

The U.S. Coast Guard Office of the Judge Advocate General:

What We're All About

By Steven D. Poulin



The port was still. A full moon lit the rippling surface of the water as the large cargo vessel sat at the pier. As a Coast Guard port state control team boarded the foreign-flagged ship for a routine inspection, a junior engineer pulled a Coast Guard officer aside and discreetly handed him a thumb drive. The thumb drive contained a photograph of a bypass system designed to override the ship's pollution prevention equipment. After several hours of inspection and many phone calls with Coast Guard attorneys, the port state control team informed the mariners that the vessel would be held for further investigation.

Many lawyers don't consider the high seas, ports or thousands of miles of U.S. inland waterways when they think about criminal justice, regulatory enforcement or first responders. However, most of the earth's surface is covered in water and a lot of activity takes place on and below that most essential liquid. The U.S. Coast Guard Office of the Judge Advocate General (CGJAG) is the maritime realm's faithful guardian and it is useful for other government lawyers to have a basic understanding of how this unique part of the U.S. military operates.

Structure and Organization of CGJAG

The CGJAG is comprised of 194 military judge advocates; 92 civilian attorneys; and 87 paralegals, legal technicians and support staff.¹ CGJAG personnel are assigned throughout the United States; however, unlike the other military services, the Coast Guard does not have many bases or garrisons. Most major Coast Guard field units responsible for ensuring safe, secure and environmentally sound maritime commerce, such as the respective captains of the port (COTP) and officers in charge, marine inspection (OCMI), do not have Coast Guard attorneys on their staffs. A single Coast Guard officer commands one of the 37 regional units, or sectors. Each sector is responsible for a particular geographic area that likely covers coastal waters, multiple deepwater ports, inland waterways and navigable rivers.²

Using Mobile, Alabama, as an example, the commander of Sector Mobile wears many different hats, such as COTP, and has responsibility for marine inspection, maritime security, law enforcement, search and rescue, and hazardous materials and oil spill response authority for a geographic area that includes the

navigable waters of Mississippi, Alabama, the Florida Panhandle, and a small portion of southwestern Georgia. These waters include the ports of Gulfport, Pascagoula, Mobile, Pensacola and Panama City, as well as the Intracoastal Waterway and inland rivers in this geographic area. On these waters, the sector commander has broad legal authority to detain vessels for safety, security and environmental protection; to take enforcement action against vessels and mariners for violations of U.S. laws or treaties; and to take action to suspend or revoke certificates, licenses, or mariner credentials.

Legal advice to the commander of Sector Mobile is provided by the legal staff assigned to the Coast Guard Eighth District commander located

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in New Orleans. District commanders are the next echelon of command above sector commanders. A district command encompasses multiple sectors within a broad geographic region. The district commanders, who are Coast Guard flag officers (rear admirals) are located in Boston, Portsmouth, Miami, New Orleans, Cleveland, Alameda, Seattle, Juneau and Honolulu. Each of these locations has a legal office with both civilian and military attorneys.

The three-star (vice admiral) area commanders in Alameda (Pacific) and Portsmouth (Atlantic) are the next operational echelon above the district commanders and also have legal offices primarily comprised of military judge advocates. One of the reasons why military judge advocates predominantly staff district and area legal offices is that they handle the bulk of courts-martial for operational units under the Uniform Code of Military Justice and likely have the most proficiency in Coast Guard operational law and authorities. The area and district commanders also can exercise certain Coast Guard enforcement authorities that affect the maritime industry.³ The Coast Guard attorney working a particular matter may not be physically located either with the Coast Guard

officer exercising the relevant authority or even in the geographic area where the matter arose. Therefore, a matter arising in Mobile most likely will be referred to a Coast Guard attorney in New Orleans, a matter in Tampa would be referred to a Coast Guard attorney in Miami, and a matter in New York would be referred to a Coast Guard attorney in Boston.

CGJAG's largest element is the Legal Services Command (LSC), located in Portsmouth but with offices in Alameda as well.⁴ CGJAG also has a mix of military judge advocates and civilian attorneys at Coast Guard Headquarters in Washington, D.C. The civilian attorneys are the bedrock of both the LSC and the headquarters legal staffs because they provide continuity and specialization in critical areas of practice. The military judge advocates at headquarters primarily work in areas associated with operations and mission execution, military personnel, and command advice. Coast Guard headquarters attorneys work on matters with Coast Guard-wide application, especially those that involve the exercise of the commandant's authorities and decision making, broad legal oversight, management, and programmatic and national policy matters. Matters that

frequently arise at field operational units are elevated to Coast Guard Headquarters because of broader application or the need for national consistency. Otherwise, they may be issues of first impression that require higher program review and analysis or that arise from an appropriate appellate process.

