

## 2011-2012 U.S. Maritime Legislative Developments

Constantine G. Papavizas\* and Lawrence I. Kiern\*\*

### I INTRODUCTION

Unlike the 111th Congress,<sup>1</sup> which was dominated in the maritime sphere by the piracy attacks on the *M/V Maersk Alabama* and the *M/V Liberty Sun* and the *Deepwater Horizon* incident, the 112th Congress was relatively workman-like on maritime matters. Most importantly, the U.S. Congress enacted the Coast Guard Authorization and Maritime Transportation Act of 2012,<sup>2</sup> which, combined with maritime changes made to the National Defense Authorization Act for Fiscal Year 2013,<sup>3</sup> made a number of significant changes to laws affecting the world-wide maritime industry.

### II LEGISLATIVE DEVELOPMENTS

#### A. Environment

##### 1. The RESTORE Act<sup>4</sup>

On July 6, 2012, President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (MAP-21), known more commonly as the

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\*Partner and Chair, Maritime Practice, Winston & Strawn LLP (Washington, D.C.). B.A. Georgetown University; M.I.A. Columbia University; J.D. George Washington University.

\*\*Partner, Winston & Strawn LLP (Washington, D.C.). B.S. U.S. Coast Guard Academy; M.A. Wesleyan University; Ph.D. University of Connecticut; J.D. University of Michigan.

<sup>1</sup>For a description of the maritime legislative activities of the 111th Congress, see Constantine G. Papavizas & Lawrence I. Kiern, 2009-2010 U.S. Maritime Legislative Developments, 42 J. Mar. L. & Com. 291 (2011).

<sup>2</sup>Pub. L. No. 112-213, 126 Stat. 1540 (2012) (2012 Coast Guard Act).

<sup>3</sup>Pub. L. No. 112-239, 126 Stat. 1632 (2012) (NDAA 2013).

<sup>4</sup>Pub. L. No. 112-141 (2012). Division A, Title I, Subtitle F is entitled the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act).

“highway” or “surface transportation” bill.<sup>5</sup> The legislation principally provided a two-year authorization of \$105 billion for diverse surface transportation programs, including highways.<sup>6</sup> Also, of particular significance to maritime interests along the Gulf Coast region, the legislation included the “RESTORE Act.”

The RESTORE Act established the Gulf Coast Restoration Fund to finance ecosystem and economic restoration activities in the Gulf Coast region. The law provides that 80 percent of administrative and civil penalties paid by responsible parties in connection with the 2010 Macondo incident will be deposited into the Fund. Absent this legislation, these penalty payments would have been deposited into the Oil Spill Liability Trust Fund. The remaining 20 percent will be deposited into that Trust Fund. While predictions vary about the likely amount of such penalties, the estimates have ranged from approximately \$4-\$21 billion.<sup>7</sup> The Department of Justice has already announced civil penalty settlements with responsible parties in excess of \$1 billion.<sup>8</sup>

Through various channels, the RESTORE Act distributes the funds to five Gulf Coast states affected by the oil spill: Alabama, Florida, Louisiana, Mississippi, and Texas. The Act requires that the funds be used for designated activities, *e.g.* ecosystem restoration, flood protection, port infrastructure development, promotion of fisheries and tourism, workforce development, and job creation.<sup>9</sup> As a result, this legislation promises to provide significant economic stimulus to the region as it seeks to rebound from the effects of the largest oil pollution incident in our nation’s history.

## 2. 2012 Coast Guard Act

The 2012 Coast Guard Act enacted into law important environmental measures and as a practical matter appeared to end a protracted legislative effort by congressional supporters of the maritime industry to secure a uniform national ballast water standard consistent with the International Convention for the Control and Management of Ship’s Ballast Water and Sediments (Ballast Water Convention).<sup>10</sup>

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<sup>5</sup>Pub. L. No. 112-141, 126 Stat. 405 (2012).

<sup>6</sup>*Id.*

<sup>7</sup>See Lawrence I. Kiern, “Washington Insider: Gulf Coast Restoration Legislation Surfaces,” *The Maritime Executive*, 18-20 (November/December 2011).

<sup>8</sup>Jonathan L. Ramseur, “Enacted and Proposed Oil Spill Legislation in the 112th Congress,” Congressional Research Service, 5 (January 16, 2013).

<sup>9</sup>*Id.* at 6-9.

<sup>10</sup><http://www.imo.org/ourwork/environment/ballastwatermanagement/Pages/Default.aspx>; the Ballast Water Convention, adopted in 2004 aims to prevent the spread of harmful aquatic organisms by establishing standards and procedures for the management of ballast water and sediments.

