALJ for the Coast Guard is cited below and its chilling effect on our mariners should not be discounted. Parts I emphasize (below) ***represent things that I have seen occur at ALJ hearings*** although I had no part in preparing this testimony:

%Mr. Chairman, Mr. LaTourette and members of the committee, thank you for the opportunity to contribute information to your investigation.

%For a moment, let me ask you to imagine that you are a mariner living in southern Mississippi. You are a high school graduate and you have worked as a crewman on a vessel that takes supplies to oil rigs in the Gulf of Mexico. You have been employed by various companies in the last 10 years, but you have never done any other type of work and ***you have no training to do any other type of work.***

%It is 1 p.m. in the afternoon and you are sitting in the upstairs hall of a regional Coast Guard facility, ***the same facility where the investigating officer you met with six months ago has his office***. It was then that he served you with a copy of a complaint that alleged you had been intoxicated on board the vessel you last worked on, and while intoxicated you assaulted another crew member. When your vessel docked after this incident, you were informed by the company's regional employee relationsq specialist that ***you were being fired because of the allegations, and they had to report the alleged incident to the U.S. Coast Guard.***

%When you met with the investigating officer (I.O), he took your mariner's credentials from you. ***You have been out of work for six months.*** Although the investigating officer explained to you that you had the right to an attorney to represent you at a hearing, ***you can't afford an attorney.***

%You feel if you just tell your side of the story, any reasonable person will know that the charges are not true. You believe that the Coast Guard will have several crewmembers present to testify because you know the Coast Guard took statements from them. They all know what really happened.

%When you received a witness list from the Coast Guard just two weeks before your hearing, you see that the names of all the crewmembers they interviewed are not on there. ***You don't understand that this means that the Coast Guard does not intend to call these men as witnesses.***

%***There are all sorts of uniformed Coast Guard employees milling about***. After about 15 minutes, a man comes up the stairs, accompanied by the I.O. you met with and two other uniformed U.S. Coast Guard employees.

They are laughing and talking and pay no attention to you. They all go into a room down the hall, a room you are summoned into in a few minutes. To your surprise, ***sitting on the bench is the man who was just laughing and talking with the Coast Guard employees***. ***None of the crewmembers that you know witnessed the incident are present***. The only people there are your former employer's regional employee specialist and the crewmember you had the fight with.

%The hearing is over in less than 30 minutes. The crewmember that you had the fight with testifies that you were intoxicated and that you attacked him for no reason. The employee specialist testifies that he received a report of the incident, took you off the boat because that was company policy and informed you that you were fired.

%You testify that you were not intoxicated, that the other crewmember had been drinking and he attacked you. You were only defending yourself. You also testify that this crewmember had it in for you because a former girlfriend of his had started dating you.

%You know but do not say that this guy is also a cousin of someone who is an executive in the company you worked for. You don't mention this because you don't know it is important and no one asks you. ***You tell the judge that there were other witnesses to the incident, but he tells you that if you didn't get them to the hearing, then he wasn't going to hear their testimony today because today was your hearing date and your only chance to present your evidence***. Before you really understand what is happening to you, the judge says your license is suspended for six months.

‰I hope that this scenario does not sound incredible or unlikely to the committee members because, based on my experience at the Coast Guard, this scenario is representative of past hearings, the type of hearings that have gone on for years at the Coast Guard.

‰I also hope that the committee members understand that I am here today only because I believe the suspension and revocation hearing process at the Coast Guard is in violation of its own regulations and of all the basic tenets of due process. Despite ***the personal attacks and disrespectful environment I was subjected to while at the Coast Guard***, my appearance here today has nothing to do with me personally. What has been happening to the mariners who have been forced to face Suspension and Revocation proceedings without the protections guaranteed by law is the only thing that matters. I welcome the questions of the committee members.+

On Page 29: õIn contrast, NTSB ALJøs handle the adjudication of cases arising in another agency, the FAA. Under this structure, which is called a split-enforcement model, the adjudicating agency is distinct from the regulating agency. That is, the ALJs that adjudicate disputes between the regulating agency and the regulated individuals are located within a separate agency.ö

Because of the ALJøs close identification of the Coast Guard, its investigators, and the fact that ***many ALJ hearings take place in Coast Guard facilities,*** etc. as pointed out by ALJ Massey (supra) in the hearing, the House agreed by a vote of 395 to 7 to separate these appellate functions in Section X of H.R. 2830 ó that vote unfortunately, did not survive the 110th. Congress.

Point #7. Explanation of Coast Guard Administrative Proceedings.

