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## Jonesing to Repeal the Jones Act

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# JONESING TO REPEAL THE JONES ACT

*Andrés A. Kenney\**

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\* J.D. Candidate, Class of 2023, University of Maine School of Law. The author would like to thank his wife. She is his rock, and without her, he would have never been able to have the time or space to complete this article. Also, it was his wife that, without knowing at the time, brought the Jones Act and the issues around it to his attention. The author would also like to thank the editorial staff of the Ocean and Coastal Law Journal; in particular, he would like to thank Alex Read for guiding him through the writing process. Finally, the author would like to thank his family near and far. Everything he has comes from their love.

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## ABSTRACT

*The Jones Act—the title for a series of laws—is the backbone of American cabotage laws, and yet, it is rarely talked about in mainstream American discourse. The original Jones Act was enacted in 1920, and since 1920, it has not changed to any measurable degree. The Jones Act requires that all domestic maritime shipping—movement of merchandise from one U.S. point to another U.S. point—be completed by ships that are owned by U.S. citizens, operated by U.S. citizen crews, built in the U.S., and flagged by the U.S. These requirements have hampered the American economy, its security, and the maintenance of its merchant marine, even though these are the areas that are supposed to be boosted by the Act. These requirements, along with the numerous expansions and exemptions that litter their enforcement, have warped American shipping standards and their costs. In fact, because of the Jones Act, the U.S. “is ranked as having the most restrictive maritime transport industry among all OECD countries.” Now, after over 100 years under a regime that has only hurt the United States, it is time to repeal the Jones Act—either in its entirety or partially—and bring the U.S. into the 21<sup>st</sup> Century.*

## INTRODUCTION

Since its founding, the United States has used its laws to benefit and encourage U.S. shipping and ship manufacturing,<sup>1</sup> and periodically those laws have been reviewed and updated. These laws, called cabotage laws, are not unique to the United States; currently around fifty countries have similar laws.<sup>2</sup> The U.S., however, “is ranked as having the most restrictive maritime transport industry among all [Organization for Economic Cooperation and Development] countries[,]” and even China, the country with the second most restrictive laws, is beginning to relax its regulations.<sup>3</sup> After 100 years, the time has come to consider whether these laws are benefiting or harming the U.S.

Should the U.S. hold on to relics of its past, from a time when economies and world politics were much different, or should it shed the calcified protections that have now shielded its own citizens from the benefits of the global economy? This comment proposes that the answer is clear: the time has come for the U.S. to review and update these laws.

This comment will summarize what the Jones Act is, what it requires, and what has changed since it was originally enacted in 1920. Next, this comment will look at the effects the Jones Act has had on the U.S. economy, security, the shipping industry, and individual states. Finally, the comment will suggest that the Jones Act should either be repealed in part or entirely.

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1. JOHN FRITTELLI, CONG. RSCH. SERV., R45725, SHIPPING UNDER THE JONES ACT: LEGIS. AND REGUL. BACKGROUND 2 (2019).

2. Aaron Klien, *What Everyone got Wrong About the Jones Act, Hurricane Relief, and Puerto Rico*, BROOKINGS (Oct. 25, 2017), <https://www.brookings.edu/blog/up-front/2017/10/25/what-everyone-got-wrong-about-the-jones-act-hurricane-relief-and-puerto-rico> [<https://perma.cc/Z7GQ-H3HE>] (“Cabotage is the idea that that the provision of certain services within America is reserved exclusively to American companies.”).

3. William W. Olney, *Cabotage Sabotage? The Curious Case of the Jones Act*, 127 J. INT’L ECON. 1, 1 (2020). Even China “announced that it will allow foreign ships to do something that would be illegal in this country: transport goods between domestic ports.” Colin Grabow, *China Relaxes Cabotage Rules While the U.S. Clings to Outdated Protectionism*, CATO INST. BLOG (Nov. 24, 2021, 2:51 PM), <https://www.cato.org/blog/china-relaxes-cabotage-rules-amidst-supply-chain-woes> [<https://perma.cc/QZ7W-76C2>].

## I. LEGAL FRAMEWORK PRIOR TO THE JONES ACT

*A. History of Domestic Shipping Laws*

When the Jones Act became law in 1920, its substantive provisions were not new to the landscape of U.S. cabotage laws; “[r]ather, it was a restatement”<sup>4</sup> and strengthening of U.S. policies and laws that had existed since the Republic began.<sup>5</sup> On July 20, 1789, the First Congress enacted the first law to benefit U.S. ships which “assessed lesser duties on vessels built and owned domestically than on those foreign-built and -owned.”<sup>6</sup> In 1817, Congress prohibited the transport of “domestic cargo between U.S. ports”<sup>7</sup> on ships either wholly or partially owned by foreigners, and “imposed additional duties on vessels that were not crewed by Americans.”<sup>8</sup> However, loopholes were abundant in these early laws, and “foreign carriers were able to find” them “for the next 103 years”—until 1920.<sup>9</sup>

In an attempt to close the loopholes, in 1893 and 1898, Congress responded to the courts and to concerns that cabotage laws were being circumvented by passing amendments that tightened the loopholes in the 1817 Act.<sup>10</sup> The 1893 amendment, which added that domestic merchandise could not be transported between American ports on foreign ships “by way of a foreign port,”<sup>11</sup> was passed in response to *United States v. 250 Kegs of Nails*.<sup>12</sup> In *250 Kegs of Nails*, two hundred and fifty kegs of nails were loaded onto a foreign ship in New York that went to Belgium, and then the nails were placed on another foreign ship and taken to Los Angeles.<sup>13</sup> Although this route was long, it was less expensive for the shipping companies than using U.S. ships. The Supreme Court found that this route

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5. Mark D. Aspinwall, *Coastwise Trade Policy in the U.S.: Does It Make Sense Today?*, 18 J. MAR. L. & COM. 243, 243-44 (1987).

6. FRITTELLI, *supra* note 1, at 2.

7. *Id.*

8. Constantine G. Papavizas & Brooke F. Shapiro, *Jones Act Admin. Waivers*, 42 TUL. MAR. L.J. 317, 320 (2018).

9. Aspinwall, *supra* note 5, at 246.

10. FRITTELLI, *supra* note 1, at 3.

11. Act of Feb. 15, 1893, 52nd Cong., 2nd sess., ch. 117, 27 Stat. 455; Aspinwall, *supra* note 5, at 247 n.15.

12. *U.S. v. 250 Kegs of Nails*, 61 F. 410 (9th Cir. 1894); Aspinwall, *supra* note 5, at 247 n.15.