The work of the Coast Guard is inherently international, and each of the statutory missions has an international component. International law is therefore a significant practice area for CGJAG during ongoing or contemplated operations. Coast Guard Headquarters attorneys also serve as legal advisers on U.S. delegations to myriad bilateral and multilateral meetings, including sessions of the various committees and subcommittees of the International Maritime Organization (IMO).⁵

Marine Casualty Investigations

The Coast Guard investigates casualties involving U.S. vessels wherever located and foreign flag vessels operating on the navigable waters of the United States.⁶ For foreign vessels not subject to United States jurisdiction, the Coast Guard may assist other countries when requested or when the United States is deemed a

“substantially interested state” under the IMO Casualty Code.⁷

The purpose of a marine casualty investigation, one of the most common types of Coast Guard investigations, is to determine causation and contributing factors, including human error (e.g., misconduct, incompetence, negligence, ineptitude or a willful violation of law), as well as to determine if there is evidence that might lead to referral to the U.S. Department of Justice for a civil penalty or criminal prosecution.⁸ Additionally, the marine casualty investigation will address what legal, regulatory or policy changes might be necessary to prevent recurrence of the casualty.⁹

Depending on the nature of the marine casualty, Coast Guard response personnel will frequently deploy to the scene of the incident to render aid and minimize damage to the environment. Once the initial response is well in hand, the Coast Guard will begin the process of investigation. Upon notification of a marine casualty, the vessel owner or operator, shipping agent, and crew members frequently ask their attorneys to arrive on the scene for representation.

For formal investigations, “parties in interest” shall be designated if they meet the statutory criteria. The Coast Guard will detail a Coast Guard attorney to advise the investigating officer or Marine Board, oftentimes designating a judge advocate in the convening order. The judge advocate does not question witnesses or introduce evidence but will advise the formal investigation on the proceedings and all other matters associated with the investigation. Often, the judge advocate is the primary link between the formal investigation and private attorneys representing parties in interest, dealing with witness and evidence lists, expected testimony, and associated rights accorded the parties in interest.

Pollution Investigations

The Coast Guard routinely conducts inspections on board U.S. documented and foreign flag vessels to ensure compliance with applicable domestic and

international safety, security and environmental protection standards. Most of these inspections are conducted pursuant to the port state control regime codified under U.S. law and extant treaties and conventions. These port state control inspections reflect the broad law enforcement authority that the Coast Guard enjoys to conduct “inquiries, examinations, inspections, searches, seizures, and arrests ...” on vessels subject to U.S. jurisdiction “for the prevention, detection, and suppression of violations of law of the United States. ...”¹⁰

During these inspections, the Coast Guard may discover substandard conditions or violations of law that require compliance or enforcement action. In these situations, additional Coast Guard personnel, including pollution investigators and the Coast Guard Investigative Service (CGIS), may be requested for assistance.

In the pollution context, a vessel will be detained by the OCMI if it is not in compliance with domestic and international law or if the vessel otherwise represents an unreasonable threat of harm to the marine environment or the public health and welfare. The detention will not be lifted until all noted deficiencies are corrected to the satisfaction of the Coast Guard inspector. Apart from ensuring compliance, the Coast Guard may also pursue enforcement actions including, but not limited to, (1) warnings, (2) notices of violation, (3) civil penalties or (4) referral for criminal prosecution. To be clear, Coast Guard boardings and inspections ensure compliance with applicable law; they are not quests for criminal liability. However, when violations of law are detected, criminal action might be warranted. In such cases, the matter is referred to the appropriate U.S. Attorney for consideration.

Aside from efforts to stem the flow of illicit activity and attack transnational crime, such as drug interdiction and human smuggling, the Coast Guard also makes criminal referrals for violations of the Act to Prevent Pollution from Ships (APPS)¹¹ and the Federal Water Pollution Control Act

(FWPCA, also known as the “Clean Water Act”).¹² The APPS implements the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978, commonly known as MARPOL, which prohibits the illegal dumping of oil, harmful substances, garbage and other pollutants into U.S. and international waters. While referrals for violations of the APPS and the FWPCA involve only a fraction of the maritime industry, the Coast Guard is still witnessing an alarming trend of vessels that unlawfully discharge oil and oily water in violation of the APPS and MARPOL. The Coast Guard has broad discretion to determine the requirements of vessel release.¹³ Accordingly, these agreements may contain a range of financial and nonfinancial requirements, such as a bond or other surety sufficient to cover the amount of costs that the vessel may owe, including any anticipated criminal or civil penalty.