On pages 7-10 of the GAO report, the Coast Guard Administrative Proceedings including Default, Admission, Denial and Hearing, Settlement Agreement, Voluntary Surrender and Temporary Suspension generally are adequately explained along with the aims of the process. However, our mariners would be well served if they understood these provisions and were required to be tested on them in a õprofessional examinationö during while preparing for a license. However, no such requirement for training in administrative law exists for our mariners. For the most part, no exam questions cover 46 CFR Part 5 (Investigations), 33 CFR Part 20 (Formal Administrative Proceedings), 49 CFR Part 40 (drug testing regulations) or 33 CFR 95 (Alcohol testing regulations). Incidentally, the Coast Guardøs alcohol testing regulations depart sharply from comparable DOT regulations. .

Further, we question the use of the word õvoluntaryö as used in õvoluntary surrenderö of a credential. There is an ***implied threat*** that the alternative to a mariner not õ***voluntarily***ö relinquishing his credential that the Coast Guard official will drag him into a courtroom before an ALJ and have the credential taken away from him and that he never be able to get it back. This, in spite of the fact that 46 U.S. Code §7704(b) indicates that in ***drug cases***, the outcome of a hearing possibly could be a lesser penalty of ***suspension*** as opposed to revocation.

Where does the Coast Guardøs Administrative Clemency program fit in with õí affirming that the surrender is made voluntarily in preference to appearing at a hearing, that all rights to the credential are permanently relinquished and that any rights to a hearing are waived.ö The Coast Guardøs Administrative Clemency program is very complex. We found that, while it is basically a fair procedure, it is often an inadequately explained and often misunderstood by mariners. It is administered from Headquarters by the Coast Guard Office of Investigations and Analysis but not always well known or well explained to the mariners who must use depend upon it out in the field.

Although the Coast Guard ALJ program handles a very ***large percentage of drug and alcohol abuse cases***, and for many years the system appeared to be overburdened with these cases, the status of these cases never mentioned even once in the GAO report.

Point #8. The "Baggage" of the Coast Guard Investigations Program.

The Coast Guard Administrative Law program must deal with considerable õbaggageö of a poorly administered investigations program. We encourage you to have your committee staff request and review copies our Reports #R-429, #R-429-A and #R-429-B consisting of U.S. government reports that we believe amply support these allegations.

In 2008, the DHS Inspector General completed report #OIG-08-51, United States Coast Guardøs Management of the Marine Casualty Investigations Program. õInvestigationsö is one part of the Coast Guardøs Marine Safety program that was allowed to languish for at least the last 15 years. Many of its shortcomings in investigations find their way into cases brought against mariners. Our Association was invited to provide material to support the DHS report. DHS Auditors visited our offices, and we subsequently submitted 15 bound volumes of material for their inspection and consideration. A number of mariners, including those involved in several of our õmajor casesö subsequently contacted investigators at the DHS Hotline. However, no mention of this appears in the GAO report. Presumably, this information will be forthcoming in an DHS-OIG report (Footnote 3 on pg. 2) although this does not square with the GAOøs preliminary description of the anticipated DHS report in footnote.

Point #9: Assignment of Cases.

On page 7 of the GAO report: Cases are assigned to ALJs on a rotational basis unless the case is contested and may lead to a hearing. Under those circumstances, the case is assigned to an ALJ based on geographic proximity to the mariner.ö

Citing several of our õmajor casesö, why, then, wasnøt DRESSER assigned on remand to ALJ Massey in New Orleans in 2005 rather than to ALJ Brudzinski who had to be brought in from New York? If it had, there never would have been the incident reported by ALJ Massey that was one of the proximate causes of the July 31, 2007 Congressional hearing. This event is now part of ROGERS as well as DRESSER.

Why was Judge Parlen McKenna (San Francisco) allowed to recuse himself ***without a stated reason given to the respondent*** and ALJ Brudzinski (New York) sent across the country to San Diego, CA, to preside over the SHINE remand? Why were other judges imported to hear ALJ Densonøs cases in her geographic area during the 1990s.

Former ALJ Denson made what I consider to be some õon-targetö recommendations for reforming the ALJ program based upon her experiences in her written testimony submitted to the July 31, 2007 hearing.

Point #10: Comparison of ALJ Practices.

The GAO report (pages 2, 30-39 inclusive) compares the ALJ practices of four Federal agencies ó notably omitting the Social Security Administration. We note that ALJ Massey was an ALJ in the Social Security Administration and her past experience as an ALJ was mentioned by the Baltimore Sun article that triggered the Congressional hearing in 2007.

We believe it ***would have been helpful to include a comparison of the practices of the Social Security ALJs*** even though those ALJs cannot revoke credentials. Since the dispute still raging over ALJ Masseyøs forced õretirementö is central to understanding the problems with the current operation of the Coast Guard ALJ system, this should have been considered by GAO auditors.