*a. Marine Debris Act Amendments of 2012*

Title VI of the 2012 Coast Guard Act<sup>11</sup> included amendments to the Marine Debris Research, Prevention, and Reduction Act.<sup>12</sup> The term “marine debris” engenders images of the trash or litter that floats around oceans or the Great Lakes or washes up on our nation’s beaches. Marine debris is particularly noticeable where rotating ocean currents collect it or deposit it ashore. But, its adverse impacts are felt more broadly affecting marine organisms and wildlife, ocean habitats, human health, and even navigational safety.<sup>13</sup>

Congress has reported that the life span of marine debris can range from 2 weeks for some paper products to 450 years for plastics.<sup>14</sup> And the enduring problems are not merely esthetic - rather, marine debris can injure and even destroy marine organisms in multiple ways. For example, “ghost” fishing nets continue to ensnare marine wildlife for years after being lost from fishing vessels, and plastic particles can insidiously enter the food chain and poison marine wildlife. Additionally, Congress has noted the heavy direct economic costs incurred by industries and governments, *e.g.* derelict fishing gear damaging the Washington state Dungeness crab industry and local government efforts combating marine debris that washes ashore to protect local tourism.<sup>15</sup>

Until recently, the problems caused by marine debris were treated more as chronic in nature, rather than an emergency. For almost three decades, reports of the “Great Pacific Garbage Patch” have circulated and more recently those reports have received increased attention in the mainstream media, including major television network news reports. However, severe marine debris events like the March 2011 Tohoku earthquake and subsequent tsunami and the October 2012 “super-storm” Sandy have highlighted the serious problems associated with marine debris within the context of natural disasters affecting the United States.

In 2006, the Marine Debris Research, Prevention, and Reduction Act was enacted in response to recommendations made by the U.S. Commission on Ocean Policy.<sup>16</sup> The Commission recommended the establishment of a program within the National Oceanic and Atmospheric Administration (NOAA)

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<sup>11</sup>126 Stat. at 1576-1579.

<sup>12</sup>Pub. L. No. 109-449, 120 Stat. 3333 (2006) (33 U.S.C. §1951, *et. seq.*)

<sup>13</sup><http://marinedebris.noaa.gov/info/patch.html#1>. According to reports, small bits of plastics and other marine debris may account for the deaths of many thousands of seabirds and marine mammals annually.

<sup>14</sup>H. Rep No. 112-584, Part 1 at 4 (2012).

<sup>15</sup>H. Rep. No. 112-584, Part 2 at 25 (2012).

<sup>16</sup>Constantine G. Papavizas and Lawrence I. Kiern, “2005-2006 U.S. Maritime Legislative Developments,” 38 J. Mar. L. Comm. 267, 289 (July 2007).

and required reporting by the U.S. Coast Guard (Coast Guard) regarding the effectiveness of MARPOL<sup>17</sup> Annex V which regulates the handling and disposal of certain non-petroleum ship-generated wastes from larger vessels at sea. The International Maritime Organization has recently tightened the restrictions on the discharge of garbage from ships at sea such that it is now generally prohibited.<sup>18</sup>

The original NOAA program goals included mapping, identification, impact assessment, education, and coordination aimed at reduction and prevention of marine debris. NOAA and the Coast Guard promulgated regulations to define “marine debris” as “any persistent solid material that is manufactured or processed and directly or indirectly, intentionally or unintentionally, disposed of or abandoned into the marine environment, including the Great Lakes.”<sup>19</sup>

The new amendments reauthorize the program, and as a practical matter attempt to nudge NOAA’s marine debris program forward. The amendments require the agency to advance beyond the initial progress of data collection and education to spur improved efforts to actually reduce and remove marine debris, including planning for severe marine debris events, and thereby prevent adverse impacts of such debris on the marine environment, navigation safety, and the nation’s economy. The amendments specifically target development of fishing gear modifications or alternatives to conventional fishing gear posing a threat to the marine environment, and development of effective non-regulatory measures and incentives to cooperatively reduce the volume of lost and discarded fishing gear and to aid in its recovery. Unfortunately, Congress did not increase the authorized funding levels for the program, but subsequent legislative proposals have surfaced that would increase funding to assist local governments cope with the burden presented by marine debris from severe marine debris events washing ashore on local beaches.

*b. Vessel General Permit (VGP) Moratorium Extension*<sup>20</sup>

Title VII of the 2012 Coast Guard Act included, among other provisions, an extension to December 18, 2014 of the moratorium which, as a practical matter, largely bars application of the Environmental Protection Agency’s

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<sup>17</sup>The International Convention for the Prevention of Pollution from Ships, [http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-\(marpol\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx).

