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November/December 2008

# The MARITIME EXECUTIVE

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Joseph S. **Compofelice**  
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# The MARITIME EXECUTIVE

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# Washington Insider

## National Election Results Forecast Action for Maritime Policy

### Election Results Signal Change

Elections matter. And this one illustrates that principle in an especially historic fashion. Whatever your views about the wisdom of the choices the American people have made, the fact is that elections remain America's formal constitutional mechanism to make the choices.

In the wake of the election results, divergent views about their meaning are being vocally expressed across the land. Commentators characteristically overstate the brilliance of the winners and exaggerate the missteps of the losers. A presidential election that experts predicted a year ago as most likely featuring Rudy Giuliani and Hillary Clinton as their respective party's nominees unfolded dramatically differently. A severe financial crisis that emerged in mid-September may have proven the decisive factor in what had been a much tighter race up to that point. Of course, the potential consequences for national economic and security policies dominate the headlines.

The election of the presidential candidate of the Democratic Party, Barack Obama, and the substantial enlargement of that party's congressional majority suggest that the stage is set for action, whether you like it or not. Simply put, just as certain GOP candidates warned during the election, one-party rule has its consequences. Some will judge the results positive while others will not.

Those who supported the defeated candidates will see their influence over the executive and legislative branches of the federal government diminished. With these branches of government more aligned by party affiliation, there is certainly greater likelihood for action on key issues. Additionally, with the start of a new legislative calendar, the ability of opponents of legislation to simply run out the clock, as they effectively did during 2008, is significantly diminished. The national legislative game clock has been restarted and the atmosphere has shifted to action over inaction.

History also teaches that a major challenge facing the new president-elect and the new congressional majority-elect will be not to overreach their electoral mandate. For example, in 1992 the Democratic Party's candidate, Bill Clinton, won the presidency and the party enlarged its governing majority in the House of Representatives to 258 and its majority in the Senate to 57, similar to the 2008 results. And while this led to impressive legislative achievements early on, the opposition successfully painted the majority as overreaching by criticizing proposals like "don't ask don't tell," stricter gun controls, higher taxes and universal health care. The majority's proposals encountered effective criticism and, coupled with scandal, soon

sowed the seeds of its ensuing defeat. The result was the Republican Revolution of 1994.

It remains to be seen if the new leadership of our national government will heed this history lesson. To succeed for more than just two years, the new president and the new congressional leadership must balance the goals of achieving their agenda with accomplishing change that is sustainable. In essence, they must be mindful that, having won this election, the race for the next one has also just begun. This will require achieving a delicate political balance. As the legislative majority's caucus enlarges, so do the challenges presented to holding it together in the form of a governing majority. Even with its enlarged majority, the congressional Democratic Party is comprised of members reflecting politically diverse constituencies, some more progressive and some more conservative. Additionally, regional and interest-based differences abound in the caucus. And while the new president may have exhibited a progressive voting record in the Senate, he will have to hold his diverse party together to get things done. In an interview with Charlie Gibson of ABC News just before the election, then-candidate Barack Obama acknowledged that he would have to govern from the "center."

Moreover, if the new administration really understands how to govern it will stay focused on solving the problems about which the electorate cares the most and not allow itself to be distracted by sideshows. At the same time, opponents of the new administration and the new congressional majority's leadership will work mightily to defend their interests and, if necessary, they will distract and derail the new administration from enacting new policies and legislative programs they oppose. This includes seizing on missteps and highlighting the mistakes the new leadership will inevitably make. Such is the way of national politics in America. But, despite the likely controversies, for about 18 months the new president and the congressional leadership will have an unusual opportunity to enact their agenda.

### The Impact on the Maritime Industry

The consequences of the election will also likely extend to the maritime industry. However, they will do so in an indirect way. Maritime-specific policy matters have not figured prominently in the new president's agenda or that of the congressional leadership, which has instead focused on broader national economic and security issues.

The new public mood and the apparent willingness of the new administration to (1) cut taxes for the middle class while restoring higher taxes for those with higher incomes and (2) increase "common sense" regulation

***While the Bush Administration's EPA proceeded reluctantly with new ballast-water regulations only after being ordered by the courts, the new administration is more likely to adopt a proactive approach that will require additional safeguards. If the new administration adopts such an approach, it seems there will be little need for further legislation on the subject as the authority under the Clean Water Act may prove sufficient to impose stricter requirements.***

suggest that these kinds of changes will apply with equal force to the maritime industry. Additionally, the philosophy of the new administration appears likely to support proposals that require the industry to take additional steps to improve safety and reduce marine pollution.

The election results will also likely embolden advocates of stronger environmental protection measures to press their agenda more vigorously.