On page 12, OPM regulations speak of protections for ALJs provided by a hearing before the Merit Systems Protection Board. Although we heard little beyond the point that ALJ Massey had õresigned,ö and have been unable to contact her, we are left in the dark as to whether she availed herself of the õprotectionsö offered ALJs under the OPM system.

Point #11: Concurrent review by DHS Inspector General.

On page 3, footnote 3: õConcurrent with our review, the Department of Homeland Securityøs Office of the Inspector General is reviewing specific ***allegations of bias among the Coast Guard's ALJs*** and will be issuing its own report on this issue later this year.ö

In a letter addressed to the Vice Commandant of the Coast Guard on June 30, 2008 **[Enclosure #4]** we asked Vice Admiral Crea to examine the 1,000-page transcript of the SHINE hearing concluded the previous month. The reply I received from a senior staff member did not indicate that the Coast Guard intended to do this. Since there

were a number of irregularities observed during the hearing and subsequently noted in a deposition submitted to the Coast Guard by Ms. Janine Sullada, who was present during all four days of the hearing, and attempted to assist the respondent with managing his paperwork, I would like to ascertain whether the DHS office of the Inspector General plans to take up this matter as part of their review of reported õbiasö by the during the hearing by ALJ Brudzinski?

Also troubling is the fact that Vice Commandant Vivian Crea, although assisted by legal staff, is not herself a lawyer. We note that she remanded the SHINE case to be re-tried before ALJ Brudzinski, a former Coast Guard officer.

We note that each ALJ, although chosen from a list provided by OPM (outside the Coast Guard), must be ***accepted*** in their position by the Commandant. Thereafter, each ALJ is ***paid*** by the Coast Guard and *takes directions* from the Chief ALJ who has an office in Coast Guard Headquarters and serves directly under the Commandant. Coast Guard commissioned, warrant or petty ***officers serve as investigators*** and ***also prosecute*** our mariners. Some ALJs, like ALJ Brudzinski, are ***former commissioned Coast Guard officers***. All appeals are handled by a legal staff controlled by ***military officers***. In an agency that is a branch of our nationøs military establishment, our merchant mariners are civilians and deserve to be regulated as like civilians and not treated as a forgotten appendage of a military organization that they outnumber in by a ratio of almost 5 to 1. We plead with Congress to re-think military control over the U.S. Merchant Marine and especially the õmarine safetyö mission except, possibly, during wartime.

Point #12. Judicial Reviews of ALJ Decisions

In regard to footnote #24 on page 11 and footnote #9 on page 16, the Federal district court for the Eastern District of Louisiana has DRESSER and ROGERS on their docket. Hopefully, the court will decide these cases expeditiously. We further note that SHINE contends that the Coast Guardøs ALJ process effectively sabotaged several cases that he brought in State and Federal District courts so they could stifle these suits and bring his case under the ALJ system where they could control his õwhistleblowingö that caused them embarrassment. Further, SHINE alleges that Coast Guard officers sabotaged his career in the naval reserve where he was up for promotion to the rank of Lieutenant Commander. We believe SHINE has been held captive within the ALJ system for over 6 years and DRESSER for over 11 years, and ROGERS over 4½ years. We hope that Congress will examine such allegations in regard to proposed legislative changes.

Point #13: The GAO Programmatic Analysis

Pages 19 and 20: õWe determined that almost all of the case files we reviewed contained the elements required to be included in a complaint against a mariner.ö í öcomplaints filed by Coast Guard and decisions issued by Coast Guard ALJs generally included elements required by the programøs regulations.ö õJust as the complaints filed against mariners are to contain specific elements, decisions rendered by ALJs are to also contain particular elements.ö These elements were identified in detail.

This is what the public should expect from such a program ó trained lawyers and paralegals following the regulations that are put in place for them to follow. This may be reassuring but deals with little other than the format and attention to detail that I observed in every ALJ hearing I have ever observed. However, this is less than sufficient to justify ignoring or glossing over known problems in the system.

Point #14: ALJ Offices in Baltimore and the District of Columbia.

On page 13: õAdditionally, Coast Guardøs OALJ maintains a separate headquarters office in Baltimore, Maryland and reports directly o the Office of the Commandant.ö

Why? Is this for the personal convenience of the Chief ALJ? Isnøt one central office in Coast Guard Headquarters enough to manage the small number of personnel assigned to this office?

I hope that these comments may be helpful in determining the future course of events.

Respectfully submitted,
Richard A. Block, B.A., M.S.
Master #1186377, Issue #9
Secretary, National Mariners Association