<sup>18</sup>78 Fed. Reg. 13073 (Feb. 26, 2013).

<sup>19</sup>33 C.F.R. § 151.3000 (2012).

<sup>20</sup>2012 Coast Guard Act § 70, 126 Stat. at 1580.

(EPA) VGP to the nation's fishing vessel fleet and operators of vessels of less than 79 feet in length.<sup>21</sup>

Despite controversy, the EPA's VGP survived court challenges largely unscathed and its second iteration was published on April 12, 2013 and is scheduled to take effect on December 19, 2013.<sup>22</sup> Following widespread maritime industry protest against the VGP's costly burdens, the agency and key states moderated important aspects of their original proposals, including impractical ballast water numeric effluent standards, that sparked the industry's ire.<sup>23</sup> As a result, the maritime industry has largely taken the new regulatory requirements in stride, especially because it lacks any practical alternative to the EPA regulation.

During the 112th Congress, supporters of the maritime industry advanced a legislative proposal in the U.S. House of Representatives that would have established a uniform national ballast water standard and prohibited states from setting stricter standards.<sup>24</sup> However, in the face of opposition in the U.S. Senate, this provision was dropped from the final legislation approved by Congress and signed into law by the President. Additionally, in light of the EPA's decision in its new VGP to adopt the uniform ballast water standard set forth by the Coast Guard's ballast water regulation and the Ballast Water Convention, and to exempt domestic vessels under 1600 gross tons on coastal voyages because of practical considerations, it appears the political controversy over ballast water regulation at the federal level in the United States is largely resolved for the time being.

In August 2010, the EPA submitted to Congress a required report on waste stream discharges from fishing vessels and commercial vessels exempted from the VGP by the moratorium.<sup>25</sup> The report concluded that some vessel

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<sup>21</sup>See, Pub. L. No. 110-299, 122 Stat. 2995 (2008), as amended Pub. L. No. 111-215 (2010) (33 U.S.C. § 1342 note); Constantine G. Papavizas and Lawrence I. Kiern, "2007-2008 U.S. Maritime Legislative Developments," 40 J. Mar. L. Comm. 267, 289 (July 2009).

<sup>22</sup>78 Fed. Reg. 21938 (Apr. 12, 2013).

<sup>23</sup>See Lawrence I. Kiern, "Washington Insider: Money & Regulations Top Washington's Agenda," *The Maritime Executive*, 19 (March/April 2012).

<sup>24</sup>On November 16, 2011, the U.S. House of Representatives passed H.R. 2838, the "Coast Guard and Maritime Transportation Act of 2011." This bill included a proposed amendment to Title III of the Federal Water Pollution Control Act (33 USC § 1311 et seq.) by adding the proposed "Commercial Vessel Discharges Reform Act of 2011." If enacted into law, the provision would have regulated discharges from commercial vessels by establishing a national ballast water performance standard and prohibiting states from setting stricter standards. The provision was the subject of a rare floor fight involving the Coast Guard authorization legislation in which largely Democratic opponents of the provision failed by a vote of 174-225 to strip the provision from the bill. Eugene Mulero and Alexander C. Hart, "House Passes Coast Guard Reauthorization," CQ Today Online News, 2 (November 15, 2011).

<sup>25</sup>Report to Congress: Study of Discharges Incidental to Normal Operation of Commercial Fishing Vessels and Other Non-Recreational Vessels Less than 79 Feet (EPA 833-R-10-005), U.S. Environmental Protection Agency (August 2010); <http://cfpub.epa.gov/npdes/vessels/reportcongress.cfm>.

discharges from commercial fishing vessels and commercial vessels less than 79 feet in length may have the potential to impact the aquatic environment and human health. The EPA determined that incidental discharges from these vessels into a relatively large water body are not likely to cause water quality standards to be exceeded. However, the agency opined that there is a potential for these discharges to impair water quality, especially in smaller confined bodies of water already containing other pollutants. To date, Congress had taken no action with respect to the EPA report other than to extend the moratorium.

### *B. Jones Act, Short Sea Shipping*

The U.S. coastwise trade is restricted to qualified U.S.- flag vessels (absent an exception) by several laws commonly referred to as the “Jones Act.”<sup>26</sup> The Jones Act is sometimes controversial. For example, it was alleged following the *Deepwater Horizon* incident that the Jones Act impeded the spill response and that the Act should have been waived to permit foreign-flag vessels to assist.<sup>27</sup> During the 112th Congress, the Jones Act arose in particular with regard to waivers issued in connection with the June 2011 sale of approximately 30 million barrels of crude oil from the Strategic Petroleum Reserve maintained by the U.S. Department of Energy. Those waivers precipitated a number of legislative reactions which, when combined with other legislative activity, made the 112th Congress a busy two years on Jones Act matters.