13. FRITTELLI, *supra* note 1, at 3.

did not violate the terms of the 1817 Act.<sup>14</sup> The 1898 amendment, which was a response to the use of foreign ships in the shipments of goods from Seattle to Alaska via Vancouver, Canada, added language that prohibited domestic shipments to be carried by a foreign ship “for any part of the voyage.”<sup>15</sup> Together, these amendments “prohibited the transportation of ‘merchandise’ by water ‘from one port of the United States to another port of the United States, either directly or via a foreign port, or for any part of the voyage, in any other vessel than a vessel of the United States.’”<sup>16</sup>

Although Congress believed it had closed the loopholes after the 1893 and 1898 amendments, in 1913, an interpretation of the Act by the United States Attorney General proved otherwise.<sup>17</sup> In 1913, Attorney General George W. Wickersham interpreted the 1898 Act’s “for any part of the voyage” language to “not . . . apply to mixed water/land transportation.”<sup>18</sup> The interpretation was made after shippers for the Seattle-to-Alaska route had changed the route from using only ships— which offloaded goods in Vancouver—to using railroads as part of the route.<sup>19</sup> Wickersham made this interpretation because he “reasoned that ‘any part of the voyage’ meant ‘any part of an ocean voyage.’”<sup>20</sup> As a result, shipments from Seattle to Alaska continued on foreign ships because the merchandise would go via railroad for some part of the journey. Wesley Jones—Washington’s Senator and chair of the Commerce Committee—“sought to stop this practice” and became the chief sponsor of Section 27 of the Merchant Marine Act of 1920.<sup>21</sup> Thus, the Attorney General’s interpretation became a direct catalyst for the passage of the 1920 Act.<sup>22</sup>

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14. *Id.* This case is also important because it created the “intent test”—if a shipper used a foreign-flagged ship for any part of the journey where the “intended destination was the United States, [then] a coastwise violation would occur.” Aspinwall, *supra* note 5, at 248 n.18 (emphasis original). This test would be used exclusively for Jones Act violation determinations until the “alteration test” was introduced. *Id.*; see also Robert W. Gruendel, *The Weakening Grip of U.S. Cabotage Law*, 4 *FORDHAM INT’L L.J.* 391, 399-403 (1980).

15. Act of Feb. 17, 1898, §1, 23 Stat. 248; Aspinwall, *supra* note 5, at 247 n.15.

16. Papavizas & Shapiro, *supra* note 8, at 320 (quoting Act of Feb. 17, 1898, ch. 26, 30 Stat. 248 (1898)).

17. *Id.* at 320-21.

18. *Id.*; *Transp. of Merch. from Seattle to Fairbanks*, 30 U.S. Op. Att’y Gen. 3 (U.S.A.G.), 1913 WL 639.

19. FRITTELLI, *supra* note 1, at 3.

20. Papavizas & Shapiro, *supra* note 8, at 321; *Transp. of Merch.*, 1913 WL 639.

21. FRITTELLI, *supra* note 1, at 3.

22. *Id.*

### *B. Contextual History*

The weaknesses and loopholes in the cabotage laws that predated the 1920 Merchant Marine Act prompted the Act's passage, as described above, but the broader legal and historical context also played a key role. In general, there are two areas that comprise the contextual history: other legislation that affected the cabotage laws and world history.

#### 1. Other Legislation Affecting the Cabotage Laws

In the late 1800s, Congress enacted a pair of statutes that expanded the scope of U.S. cabotage laws: the Passenger Ship Act of 1886<sup>23</sup> and An Act to Prevent Smuggling and for Other Purposes.<sup>24</sup> Less than two decades later, however, Congress dealt a blow to U.S. shipbuilders when it passed the Panama Canal Act of 1912.<sup>25</sup> As described in more detail below, commentators view the passage of the Jones Act as being spurred, at least in part, by that perceived retreat from a staunchly pro-American built policy.

In 1824, the Supreme Court held in the seminal case *Gibbons v. Ogden* that ship passengers were “an element of coastwise commerce,”<sup>26</sup> but it was not until Congress enacted the Passenger Ship Act of 1886 that passenger transportation was explicitly situated “within the purview of coastwise trade.”<sup>27</sup> The 1886 Act extended the foreign ship “prohibition . . . to vessels transporting passengers domestically.”<sup>28</sup> That 1886 Act “clearly and unequivocally defined” the transporting of passengers domestically as being a part of coastwise trade.<sup>29</sup> The 1886 Act has now become inextricably intertwined with the Jones Act.<sup>30</sup>

The second act from 1886—An Act to Prevent Smuggling and for Other Purposes—was the first time the U.S. explicitly regulated towage.<sup>31</sup>

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23. Act of June 19, 1886, ch. 421, 24 Stat. 81; Aspinwall, *supra* note 5, at 250.

24. Act of July 18, 1866, ch. 201, 14 Stat. 182, §21; Aspinwall, *supra* note 5, at 255.

25. Act of Aug. 25, 1912, ch. 390, 37 Stat. 562, §5; Aspinwall, *supra* note 5, at 248, 256, 260.

26. Aspinwall, *supra* note 5, at 250; *Gibbons v. Ogden*, 22 U.S. 1, 215 (1824) (“[C]ommer ce is not prevented because the object of it is to serve the pleasure of passengers. The business was that of earning money by transporting people on the navigable waters of the United States and, strictly speaking, it is just as much a part of commerce . . . as if these vessels were carrying cargoes of merchandise.”).

27. Aspinwall, *supra* note 5, at 256.

28. FRITTELLI, *supra* note 1, at 2.

29. Aspinwall, *supra* note 5, at 251.

30. *See* Section III.B.

31. Aspinwall, *supra* note 5, at 255.



The Act prevented “all steam tug-boats[] not of the United States” from towing U.S. vessels in domestic waters.<sup>32</sup> The Act was amended the following year, in 1887, to allow “foreign tugs to tow U.S.-documented ships between U.S. ports if any of the towage was through foreign waters” and to allow “tugs owned by foreign railroads whose lines entered the United States by means of tugs or ferries” to engage in domestic shipping.<sup>33</sup> These amendments remained in place until 1940,<sup>34</sup> and were prime examples of the complexities of what U.S. cabotage laws tried to regulate and the carve-outs and exceptions the Jones Act would face after its passage.