For example, even with the passage of domestic legislation implementing MARPOL Annex VI during the 110th Congress, the State of California continues to press its right to require more ambitious air emission controls by regulating marine fuels.

Additionally, considering their victory in the courts, environmental advocates of stricter regulation of ballast-water discharges will likely press their position vigorously before the new administration. While the Bush Administration's EPA proceeded reluctantly with new ballast-water regulations only after being ordered by the courts, the new administration is more likely to adopt a proactive approach that will require additional safeguards. If the new administration adopts such an approach, it seems there will be little need for further legislation on the subject as the authority under the Clean Water Act may prove sufficient to impose stricter requirements.

When one considers the maritime legislative proposals that languished in the 110th Congress, it seems likely that they will form the foundation for the maritime legislative agenda in the 111th Congress. For example, the House of Representatives supported measures to reform the Coast Guard's marine safety program, the licensing of mariners, and fishing vessel safety. Additional oil spills and the continuing loss of fishing vessels and the lives of their crews at sea suggest that the reasons behind these measures will continue to persuade members of Congress to act.

## **110th Congress Promoted Significant Maritime Improvements**

Most of the maritime legislative agenda founded during the 110th Congress. But that does not mean that the Congress accomplished little.

To the contrary, congressional scrutiny of the Coast Guard's marine safety program, led by Chairman James Oberstar (D-MN) of the House Transportation and Infrastructure Committee, undoubtedly produced positive results. As an initial step, the Commandant of the Coast Guard swiftly acknowledged the service's shortcomings and proposed a serious reform plan. The Bush Administration budget request proposed additional resources and the Congress appropriated substantial additional funds. As a result, on October 24, 2008, the Coast Guard announced that it would add 500 new marine inspectors, investigators and other personnel. These additional resources, coupled with the Coast Guard's marine safety reform plan, should substantially improve the service's capability in this important area.



Additionally, some measures of interest were enacted into law during the waning days of the 110th Congress. As reported previously in this column, Congress and President Bush enacted into law implementing legislation for MARPOL VI and exemptions from the permitting requirements of the Clean Water Act for recreational boaters and certain small commercial vessels. These narrowly

crafted measures were portrayed by their supporters as essential and enjoyed widespread bipartisan support, which allowed their passage when other measures remained stymied.

The Coast Guard also persuaded Congress to enact specific legislation outlawing the use of submarines by drug smugglers. In the last few years, the Coast Guard has reported the increased use of submarines and semi-submersibles to smuggle illegal drugs from South America into the United States. So far this year the Coast Guard reports it has spotted 60 such vessels and estimates that about 30 percent of Colombia's cocaine is smuggled into the United States using these vessels. In connection with a recent federal court proceeding in Tampa, smugglers told federal agents that their 50 to 60-foot-long submarine carried six to eight tons of cocaine from Colombia's Pacific Coast for transfer to a Mexican fishing vessel. While the Coast Guard has been successful in interdicting many of these shipments, it also sought an express legislative enactment outlawing the use of submersibles. Congress passed the measure and President Bush signed it into law on October 13, 2008.

Congress also enacted into law the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (the "DOD Act"), which President Bush signed into law. In the absence of a Coast Guard Authorization Act in 2008, this measure included significant maritime provisions, some of which are highlighted in brief.

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The DOD Act effectively provides the Department of Transportation (“DOT”) enhanced powers in several key respects. First, it provides new authorities to enforce cargo preference laws and clarifies the scope of these laws. The legislation seeks to resolve disputes that have arisen about the application of cargo preference requirements. Second, the DOD Act provides that DOT must make an affirmative determination that U.S.-flag vessels are not available before the executive branch can waive the Jones Act for national security reasons. President Bush twice waived the Jones Act in the aftermath of Hurricanes Katrina and Rita in 2005. These waivers raised questions about DOT’s authority, and the legislation seeks to clarify the process by requiring a DOT determination for all waivers “of the non-availability of qualified United States flag capacity to meet national defense requirements.”

Additionally, as a practical matter the DOD Act likely ends the controversial practice of exporting vessels owned by the U.S. government for scrapping abroad. The law now requires that there must be a “compelling need for dismantling.” Additionally, exporting is allowed only if there is no available U.S. scrap yard capacity, and foreign scrapping must be conducted in accordance with U.S. standards. It appears these conditions may prove insurmountable, effectively bringing the practice to an end.

### Outlook

These very limited enactments at the close of the 110th Congress illustrate how difficult the legislative process proved in the past election year when, as a practical matter, very little moved through the U.S. Senate. Now that the election is one for the history books, the stage is set for more ambitious policy changes. These broader changes will no doubt affect the maritime industry along with the rest of the nation. For the good of the country, let’s hope they work and that the unintended consequences that will result don’t eclipse the accomplishments.

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