After the boarding and inspection are completed, Coast Guard attorneys will assist the district commander in making a decision about whether to refer the case to the U.S. Attorney for prosecution. If the matter is referred and the U.S. Attorney accepts the case, any subsequent investigation of criminal activity would be in support of the U.S. Attorney’s prosecution and typically is conducted by the CGIS pursuant to its independent law enforcement authority.¹⁴

Investigation of Illegal Drug Trafficking, Violations of Fisheries Law and Terrorist Threats

The Coast Guard is charged with preventing terrorism against U.S. passengers at foreign and domestic ports and designated waterfront facilities. It faces difficult challenges against highly sophisticated adversaries. Coast Guard boarding teams face frequent violations of multinational fisheries agreements and foil high-tech attempts to smuggle drugs into the United States. The Coast Guard deploys off South America and in the drug transit zone. This

six-million-square mile area, roughly the size of the United States, includes the Caribbean, the Gulf of Mexico and the Eastern Pacific. The Coast Guard has intercepted thousands of tons of illegal drugs that otherwise would have found their way to America's streets.

Suspension and Revocation Proceedings

The Coast Guard has authority to suspend or revoke Merchant Mariner Credentials for acts of incompetence, misconduct, negligence, violations of law or regulation, and use of dangerous drugs.¹⁵ The purpose of suspension and revocation proceedings is to promote safety at sea.¹⁶ These proceedings are remedial, not penal, in nature and are intended to help maintain standards of competency and conduct essential to the promotion of safety at sea.¹⁷

Traditionally, Coast Guard investigating officers presented the case for the Coast Guard and it was uncommon to have a Coast Guard judge advocate or CGJAG attorney sit first or second chair in the proceeding. However, the Coast Guard changed its practice in recent years and now Coast Guard attorneys are assigned to each suspension and revocation proceeding. Investigating officers retain responsibility for investigating the basis for the suspension and revocation actions, managing the files, and preparing the complaint that will initiate the action. Prior to filing the action, the complaint will be reviewed by Coast Guard attorneys. The Coast Guard attorney likely will sit as first chair with the investigating officer sitting second chair, although the roles may be reversed based on experience.

Suspension and Revocation Appeals

Mariners have a formal appeals process for decisions and orders issued by Coast Guard administrative law judges (ALJs). The appellate procedures apply to appeals by either party, — i.e., the Coast Guard (government) or the mariner — and clearly state that only the following matters may be appealed:



- (1) Whether each finding of fact is supported by substantial evidence.
- (2) Whether each conclusion of law accords with applicable law, precedent, and policy.
- (3) Whether the ALJ abused his or her discretion.
- (4) The ALJ's denial of a motion for disqualification.¹⁸

Conclusion: Coast Guard, Protector of the United States

Many people take the protection of waterways and their environmental and economic health for granted. The safety and security of our water is vital to the health of our country. It is reassuring to know that the Coast Guard and its lawyers are working hard to protect it. ■

Endnotes

1. See U.S. COAST GUARD, WELCOME TO THE COAST GUARD LEGAL WEBSITE (modified Jan. 12, 2016), www.uscg.mil/legal.
2. See 33 C.F.R. pt. (2015).
3. See *id.* See also the discussion later in this article regarding the specific roles of the area and district commanders in the decision appeals process.
4. See U.S. COAST GUARD, LEGAL SERVICE COMMAND (modified Sept. 11, 2015), www.uscg.mil/lsc.
5. IMO is a specialized agency of the United Nations that provides an internationally recognized forum for Member States, informed by observer and non-governmental organizations, to establish

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global standards for safe, secure and environmentally sound shipping. The Coast Guard has been delegated responsibility to represent the United States at IMO. As such, the Coast Guard regularly heads U.S. delegations to a range of IMO sessions. The chief of the Office of Maritime and International Law at Coast Guard Headquarters leads the U.S. delegation to IMO's Legal Committee. See generally INT'L MAR. ORG., INTRODUCTION TO IMO (2016), www.imo.org/About/Pages/Default.aspx.

6. 46 U.S.C. § 6301 (2012).

7. Code for the Investigation of Marine Casualties and Incidents (Casualty Investigation Code) (Resolution A.849(20)) 1997. The United States objected to certain aspects of the code as inconsistent with federal law. Nevertheless, the Coast Guard will apply the code to the maximum extent practicable. The code defines the conditions for being a "substantially interested state."

8. 33 C.F.R. § 20.1001 (2015); 46 C.F.R. § 4.07-1.

9. 33 C.F.R. § 20.1001 (2015); 46 C.F.R. § 4.07-1.

10. 14 U.S.C. § 89 (2012).

11. 33 U.S.C. §§ 1901 et seq. (2012).

12. *Id.* §§ 1251 et seq. (2012).

13. *Id.* § 1908(e); see *Watervale Marine, Ltd. v. United States*, 12-Cv-0105 (D.D.C. July 18, 2014).

14. See 14 U.S.C. § 95.

15. 46 U.S.C. §§ 7701, 7703, 7704 (2012).

16. 46 U.S.C. § 7701(a) (2012).

17. 46 C.F.R. § 5.5 (2015).

18. 33 C.F.R. § 20.1001 (2015); 46 C.F.R. § 5.701 (2015).