The third piece of legislation, the Panama Canal Act of 1912, was a source of apprehension for some American policymakers.<sup>35</sup> The Act “permitted foreign construction for American ships in the foreign trade.”<sup>36</sup> This worried American policymakers who were “proponents of a ‘build-America’ policy,” because they believed that the Act was the beginning of a slippery slope that would lead to “foreign-built ships in the domestic trades.”<sup>37</sup> Thus, the Jones Act is seen, by some, as a reaction to the Panama Canal Act of 1912, in particular because the Jones Act mandated that domestic trade ships be built in the U.S.<sup>38</sup>

## 2. World History

World history from the beginning of the Republic until 1920 similarly provides critical background for the passage of the Jones Act. In the early years of the Republic, the late 1700s to the mid-1800s, the U.S. was “[b]lessed . . . with abundant lumber, excellent shipbuilding know-how, and some of the world’s best mariners[.]”<sup>39</sup> This led to the U.S. having a “comparative advantage in shipbuilding.”<sup>40</sup> Accordingly, when policymakers like President George Washington urged Congress to pass

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32. *Id.* at 255 n.41.

33. *Id.* at 255.

34. *Id.* at 256.

35. *Id.* at 248.

36. *Id.*

37. Aspinwall, *supra* note 5, at 248.

38. *Id.*

39. Colin Grabow, *Protectionism and the Development of the U.S. Maritime Industry*, CATO INST. COMMENTARY (Oct. 11, 2021), <https://www.cato.org/commentary/protectionism-development-us-maritime-industry> [<https://perma.cc/67RC-G26U>].

40. FRITTELLI, *supra* note 1, at 2.

laws that protected America's merchant fleet, there were minimal negative effects.<sup>41</sup>

However, by the late 1800s, the advantages from the beginning of the Republic began to wane, and the negative effects of the laws that protected America's merchant fleet started to become more apparent. The U.S. had lost its edge in the shipbuilding industry to Scotland and England,<sup>42</sup> and this created a "steep drop-off in the share of U.S. foreign trade carried by U.S. vessels."<sup>43</sup> Around the same time, competition from railroads began to affect coastwise shipping.<sup>44</sup> Thus, by the late 1800s, the "free ship" movement—pushing to "allow foreign-built vessels to sail under the U.S. flag"—began to gain momentum.<sup>45</sup> In 1912, with the passage of the Panama Canal Act, foreign-built vessels were given more access to the American markets.<sup>46</sup>

Then World War I began. After the war began and consumed Europe, European ships were either being used in "the war effort or kept . . . in harbors for fear of submarine attacks[.]"<sup>47</sup> As a result, the United States faced "a shortage of ships for carrying its foreign trade."<sup>48</sup> To make up for that deficit, the United States had no choice but to waive "domestic shipping restrictions" during the war,<sup>49</sup> while simultaneously building up its own merchant fleet. By the end of the war, the government was concerned with protecting its newly-built surplus of cargo ships and ensuring that the United States would not face another shortage of ships if another war broke out.<sup>50</sup> Thus, after World War I, Congress wanted to quickly reinstate the previous restrictions, protect the investment it had

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41. "In his second annual State of the Union address in 1790, President George Washington urged Congress to consider the detrimental effect that a war could have on the United States, both economically and strategically, without a strong American merchant fleet." Aspinwall, *supra* note 5, at 243 n.1.

42. In fact, there was significant stagnation in British shipbuilding from 1815-1845, due in part to "its protectionist Navigation Acts," but with the repeal of the Navigation Acts in 1849 the British experienced success in shipbuilding and shipping. Colin Grabow, *Rust Buckets: How the Jones Act Undermines U.S. Shipbuilding and National Security*, CATO INST. POL'Y ANALYSIS NO. 882 (Nov. 12, 2019), <https://www.cato.org/policy-analysis/rust-buckets-how-jones-act-undermines-us-shipbuilding-national-security> [<https://perma.cc/DYR5-NEEL>].

43. FRITTELLI, *supra* note 1, at 2.

44. *Id.*

45. *Id.*

46. Aspinwall, *supra* note 5, at 248

47. FRITTELLI, *supra* note 1, at 5.

48. *Id.* at 9.

49. *Id.* at 12.

50. *Id.* at 5.

made in its merchant fleet, and make sure the United States would “not be dependent on any other nations’ merchant vessels.”<sup>51</sup> The fix to all of this was the Merchant Marine Act of 1920.<sup>52</sup>

## II. THE JONES ACT

The “modern” cornerstone for U.S. maritime protectionism is the “Jones Act,”<sup>53</sup> which is not one single act, but rather a series of statutes since 1920.<sup>54</sup> The foundation of the series is the Merchant Marine Act of 1920.<sup>55</sup> The Act declared:

That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine[.]<sup>56</sup>

The Act covered a wide range of issues, but the focus of this comment is Section 27 of the Act. Section 27 states:

That no merchandise shall be transported by water, or by land and water . . . between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and

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51. *Id.*

52. *Id.*

53. Aspinwall, *supra* note 5, at 247. This is not to be confused with other “Jones Acts” like section 33 of the 1920 Merchant Marine Act— “which governs claims made by seaman for personal injuries suffered in the course of their employment”—or the 1917 Jones Act— “which . . . conferred full U.S. citizenship on residents of Puerto Rico.” Papavizas & Shapiro, *supra* note 8, at 320.

54. Papavizas & Shapiro, *supra* note 8, at 319. “‘Jones Act laws’ is often colloquially extended to other legislated provisions as well, such as the Passenger Vessel Services Act, and other laws supporting the U.S.-flag commercial fleet.” *Domestic Shipping*, U.S. DEP’T OF TRANSP. MAR. ADMIN., <https://www.maritime.dot.gov/ports/domestic-shipping/domestic-shipping> (last visited Nov. 26., 2022) [<https://perma.cc/CXU3-87CH>].