#### *1. Jones Act Waivers*

Congress enacted authority in 1942 to waive the Jones Act as a temporary war time measure.<sup>28</sup> In that law, made permanent in 1950,<sup>29</sup> “navigation or vessel-inspection laws,” which includes the Jones Act, can be waived either upon request of the Secretary of Defense or by the U.S. Department of Homeland Security (as the department containing the agency which is charged with administration of the navigation and vessel inspection laws, which is U.S. Customs and Border Protection for purposes of the waiver section) when it is considered “in the interest of national defense.”<sup>30</sup> In 2008, the

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<sup>26</sup>46 U.S.C. § 55102. Other maritime cabotage laws govern the carriage of passengers, dredging and towing.

<sup>27</sup>See Robert B. Bluey, “Jones act is no laughing matter,” *Politico* (July 1, 2010).

<sup>28</sup>Pub. L. No. 77-507, § 501, 56 Stat. 176 (1942).

<sup>29</sup>Pub. L. No. 81-891, 64 Stat. 1120 (1950).

<sup>30</sup>46 U.S.C. § 501. U.S. Customs and Border Protection has indicated in a number of rulings that commercial expediency is not a sufficient reason to grant a Jones Act waiver. E.g. Response to Request of David Mayo, Freight Management Companies, HQ 112085 (Mar. 10, 1992).

waiver provision was amended to require a determination by the U.S. Maritime Administrator “of the non-availability of qualified United States flag capacity to meet national defense requirements” before a waiver can be granted.<sup>31</sup>

This waiver authority became a matter of controversy with respect to the sale of crude oil from the Strategic Petroleum Reserve in 2011. When the sale was initially announced, the Department of Energy (DOE) indicated that a blanket Jones Act waiver would apply – which it then withdrew the next day in favor of case-by-case waivers.<sup>32</sup> During a pre-bid briefing, DOE indicated that the oil would be sold in 500,000 barrel increments and that bidders would not be required to divide lots to accommodate available Jones Act vessels.<sup>33</sup> The result, given the general lack of qualified U.S.- flag vessels able to carry 500,000 barrels at a time, was the issuance of almost 50 individual Jones Act waivers.<sup>34</sup>

The U.S. - flag Jones Act community reacted negatively to this result. The American Waterways Operators, for example, were quoted as saying that “all the profit from movement of the oil has gone to foreign shippers and crewmen, and that’s galling.”<sup>35</sup>

Congressional reaction was also negative. Congress included in the Consolidated and Further Continuing Appropriations Act, signed into law on November 18, 2011, a waiver limiting requirement.<sup>36</sup> For Fiscal Year 2012, no waiver could be issued with respect to any other SPR sale except following consultation with private industry as to the availability of vessels, singly or collectively, to carry the SPR oil.

A second Fiscal Year 2012 restriction was added in the Consolidated Appropriations Act, 2012.<sup>37</sup> That Act also required the Department of Homeland Security to inform certain Congressional committees within 48 hours of the issuance of any waiver of “navigation or vessel inspection laws.”

A permanent waiver change was made in section 301 of the 2012 Coast Guard Act.<sup>38</sup> In connection with the requirement that no waiver may be

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<sup>31</sup>Pub. L. No. 110-417, § 3510, 112 Stat. 4356, 4769 (2008).

<sup>32</sup>See, e.g., Tom Doggett, “White House drops plan to let foreign vessels move SPR oil,” *Reuters* (June 24, 2011).

<sup>33</sup>Sayeh Tavanger, “DOE offers more details on SPR auction,” *Platt’s Energy Weekly, Inside Energy Extra* (June 28, 2011).

<sup>34</sup>See A Review of Vessels Used to Carry Strategic Petroleum Reserve Drawdowns Before the Subcomm. on Coast Guard & Maritime Transportation, H. Comm. on Transportation & Infrastructure, 112th Cong. (2012).

<sup>35</sup>John M. Broder, “Oil Reserves Sidestep U.S. Vessels,” *N.Y. Times* (Aug. 23, 2011).

<sup>36</sup>Pub. L. No. 112-55, § 172, 125 Stat. 552 (2011).

<sup>37</sup>Pub. L. No. 112-74, § 529, 125 Stat. 786 (2011).

<sup>38</sup>126 Stat. at 1562.

granted unless the Maritime Administrator finds a lack of U.S.- flag capacity, the Administrator must also identify actions which could be taken to enable U.S.- flag vessels to meet the national defense requirements, must provide notice to appropriate agency heads of a waiver request and must publish each waiver request within 48 hours of receipt.