55. Act of June 5, 1920, ch. 250, 41 Stat. 988 (1920).

56. *Id.* §1 (codified as amended at 46 U.S.C. § 50101).

documented under the laws of the United States and owned by persons who are citizens of the United States . . .<sup>57</sup>

Now, over a hundred years later and after the passage of numerous amendments and related laws, the Merchant Marine Act of 1920 is still the backbone of U.S. maritime policy.<sup>58</sup>

The Jones Act requires that all domestic maritime shipping—movement of merchandise from one U.S. point to another U.S. point—be completed by ships that are owned by U.S. citizens, operated by U.S. citizen crews, built in the U.S., and flagged by the U.S.<sup>59</sup> Specifically, for the crewing and ownership requirements, the Jones Act requires that “the master, all of the officers, and 75% of the remaining crew must be U.S. citizens,” and, if a corporation owns the ship, “75% of the corporation’s stock must be owned by U.S. citizens.”<sup>60</sup> Domestic maritime shipping “may be defined as the navigable internal and territorial waters of the United States, its territories, districts, and possessions, and structures attached to the U.S. Outer Continental Shelf.”<sup>61</sup> The only areas or territories of the U.S. that are exempt from the Jones Act are the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands.<sup>62</sup>

The Jones Act controls and regulates all domestic maritime shipping, and its reach has expanded since the 1920s. The following are notable expansions in the law and policy of the Jones Act during the last hundred years. The Tariff Act of 1930<sup>63</sup> implemented a “50% duty on the price of any nonemergency repairs on U.S. flag ships done in foreign shipyards.”<sup>64</sup> In 1935, Congress passed legislation providing that Jones Act ships that were “sold to foreign owners or registered under a foreign flag” could not later be designated as Jones Act ships again.<sup>65</sup> The Towing Act of 1940<sup>66</sup> brought “towing vessels . . . and salvage vessels” within the scope of the

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57. *Id.* §27 (codified as amended at 46 U.S.C. § 55102).

58. *See* 46 U.S.C. §§ 50101, 50102 (2009).

59. *See* 46 U.S.C. § 55102(b).

60. FRITTELLI, *supra* note 1, at 5.

61. Aspinwall, *supra* note 5, at 244.

62. FRITTELLI, *supra* note 1, at 5; 46 U.S.C. § 55101.

63. 19 U.S.C. § 1466 (2006).

64. FRITTELLI, *supra* note 1, at 23. An MARAD study from 2011 found that U.S. ships still have non-emergency repairs done at foreign shipyards because “the total cost is less” than repairs done in the U.S. JOHN FRITTELLI, CONG. RSCH. SERV., R43653, SHIPPING U.S. CRUDE OIL BY WATER: VESSEL FLAG REQUIREMENTS & SAFETY ISSUES 11-13 (2014) [hereinafter FRITTELLI, R43653].

65. FRITTELLI, *supra* note 1, at 10.

66. 46 U.S.C. § 80104 (2006).

Jones Act.<sup>67</sup> In 1956, an amendment was added that said that Jones Act vessels “could not be ‘rebuilt’ abroad without losing their coastwise trading privileges.”<sup>68</sup> The Merchant Marine Act of 1970<sup>69</sup> added to the U.S. maritime policy the objective of “the creation and maintenance of efficient shipbuilding and repair capacity in the United States.”<sup>70</sup> Although the Dredging Act of 1906 already required “dredging in U.S. waters be [done by] U.S.-built, -operated, and -crewed” ships,<sup>71</sup> before 1988, the dredge itself could be carried away by foreign-built ships. In 1988, Congress expanded the definition of “merchandise” in the Jones Act by including, for the first time, “valueless material, such as dredge spoil or municipal solid waste” within its scope; accordingly, the ships that carried the dredge had to be Jones Act compliant.<sup>72</sup> Most recently, even though there is currently no ship in the Jones Act fleet that is designed for offshore wind turbine installations, U.S. Customs and Border Protection (“CBP”) explicitly extended the Jones Act to offshore wind development and installation.<sup>73</sup>

### III. ENFORCEMENT OF THE JONES ACT: EXEMPTIONS, EXCEPTIONS, AND WAIVERS

Both the U.S. Coast Guard and CBP enforce Jones Act statutes and regulations through a series of escalating fines that are strictly enforced and largely unyielding in nature.<sup>74</sup> The enforcement of the Jones Act is carried out primarily by the Coast Guard.<sup>75</sup> The primary enforcement mechanism is the requirement for a “coastwise endorsement.”<sup>76</sup> A

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67. FRITTELLI, *supra* note 1, at 10.

68. Papavizas & Shapiro, *supra* note 8, at 323 n.31; *see* 46 U.S.C. §§ 12101(a), 12132(b) (2006).

69. Public Law 91-469, now codified as 46 U.S.C. § 1120 (2000).

70. 46 U.S.C. § 1120.

71. FRITTELLI, *supra* note 1, at 18.

72. *Id.*

73. Letter from U.S. CBP, re: Coastwise Towing; Scouring Protection; 46 U.S.C. § 55102; 46 U.S.C. § 55111; 19 C.F.R. § 4.80(b) (Jan. 27, 2021), [https://www.hklaw.com/-/media/files/insights/publications/2021/02/h309186-20210127\\_cbp.pdf?la=en](https://www.hklaw.com/-/media/files/insights/publications/2021/02/h309186-20210127_cbp.pdf?la=en).

74. Papavizas & Shapiro, *supra* note 8, at 355; *see* U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: MITIGATION GUIDELINES: FINES, PENALTIES, FORFEITURES AND LIQUIDATED DAMAGES 183-85 (2004).

75. FRITTELLI, *supra* note 1, at 5.

76. *Id.*; *see also* 46 C.F.R. § 67.19 (2017). In the regulations the U.S.-built requirements are found at 46 C.F.R. §§ 67.95 (2009)-67.101, the U.S. ownership requirements are found at 46 C.F.R. §§ 67.30 (2017)-67.43, and the U.S. crewing requirements are found at 46 C.F.R. § 10.221 (2019).

coastwise endorsement is essentially the license a ship needs to be able to work within U.S. waters.<sup>77</sup> Although the Coast Guard is the main enforcer of the Jones Act, CBP “is primarily responsible for determining what maritime activity falls under the act.”<sup>78</sup> In particular, CBP is in charge of “defining what constitutes ‘transportation’” and what are “U.S. points.”<sup>79</sup>

However, interpretations of the law—both before and after the passing of the 1920 Merchant Marine Act—have created exemptions, exceptions, and waivers of the Jones Act for various passenger ships, offshore oil and gas vessels, and vessels used in times of emergency.<sup>80</sup> Although the world has changed dramatically in the last 102 years, Congress has not kept up. Consequently, “judicial and administrative decisions” have been the primary driver of Jones Act policy during that time.<sup>81</sup> This form of lawmaking has created a patchwork of strange rules that arguably do not follow the policies of U.S.-built, U.S.-owned, and U.S.-sailed ships in U.S. waters, as set forth in the Jones Act.<sup>82</sup> Below are a few of the most important of these exemptions, exceptions, and waivers.

#### *A. U.S.-Built Ships*

Even when U.S. shipbuilders physically construct ships, it is not clear that the ships can truly be considered U.S.-built.<sup>83</sup> Key parts of ships are often produced abroad, including steel plating.<sup>84</sup> In addition to the physical parts, “foreign know-how is also frequently required.” This foreign know-how includes “designs, support services and some of the material necessary for ship production.”<sup>85</sup> The foreign know-how and parts are considered necessary by the shipbuilder because the “frightfully high costs” of U.S.-built ships “would be even higher absent their access to foreign” help.<sup>86</sup>

The Coast Guard requires that U.S.-built ships be assembled in the U.S., and that “[a]ll major components of its hull and superstructure [be] fabricated in the United States.”<sup>87</sup> However, a “major component” is

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77. See 46 C.F.R. § 67.19 (2022).

78. FRITTELLI, *supra* note 1, at 6.

79. *Id.*, at 5-6; 19 C.F.R. §§ 4.80-4.93 (2022).

80. *Id.*, at 7-10.

81. Aspinwall, *supra* note 5, at 251.

82. See below.

83. Grabow, *supra* note 42, at 11-12.

84. *Id.* at 11.

85. *Id.* at 11.

86. *Id.* at 12.

87. 49 C.F.R. § 67.97 (2022).

“based on weight” and “up to 1.5% of the steel weight . . . can be manufactured abroad.”<sup>88</sup> Furthermore, anything that is “self-supporting and independent of the vessel’s structure and does not contribute to the overall integrity of the vessel or compromise the watertight envelope of the hull can be manufactured” abroad.<sup>89</sup> What this allows is for (1) engines, “consoles, wiring, piping, certain mechanical systems and outfitting” to be imported, because they are “attached to the hull rather than an integral part of the hull’s structure,” and for (2) items like “propeller[s], stern bulb, bulbous bow, some rudders . . . and watertight closures” to be imported “as long as they (in the aggregate) do not exceed the steel weight limit.”<sup>90</sup> Additionally, the Coast Guard also allows standard forms of steel “to be imported with no limit on their weight” as long as the “shaping molding, and cutting” is done in the U.S. shipyards.<sup>91</sup> Ships that are built with all of the foreign parts and know-how are disparagingly called “kit ships” by proponents of the Jones Act.<sup>92</sup> These domestic purchase requirements for Jones Act ships find no analogue in other shipping industries (for example, railroad and trucking), but, because of the many caveats, those within the industry have come to question whether U.S.-built is actually U.S.-built.<sup>93</sup>

The question of whether “kit ships” are definitionally “fabricated in the United States” was addressed in *Philadelphia Metal Trades Council v. Allen*.<sup>94</sup> In 2004, Aker Philadelphia Shipyard partnered with a South Korean shipbuilder to build a “kit ship” tanker that it intended to be Jones Act compliant.<sup>95</sup> After getting approval from the Coast Guard, the labor unions representing the shipyard workers filed suit against the Coast Guard in federal court alleging that allowing the kit ship to be Jones Act compliant would be “contrary to the protection[] guaranteed by the Jones Act.”<sup>96</sup> On the other side, the shipyard intervened on behalf of the Coast Guard and argued that if they could not use foreign parts, then it would “render the American construction of ships too expensive to pursue.”<sup>97</sup> The court sided with the shipyard and the Coast Guard, and since then the

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88. FRITTELLI, *supra* note 1, at 6.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*, at 6-7.

93. *Id.*

94. *Philadelphia Metal Trades Council v. Allen*, No. CIV.A 07-145, 2008 WL 4003380 (E.D. Pa. Aug. 25, 2008); FRITTELLI, *supra* note 1, at 22-23.

95. Han Deng, “Built” or “Rebuilt”? *That is the Question: Risk of Losing the Coastwise Privilege After Vessel Modification Projects Outside the United States*, 35 TUL. MAR. L.J. 241, 254 (2010).

96. *Philadelphia Metal Trades Council*, 2008 WL 4003380, at \*5.

97. *Philadelphia Metal Trades Council*, 2008 WL 4003380, at \*19.

partnership has continued.<sup>98</sup> Time will tell whether this interpretation will be adopted by other courts.

### *B. Passenger Ships*

The first step to understanding the patchwork of regulations that applies to passenger ships is understanding that the definition of passenger—“any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership, or business”—is all encompassing and does not depend on any exchange of money.<sup>99</sup> The breadth of this definition leads to a pervasive, complex, and (seemingly) ambiguous application of the Jones Act to passenger ships.

For example, whether a ship is a passenger ship and thus must abide by the Jones Act depends on the technical aspects of what the ship is doing. One common type of passenger vessel trip is referred to as a “voyage[] to nowhere,” because the ship does not visit other ports; rather, it embarks and disembarks at the same port.<sup>100</sup> Based on a Treasury decision from 1900, “CBP has determined that if such vessels stay within the 3-mile zone of U.S. territorial waters they must be Jones Act-compliant” because anywhere within the three-mile zone is considered a “U.S. point.”<sup>101</sup> If such ships go beyond the three-mile zone, they do not need to be Jones Act compliant.<sup>102</sup> However, if the “voyage to nowhere” is a charter fishing trip or a yacht with a captain and crew, the three-mile exception does not apply, and so the boat must be Jones Act compliant.<sup>103</sup> So, to get around the Jones Act, a boat needs to both travel beyond three miles from shore and not be a yacht or fishing charter.

To clarify the rules applicable to passenger ships, CBP has established a “three-tiered regulatory system” that establishes when a non-Jones Act passenger vessel has violated the Jones Act.<sup>104</sup> A first-tier violation happens if a passenger gets transported “between U.S. ports without any

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98. FRITTELLI, *supra* note 1, at 6.

99. 19 CFR § 4.50(b) (2022); FRITTELLI, *supra* note 1, at 8.

100. FRITTELLI, *supra* note 1, at 8; ASPINWALL, *supra* note 5, at 252. Examples include whale watching, recreational diving, gambling, duty-free shopping, and deep-sea fishing.

101. *Id.*, at 8; ASPINWALL, *supra* note 5, at 252.

102. *Id.*; ASPINWALL, *supra* note 5, at 252.

103. *Id.* (noting that even if the owner of the yacht is just trying “to entertain business clients aboard his or her vessel” the ship must comply with the Jones Act.); ASPINWALL, *supra* note 5, at 252; *see* *London Guarantee & Accident Co. v. Indus. Accident Comm’n of Cal.*, 279 U.S. 109 (1929) (holding that for deep sea fishing is commerce no matter the distance from shore and no matter if the trip goes to and from the same port.); *see also* T.D. 55193(2), 95 *Treas. Dec. Int. Rev.* 368 (1960).