## 2. *Jones Act Citizenship Requirements*

The Jones Act restricts the U.S. domestic maritime trade to qualified U.S.- flag vessels owned and operated by qualified U.S. citizens, absent an exception.<sup>39</sup> To qualify as a Jones Act citizen, a company must be owned at least 75 percent by U.S. citizens.<sup>40</sup> As the law does not look specifically to aggregate U.S. ownership for purposes of the Jones Act, non-citizens can effectively own more than 25 percent of an overall Jones Act enterprise. A proposal was advanced in the 112th Congress that would have limited non-citizen ownership to 25 percent by taking into account each tier of owning entities. A similar requirement pertains to large U.S. fishing vessels under the 1998 American Fisheries Act.<sup>41</sup> The proposal was not adopted by the 112th Congress.

## 3. *Proposed Jurisdiction Extension for Offshore Alternative Energy*

The Jones Act only applies beyond U.S. territorial waters into the U.S. Gulf of Mexico and otherwise onto the U.S. outer continental shelf by virtue of the Outer Continental Shelf Lands Act (OCSLA).<sup>42</sup> OCSLA applies by its terms to the exploration, development and production of mineral resources.<sup>43</sup> Anticipating that alternative energy projects (such as offshore wind farms) would likely occur on the U.S. outer continental shelf, Congress amended OCSLA in the Energy Policy Act of 2005 to grant the U.S. Department of Interior authority to enter into offshore leases of renewable energy projects and to otherwise regulate such projects.<sup>44</sup> It was not clear, however, that Congress had amended the law so as to extend the Jones Act to renewable energy projects, which was noted by commentators.<sup>45</sup> To clear up the potential confusion, the U.S. House of Representatives passed the Providing for

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<sup>39</sup>46 U.S.C. § 55102(b).

<sup>40</sup>46 U.S.C. § 50501(a).

<sup>41</sup>Pub. L. No. 105-277, Div. C, tit. II §§202-204, 112 Stat. 2681-616 (1998); see, e.g., 46 C.F.R. § 67.39(b)(2).

<sup>42</sup>Pub. L. No. 83-212, 67 Stat. 462 (1953).

<sup>43</sup>43 U.S.C. § 1333(a)(1).

<sup>44</sup>Pub. L. No. 109-58, 119 Stat. 594 (2005).

<sup>45</sup>See Constantine G. Papavizas & Gerald A. Morrissey III, "Does the Jones Act Apply to Offshore Energy Projects?", 34 *Tulane Mar. L. J.* 377 (Summer 2010).



Our Workforce and Energy Resources (POWER) Act on December 8, 2011 making it clear that OCSLA extended the Jones Act to renewable offshore projects.<sup>46</sup> The act was opposed,<sup>47</sup> and the U.S. Senate never acted on it in the 112th Congress.

#### 4. Anti-Jones Act Legislation

High gasoline prices in the United States prompted some criticism of the Jones Act during the 112th Congress. The theory advanced was that the Jones Act somehow increased the price of domestic gasoline to a level it would not have been but for the Jones Act requirement to utilize U.S.- flag vessels to transport U.S. petroleum products.<sup>48</sup> The criticism led to the proposal of several amendments by Sen. John S. McCain to the “Repeal Big Oil Tax Subsidies Act”<sup>49</sup> either to repeal or substantially amend the Jones Act.<sup>50</sup> None of the amendments were actually offered for a vote by the U.S. Senate.

#### 5. America’s Cup Act of 2011

Proving that it can act quickly if properly motivated and where the political stars align, the 112th Congress enacted the America’s Cup Act of 2011 which went from introduction to Presidential signature in 27 days (November 2, 2011 to November 29, 2011).<sup>51</sup> The Act relaxed Jones Act restrictions applicable to both competing and supporting vessels (such as vessels used to re-position yachts among race venues) participating in the running of the 34th America’s Cup races in the United States.

#### 6. Containerized Short Sea Shipping

The coastwise marine transportation of goods around the United States, often referred to as “short sea shipping” or shipping on the “marine highways,” has often been cited as a potential solution of current and future highway and rail congestion.<sup>52</sup> The 2012 Coast Guard Act mandates a new focus on barge transportation of containers on U.S. marine highways. Specifically, section 410 of that Act requires the U.S. Maritime Administration

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<sup>46</sup>H.R. 2350, 112th Cong., 1st Sess. (2011).

<sup>47</sup>See Jack Spencer and Romina Boccia, “POWER Act: Doubling Down on Bad Energy Policy,” *Web Memo: The Heritage Foundation* (Dec. 13, 2011).