104. ASPINWALL, *supra* note 5, at 253; *see* 19 C.F.R. § 4.80a(b) (2022).



intervening stops” on a non-Jones Act vessel.<sup>105</sup> A second-tier violation occurs when a non-Jones Act vessel that goes to “a nearby foreign port” drops off a passenger at a U.S. “port other than the port of embarkation.”<sup>106</sup> The third-tier is not about defining a violation, but rather it makes clear that once a non-Jones Act vessel visits a “distant foreign port[.]”<sup>107</sup> it can drop off passengers at any U.S. port. However, even with these nearby and distant foreign port exceptions, “if the number of U.S. ports visited exceeds the number of foreign ports visited *or* if the amount of time spent in U.S. ports exceeds the amount of time spent in foreign ports,” then the exceptions are not applied.<sup>108</sup> The tiers are structured this way because of an exemption for cruise ships in U.S. cabotage laws that predate the Jones Act.

Cruise ships are exempt from the Jones Act because of a 1910 Attorney General’s opinion.<sup>109</sup> The opinion stated that as long as the cruise ships visit a “*distant* foreign port (any port outside of North and Central America, Bermuda, the Bahamas, and the Virgin Islands),” then “the main objective of such a cruise itinerary is to visit such foreign ports, not to transport passengers from one U.S. port to another U.S. port.”<sup>110</sup> In 1985, the U.S. Customs Service (the predecessor agency of CBP) broadened the exemption for cruise ships when it promulgated a rule allowing “foreign-flag cruise ships to make round trips from a U.S. port and to visit other U.S. ports as long as they also include a visit to a *nearby* foreign port.”<sup>111</sup> Thus, as long as all the passengers “continue with the cruise until the cruise terminates at the same dock at which it began[.]”<sup>112</sup> a cruise ship can be foreign-flagged because the rules are “focused on the *continuity* of the voyage and *whether its intended purpose or objective* was coastwise transportation.”<sup>113</sup> These rules have resulted in almost all cruise ships at

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105. *Id.*; see 19 C.F.R. § 4.80a(b)(1) (2022). However, Congress has exempted passenger transport from a U.S. port to Puerto Rico from this first-tier violation. 19 C.F.R. §4.80a(c) (2022).

106. 19 C.F.R. § 4.80a(b)(2) (2022).

107. 19 C.F.R. § 4.80a(a)(3) (2022).

108. Aspinwall, *supra* note 5, at 254.

109. FRITTELLI, *supra* note 1, at 7.

110. *Id.* (italics in original), See 46 C.F.R. § 4.80a(c).

111. *Id.* at 7-8 (italics in original); “Nearby foreign port means any foreign port in North America, Central America, the Bermuda Islands . . . the West Indies (including the Bahama Islands, but not including . . . Aruba, Bonaire, and Curacao) . . . [and] the U.S. Virgin Islands[.]” 19 C.F.R. § 4.80a(a)(2).

112. FRITTELLI, *supra* note 1, at 8.

113. Aspinwall, *supra* note 5, at 251 (italics in original).

American ports being foreign-flagged,<sup>114</sup> and the “virtual extinction of the U.S.-flag passenger fleet.”<sup>115</sup>

In sum, although passenger ships are clearly within the purview of the Jones Act, the exemptions and exceptions that are baked in allow the law to be skirted.

### *C. Oil and Gas Ships*

Oil and gas vessels provide another illustrative example of how the Jones Act works, as well as its limitations and weaknesses. For offshore oil and gas, there are two main vessel types: tankers and offshore supply vessels (OSVs). Both of these types of ships are controlled by the Jones Act, but there are broad exceptions in the Jones Act for each.<sup>116</sup> Tankers are generally used for “‘lightering’ (the transfer of oil offshore from an oil tanker too large to transit a harbor to a smaller vessel),” and the three-mile exception greatly affects them.<sup>117</sup> Tankers used for lightering can be foreign-flagged, but only if they are not anchored to the seabed within three miles of the shore while they are lightering.<sup>118</sup> In practice, this has an uneven effect across the country, because while some lightering areas, such as those in the Gulf of Mexico, are beyond the three-mile zone, other lightering areas, like operations in the Delaware Bay, are within the zone.<sup>119</sup> This means that while lightering in places like the Delaware Bay has to be completed by Jones Act-compliant ships, foreign-flagged tankers can more easily get around the Jones Act and be used to supply oil in other areas like the Gulf Coast.<sup>120</sup>

Meanwhile, for OSVs, there are “two factors [that] determine whether these vessels must be Jones Act-compliant.”<sup>121</sup> The first factor is whether the oil rig they are servicing is “attached to the seabed (anchored or submerged to)” within 200 miles of the shore, or whether they are “semi-submerged” mobile offshore drilling units (MODUs) that “can hold their

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114. FRITTELLI, *supra* note 1, at 7.

115. Aspinwall, *supra* note 5, at 251. “The U.S. hasn’t built a big cruise ship since 1958,” and “the only [Jones Act]-complaint cruise ship” was built in Germany. Mary Anastasia O’Grady, Opinion, *Alaska Tourism is Ailing but Not from Covid*, WALL ST. J., April 4, 2021.

116. FRITTELLI, *supra* note 1, at 8.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 9.

positions with the use of propellers.”<sup>122</sup> If the oil rigs are attached to the seabed within 200 miles of shore, they are considered to be attached to a “U.S. point[.]” Then the OSVs have to comply with the Jones Act because they are transporting material to a “U.S. point.”<sup>123</sup> If, on the other hand the oil rig is a MODU, the OSV can be foreign-built but it still must “be U.S.-owned and -crewed.”<sup>124</sup>

The second factor is “whether the OSV is transporting supplies or workers to the oil rig, or if the vessel is involved in installing equipment necessary for the operation of the rig.”<sup>125</sup> If the OSV is transporting supplies or workers to an anchored or submerged oil rig, then it must comply with the Jones Act. However, if the OSV is installing necessary equipment to such a rig, it is exempt.<sup>126</sup> This factor gets complicated by the definition of “vessel equipment,” which includes anything “necessary and appropriate for the navigation, operation[,] or maintenance of a vessel or for the comfort and safety of persons on board.”<sup>127</sup> This definition means that “installing necessary equipment” includes “laying cable or pipeline . . . installing rig equipment or conducting geophysical surveying or diving inspections.”<sup>128</sup> Consequently, all of those activities can be done by non-Jones Act vessels.<sup>129</sup> Therefore, any OSV that is servicing MODUs or transporting things other than supplies or workers does not have to comply with the Jones Act.