<sup>48</sup>E.g. Gregg Laskoski, “Rescinding Jones Act First Step to Lowering Gas Prices,” *U.S. News Opinion Blog* (March 7, 2012).

<sup>49</sup>S. 2204, 112th Cong., 2d Sess. (2012).

<sup>50</sup>See “McCain amendments target Jones Act,” *AMO Currents* (March 27, 2013).

<sup>51</sup>Pub. L. No. 112-61, 125 Stat. 753 (2011).

<sup>52</sup>E.g. Maritime Admin.. U.S. Dep’t of Transportation, “America’s Marine Highway – Report to Congress” (April 2011).

(MARAD), within a specified period, to complete a design of a “containerized, articulated barge” with dual commercial and defense use “that is able to utilize roll-on/roll-off or load-on/load-off technology in marine highway maritime commerce.”<sup>53</sup> Section 411 requires MARAD to assess the potential for “container-on-barge” usage in short sea transportation.<sup>54</sup>

### *C. Security*

#### *1. Piracy*

The pirate attacks on the U.S.- flag vessels *M/V Liberty Sun* and *M/V Maersk Alabama* in April 2009 led to a flurry of U.S. Government action and Congressional attention during the 111th Congress.<sup>55</sup> Although there has not been another high profile attack on a privately owned U.S.- flag vessel since that time, Congress has continued to consider improvements to the legal landscape affecting U.S.- flag vessels.

In the 2012 Coast Guard Act, Congress enacted several new provisions relating to piracy focusing on armed security, reporting and training. With regard to armed security, the 2012 Coast Guard Act requires the Secretary of Transportation to direct other agencies shipping their cargoes in U.S.- flag vessels to provide armed personnel to protect vessels or reimburse vessel owners for the provision of armed personnel when the vessels transit “high risk waters.”<sup>56</sup> On reporting, the law requires the Secretary of Defense, in consultation with the Department of Homeland Security, to report to specified Congressional committees regarding actions taken to protect non-U.S.- flag vessels from pirate attacks from 2009 to 2012 and the estimated cost of such actions.<sup>57</sup> Finally, Congress required the Secretary of Transportation, in consultation with the Department of Defense, to certify a training curriculum for U.S. mariners on the use of force against pirates, including defense tactics and procedures to improve crewmember survivability if captured and taken hostage by pirates.<sup>58</sup>

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<sup>53</sup>126 Stat. at 1572.

<sup>54</sup>*Id.*

<sup>55</sup>See Constantine G. Papavizas & Lawrence I. Kiern, “2009-2010 U.S. Maritime Legislative Developments,” 42 *J. Mar. L. & Com.* at 304 (July 2011).

<sup>56</sup>126 Stat. at 1575.

<sup>57</sup>126 Stat. at 1575-76.

<sup>58</sup>126 Stat. at 1575.

## 2. *Transportation Worker Identification Credential (TWIC) Revision*

A key element of the Maritime Transportation Security Act of 2002 was the imposition of a requirement that all persons entering a secure area in a port/terminal facility or vessel must either have a Transportation Worker Identification Credential (TWIC) or be escorted by someone with a TWIC card.<sup>59</sup> One of the ongoing criticisms of the TWIC program is the difficulties often faced by applicants in applying for, qualifying for and obtaining their cards. Section 709 of the 2012 Coast Guard Act addresses that problem by streamlining the process so that applicants do not have to make two trips to the same enrollment center to obtain their TWIC card.<sup>60</sup>

### *D. Preservation and Promotion of the U.S.- Flag Fleet*

#### *1. Maritime Security Program Amendments*

One of the most successful U.S.- flag promotion programs has been the Maritime Security Program initially authorized in the Maritime Security Act of 1996.<sup>61</sup> In that initial authorization, the Program provided stipends to 47 militarily useful privately owned U.S.- flag vessels. In exchange, the relevant vessel owner or operator is required to make the enrolled vessel, as well as related intermodal assets, available to the U.S. Government in the event of national emergency or war. The Program operates through individual Maritime Security Program Operating Agreements which are ten year contracts with MARAD subject to annual appropriations.

The Maritime Security Program was expanded in 2003, effective in 2005, in the Maritime Security Act of 2003 which was included in the National Defense Authorization Act for Fiscal Year 2004.<sup>62</sup> Among the changes made was to increase the number of vessels from 47 to 60. The 2003 program authorization was a ten-year authorization expiring on September 30, 2015.

In 2011, Congress extended the termination date of the Maritime Security Program from 2015 to 2025.<sup>63</sup> No other changes were made to the Program at that time.

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<sup>59</sup>See Pub. L. No. 107-295, 116 Stat. 2064 (2002).

<sup>60</sup>126 Stat. at 1581; see "AWO Applauds Passage of Coast Guard Bill," *Maritime Professional* (January 1, 2013).

<sup>61</sup>Pub. L. No. 104-239, 110 Stat. 3118 (1996).

<sup>62</sup>Pub. L. No. 108-136, 117 Stat. 1392, 1802 (2003).

<sup>63</sup>Pub. L. No. 111-383, 124 Stat. 4137, 4518 (2011).

In 2012, Congress enacted substantial changes to the Maritime Security Program for the newly extended authorization period.<sup>64</sup> Congress amended MSP to adjust the vessel eligibility requirements, to increase the stipend levels over time, to require that all 60 contractors be offered to extend their contracts for an additional ten years without competition, to provide a procedure for the issuance of contracts if any offer was not accepted by any contractor and to eliminate the requirement that transfers of contracts be to qualified U.S. citizens unless no such citizen is available.

The “grandfathering” of all 60 contracts and the elimination of the citizenship transfer restriction were controversial.<sup>65</sup> It was alleged that the Program was dominated by foreign citizen controlled companies, that such domination should be alleviated and that the U.S. Government should take advantage of a competitive procurement process before issuing new contracts for the 2015–2025 period. In the end, Congress did not accept these arguments and the grandfather and elimination of the citizenship provisions were enacted.

## 2. *Anti-Cargo Preference Provision*

The privately owned U.S.- flag commercial fleet engaged in the foreign trade depends heavily on U.S. cargo preference laws and requirements for its survival. One cargo preference law – the Cargo Preference Act of 1954<sup>66</sup> – generally reserves 50 percent of certain U.S. Government impelled cargoes to qualified U.S.- flag vessels. That 1954 Act was amended in 1985 with respect to international food-aid cargoes, predominantly pursuant to Public Law 480 or PL 480, to increase the reservation percentage to 75 percent.<sup>67</sup> Without notice or any advance public consideration, the U.S. Congress repealed the 1985 increase to 75 percent in the 2012 in the Moving Ahead for Progress in the 21st Century Act (MAP-21).<sup>68</sup> Certain members of Congress, especially Rep. Elijah E. Cummings on Maryland, immediately began efforts after the repeal to reverse the change, although no further change was made in the 111th Congress.<sup>69</sup>

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<sup>64</sup>Pub. L. No. 112-239, 126 Stat. 1632, 2223 (2013).

<sup>65</sup>See, e.g., Brendan McGarry, “Maersk-Led Foreign Control of U.S. War Shipping Seen Continuing,” *Bloomberg* (Oct. 25, 2012).

<sup>66</sup>46 U.S.C. § 55305.

<sup>67</sup>See 46 U.S.C. §§ 55311-55318.

<sup>68</sup>Pub. L. No. 112-141, 126 Stat. 405, 915 (2012).

<sup>69</sup>See H.R. 6170, 112th Cong., 2nd Sess. (2012) (42 co-sponsors).

### *3. U.S.- Flag Fleet Studies*

The 112th Congress mandated that several studies be done regarding the U.S.- flag fleet. The 2012 Coast Guard Act requires the Coast Guard to report within 180 days of enactment on the factors under Coast Guard control “that impact the ability of vessels documented in the United States to effectively compete in international transportation markets.”<sup>70</sup> The 2012 Coast Guard Act also required the Comptroller General of the United States to conduct a study within one year of the date of enactment “of the training needs of the maritime workforce.”<sup>71</sup>

### *D. Taxes*

#### *1. Harbor Maintenance Tax*

One of the perennial areas of concern in the U.S. maritime industry is the lack of funding for the maintenance and improvement of U.S. maritime infrastructure. The issue is particularly frustrating because the U.S. Congress enacted in the Water Resources Development Act of 1986 a harbor maintenance tax purportedly to fund such maintenance and improvements, but the funds generated from the tax have not been used for that purpose.<sup>72</sup> Legislation was introduced in the 112th Congress by Rep. Charles Boustany, Jr. of Louisiana and 196 co-sponsors to ensure that harbor maintenance tax collections would be used for harbor maintenance programs.<sup>73</sup> The legislation was known as the “Realize America’s Maritime Promise Act” or “RAMP Act.” The bill was not enacted into law in the 112th Congress but is likely to be taken up again by the 113th Congress.

#### *2. U.S. Controlled Fleet Tax – Subpart F*

The American Jobs Creation Act of 2004 permitted U.S. companies to defer federal income taxes under Subpart F of the Internal Revenue Code on certain foreign source shipping income.<sup>74</sup> However, for foreign earnings reinvested in foreign shipping assets before 1987, such earnings could not be

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<sup>70</sup>126 Stat. at 1584.