Tankers transporting oil are also subject to an exception that “has been significant in shaping coastal maritime activity.”<sup>130</sup> The exception has been called the “new and different product exception”<sup>131</sup> or the “alteration test,”<sup>132</sup> and, although it applies to any Jones Act shipment, its effects are seen most clearly in the transportation of oil and gas. The exception was first stated and approved, in the oil and gas context,<sup>133</sup> in the 1978 case of *American Maritime Association v. Blumenthal*.<sup>134</sup> In *Blumenthal*, the D.C.

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122. *Id.* at 8.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 10.

131. *Id.*

132. Aspinwall, *supra* note 5, at 248 n.18.

133. This exception was first stated in a “1964 Customs Service ruling involving California rice being processed in the U.S. Virgin Islands.” FRITTELLI, *supra* note 1, at 10.

134. *American Maritime Association v. Blumenthal*, 590 F.2d 1156, 1161 (D.C. Cir. 1978).

Circuit held that a foreign-flagged ship had not violated the Jones Act by transporting Alaskan oil to the Virgin Islands, unloading the oil at a refinery, reloading the “altered” oil, and taking that altered oil to the East Coast.<sup>135</sup> This exception is now explicitly laid out in the governing regulations.<sup>136</sup> The exception allows foreign-flagged ships to get around the Jones Act merely by stopping at a “foreign port[,]” like the Bahamas or U.S. Virgin Islands (despite the fact that the U.S. Virgin Islands are a U.S. territory), unloading its oil or gas, and then reloading with oil or gas from the same facility.<sup>137</sup> Again, this exception gives a whole industry an easy way to circumvent the policies in the Jones Act.

The exemptions and exceptions that apply to passenger ships and ships that operate within the oil and gas industry are not only confusing; they also subvert the Jones Act by undermining its goals. Indeed, the breadth of these exceptions begs the question whether the Jones Act policy of U.S. domestic shipping being completed by U.S. ships and crews is being fulfilled in any meaningful way. In addition to these large carve-outs, there are also several waivers that have been granted and applied to the Jones Act over the last 100 years.

#### *D. Waivers*

Although “there is no inherent authority in the Jones Act to waive the law,” as soon as the U.S. entered World War II in 1941, President Franklin D. Roosevelt waived the Jones Act.<sup>138</sup> The executive order he signed to waive the Jones Act “set the pattern for the waiver law that exists today.”<sup>139</sup> The order stated that a waiver had to be “necessary in the conduct of the war,” and it created two methods for waivers to be granted: (1) request by the Secretaries of Navy or War or (2) all other requests.<sup>140</sup>

The waiver authority from President Roosevelt’s executive order eventually lapsed, but then, as the Korean War was beginning in 1950, Congress added a semi-permanent waiver authority to the text of the Jones Act that “could [be] terminate[d] by joint resolution of Congress at a time

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135. *Id.*; see T.D. 56272(2) [where source was accessed from] (Sept. 9, 1964). The use of the alteration test was also important because the court explicitly set aside the traditional “intent test,” which had been the test used by the court since *250 Kegs of Nails*. Aspinwall, *supra* note 5, at 248 n.18; Gruendel, *supra* note 14, at 399-403.

136. 19 C.F.R. § 4.80b(a).

137. FRITTELLI, *supra* note 1, at 8.

138. Papavizas & Shapiro, *supra* note 8, at 325; Executive Order 8976 6 Fed. Reg. 6441-42 (Dec. 17, 1941).

139. *Id.*

140. *Id.*, at 325-26; Executive Order 8976 6 Fed. Reg. 6441-42 (Dec. 17, 1941).

“the President may designate.”<sup>141</sup> The law passed in 1950 is still the waiver law today.<sup>142</sup> It mimics the 1941 executive order by allowing waivers only “in the interest of national defense,”<sup>143</sup> and by giving two paths for waivers to be granted: (1) “[o]n the request of the Secretary of Defense”<sup>144</sup> or (2) requests “for non-Defense entities.”<sup>145</sup> However, regardless of the category of waiver, “the final issuer of any Jones Act waiver is the Secretary of Homeland Security.”<sup>146</sup>

The bifurcation in the path for how to grant a waiver is important because, although waivers are rarely granted, the path for the military is much easier than for non-military entities.<sup>147</sup> Waivers requested by the Secretary of Defense “shall” be granted, and CBP has the power to authorize the waiver immediately upon request because the Secretary of Defense “is the Federal Authority on ‘interests of national defense.’”<sup>148</sup>

Waivers for non-Defense entities, on the other hand, may be granted, but they require a more complex process.<sup>149</sup> First, for non-Defense waivers, the Department of Homeland Security must “make[] a rapid assessment regarding whether there is sufficient ‘interest of national defense’ to proceed.”<sup>150</sup> Then, if the interest is met, “the Maritime Administration is formally consulted” to assess “the availability of qualified United States flag capacity to meet the national defense requirements.”<sup>151</sup> The Administrator can then give advice on how the “U.S.-flag fleet can be enabled to meet the national defense needs,” but if it does, it “must inform the Secretary of Transportation when formal advice is issued, and post non-availability advice on the Maritime Administration website.”<sup>152</sup> Once all these steps are completed, the non-defense waiver may be granted.<sup>153</sup>

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141. *Id.*, at 329; Pub. L. No. 81-891, 64 Stat. 1120 (1950).

142. *Id.* at 333.

143. 46 U.S.C. § 501 (2021).

144. § 501(a).

145. *Domestic Shipping*, U.S. DEP’T OF TRANSP. MAR. ADMIN., <https://www.maritime.dot.gov/ports/domestic-shipping/domestic-shipping> (last visited Mar. 28, 2022) [<https://perma.cc/NPQ9-GATS>]; see 46 U.S.C. § 501(b) (2021).

146. *Id.*

147. It appears that only three non-defense entities waivers have been granted since 2012, which is when public reports were made mandatory. Papavizas & Shapiro, *supra* note 8, at 335; *Domestic Shipping*, *supra* note 54.

148. 46 U.S.C. § 501(a)(1); *Domestic Shipping*, *supra* note 54.

149. *Id.*; *Domestic Shipping*, *supra* note 54.

150. *Id.*

151. *Id.*

152. *Id.*

153. 46 U.S.C. § 501(b)(1).