<sup>71</sup>Id. at 1573.

<sup>72</sup>See, e.g., Testimony of Kurt J. Nagle, President and CEO, American Association of Port Authorities, before the Hearing on Harbor Maintenance Funding and Maritime Tax Issues, U.S. House of Representatives, Ways and Means Committee, 112th Cong., 2d Sess. (Feb. 1, 2012).

<sup>73</sup>H.R. 104, 112th Cong., 1st Sess. (2011).

<sup>74</sup>Pub. L. No. 108-357, 118 Stat. 1418 (2004).

repatriated without the application of income tax to those earnings.<sup>75</sup> The 112th Congress considered,<sup>76</sup> but did not enact, legislation which would have ameliorated this issue of “stranded” pre-1987 earnings.

*E. Foreign Classification Society Delegation Authority Amended*<sup>77</sup>

Title III of the 2012 Coast Guard Act included, among other provisions, an effective bar on foreign classification societies from performing services pursuant to delegations from the Coast Guard if they also provide services in, or for, a state sponsor or terrorism as determined by the Secretary of State, e.g. Iran, Cuba, Sudan, or Syria. The provision amends 46 U.S.C. § 3316, which generally governs classification societies and delegations of authority by the Coast Guard to the societies. It requires the Secretary of State to determine that “the foreign classification society does not provide comparable services in or for a state sponsor of terrorism.”<sup>78</sup>

In recent years, political pressure had mounted on major classification societies to halt business with Iran in particular. The legislation was originally introduced in the Congress as the “Ethical Shipping Inspections Act of 2011”<sup>79</sup> and enjoyed prominent bipartisan support providing another opportunity for Congress to sanction Iran. European Union sanctions imposed in 2012 and the proposal which became this legislation influenced decisions by the last three major classification societies doing business with Iran, Lloyds Register, Bureau Veritas, and Germanischer Lloyd, to end that work.<sup>80</sup>

*F. Deepwater Port Act Amended*

Title III of the 2012 Coast Guard Act also included an amendment to the Deepwater Port Act of 1974<sup>81</sup> to expand the definition of a deepwater port to include one transporting petroleum and natural gas “from” the United States, not just “to” the United States. While the amendment does not alter other laws governing export controls, it clarifies that the Deepwater Port Act would not bar energy exports from the United States from such facilities.

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<sup>75</sup>See Testimony of Morten Amtnen, President and CEO, Overseas Shipholding Group, Inc., before the Hearing on Harbor Maintenance Funding and Maritime Tax Issues, U.S. House of Representatives, Ways and Means Committee, 112th Cong., 2d Sess. (Feb. 1, 2012).

<sup>76</sup>H.R. 1031, 112th Cong., 1st Sess. (2011).

<sup>77</sup>126 Stat. at 563.

<sup>78</sup>*Id.*

<sup>79</sup>S.1496 (112th Cong.).

<sup>80</sup>See Lawrence I. Kiern, “Washington Insider: Congress Decides Maritime Issues Amid Fiscal Policy Debate,” *The Maritime Executive*, 20 (January/February 2013).

<sup>81</sup>33 U.S.C. § 1502(9)(A).

Political controversy is swirling around recent requests by energy producers to export natural gas from the United States and the prospect of greater exports of crude oil is also engendering debate.<sup>82</sup> On May 17, 2013, the Department of Energy granted its second permit for liquefied natural gas exports to a country that does not have a free trade agreement with the United States.<sup>83</sup> If the U.S. Department of Energy approves additional energy export requests, this amendment to the Deepwater Ports Act means that domestic deepwater port facilities will not face a separate legal barrier to exporting domestically produced petroleum and natural gas.<sup>84</sup>

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<sup>82</sup>Ben Lefebvre and Alison Sider, "Oil Exports Get Second Look," *The Wall Street Journal Online* (April 3, 2013); <http://online.wsj.com/article/SB10001424127887323361804578389061086381802.html>.

<sup>83</sup>Steven Mufson, "U.S. Backs Expanded LNG Exports," *The Washington Post*, A10 (May 18, 2013).

<sup>84</sup>According to the U.S. Maritime Administration, the Louisiana Offshore Oil Port (LOOP) is the only currently operational "Deepwater Port petroleum terminal in existence today." Licenses have been issued for other facilities, including offshore of the states of Massachusetts and Florida, which are under development. [http://www.marad.dot.gov/ports\\_landing\\_page/deepwater\\_port\\_licensing/dwp\\_current\\_ports/dwp\\_current\\_ports.htm](http://www.marad.dot.gov/ports_landing_page/deepwater_port_licensing/dwp_current_ports/dwp_current_ports.htm).