In addition to the practical difficulty of obtaining a waiver, all waivers also face “a tidal wave of political ramifications” because the “[t]he [U.S.] shipping industry views these waivers as a direct threat to [U.S.] maritime jobs and sovereignty.”<sup>154</sup> For example, one American Maritime Partnership (AMP) article argued that Jones Act waivers “undermine American companies and jobs” and cost “American mariners and their American employers millions.”<sup>155</sup> These political hurdles are difficult to overcome or change because the “maritime lobby generously donates to politicians on both sides of the aisle.”<sup>156</sup>

Despite these practical and political challenges, waivers are occasionally granted. Many waivers have come after major hurricanes to ensure there is no disruption in the supply of energy.<sup>157</sup> These waivers are typically only granted to ensure the availability of adequate energy supplies, and they proceed through the 46 U.S.C. §501(a) Secretary of Defense path.<sup>158</sup> However, in 2017, after Hurricane Maria devastated Puerto Rico, the Department of Homeland Security granted a waiver that “extended beyond petroleum to cover ‘all products.’”<sup>159</sup> Waivers have also been granted after major environmental disasters such as the Exxon Valdez and Deepwater Horizon oil spills,<sup>160</sup> or when energy supplies were disrupted by outside forces.<sup>161</sup> Finally, another large group of waivers arise

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154. Isaak Hurst, *US Cabotage Laws and Alaska’s LNG Trade*, INT’L MARITIME GROUP (May 22, 2021), <https://maritime.law/legal-insights/us-cabotage-laws-and-alaska-lng-trade> [<https://perma.cc/6SVB-CQZL>].

155. Michael Roberts, *Jones Act Waivers Should be a Last Resort*, AMERICAN MARITIME PARTNERSHIP (June 30, 2021), <https://www.americanmaritimepartnership.com/articles/jones-act-waivers-should-be-a-last-resort> [<https://perma.cc/QEN9-KS42>]. The American Maritime Partnership is “powerful lobby group representing Jones Act carriers, shipbuilders and unions” that support the Jones Act. Joshua Mason & Jonathan Helton, *FIVE MYTHS ABOUT THE JONES ACT*, GRASSROOT INST. OF HAW. 7 (2021).

156. O’Grady, *supra* note 115.

157. Papavizas & Shapiro, *supra* note 8, at 340-344. Waivers for the transportation of petroleum products were granted after Hurricanes Katrina (2005), Rita (2005), Sandy (2012), Harvey (2017), Irma, (2017), and Maria (2017).

158. *Id.*

159. *Id.* at 344 (quoting U.S. DEP’T OF HOMELAND SEC., *WAIVER OF COMPLIANCE WITH NAVIGATION LAWS* (Sept. 28, 2017)).

160. *Id.* at 345.

161. “In 2011, a severe November storm froze parts of the Bering Sea making a traditional tug and barge fuel delivery impossible” and so a waiver was granted for a Russian tanker “to deliver 1.3 million gallons of home heating oil, unleaded gasoline, and diesel fuel to Nome and its residents.” Hurst, *supra* note 154. In 2021, the Colonial Pipeline, “which supplie[s] nearly half the refined fuels from Texas to the US eastern seaboard,” was hacked and so waivers were granted to allow foreign-flagged vessels to

during times of war.<sup>162</sup> But again, all waivers have an uphill political fight in which the opposition, spearheaded by the AMP, claims that such waivers “contribute[] nothing to the effectiveness of the emergency response” and only “undermine American companies and jobs by allowing foreign vessels.”<sup>163</sup> These waivers tend to show that, although the Jones Act is supposedly “necessary for the national defense,”<sup>164</sup> in moments of crisis, foreign ships are needed, and so waivers are granted.

#### IV. THE EFFECTS OF THE JONES ACT ON THE UNITED STATES

This comment will next look at how the Jones Act affects the United States by examining the Jones Act through the lenses of three different, but interrelated, areas of policy: (1) national non-security areas like the national economy, environment, and ship building industry; (2) national security; and (3) state and regional secondary effects.

The proponents of the Jones Act argue that it “protect[s] domestic employment and allow[s] the U.S. to more carefully monitor safety standards” and also that “foreign rivals have an unfair advantage because they face less stringent laws and regulations, pay lower wages, and receive production subsidies.”<sup>165</sup> What is more difficult for proponents to explain is “why the shipping industry is protected but other modes of transportation are not[,]” when other industries also face stiff foreign competition.<sup>166</sup> For example, the domestic automotive and aviation industries are both global leaders in their fields, despite facing foreign competition, laying bare the shortfalls of freezing an industry for over 100 years the way the Jones Act has done with the shipping industry.<sup>167</sup> As a result of the restrictions and disincentives that the Jones Act imposes on waterborne transport, “[m]any industries argue . . . that the Jones Act has

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ship fuel from Lake Charles, Louisiana to Linden, New Jersey. *Second Jones Act Waiver Granted to Citgo After Colonial Outage*, INSURANCE MARINE NEWS (May 17, 2021), <https://insurancemarinenews.com/insurance-marine-news/second-jones-act-waiver-granted-to-citgo-after-colonial-outage> [<https://perma.cc/9MYV-T5SQ>].

162. See FRITTELLI, *supra* note 1, at 12; Papavizas & Shapiro, *supra* note 8, at 325-52.

163. Michael Roberts, *Jones Act Waivers should be a Last Resort*, AMERICAN MARITIME PARTNERSHIP (June 30, 2021), <https://www.americanmaritimepartnership.com/articles/jones-act-waivers-should-be-a-last-resort> [<https://perma.cc/PK43-XPE7>].

164. 46 U.S.C. § 50101 (2009).

165. Olney, *supra* note 3, at 3.

166. *Id.*

167. Grabow, *supra* note 42, at 8.

led them to source inputs (such as feed grains, scrap metal, and road salt) from abroad rather than from domestic producers.”<sup>168</sup>

### *A. National Non-Security Effect*

#### 1. National Economy

The Jones Act is a form of what a report by the OECD calls “local content requirements.” Local content requirements, in the long term, are counter-productive because they “generate indirect costs in the economy.”<sup>169</sup> Even though the outcomes from these policies are “well-documented [as] counter-productive,” the policies have increased in popularity since 2008.<sup>170</sup> Those well-documented outcomes are “higher prices of domestically procured components” which leads to higher “price[s] of the final good” and a decline in “the quantity sold.”<sup>171</sup> Furthermore, the policies “have anti-competitive effects and generally fail to increase domestic welfare.”<sup>172</sup> The reasons these policies fail are because they encourage “an inefficient allocation of resources . . . a reduction in competition for the target industry, a decline in product quality . . . as well as corruption and favoritism.”<sup>173</sup>

In the U.S., the Jones Act has been championed as benefiting the national economy for over 100 years.<sup>174</sup> The AMP claims that the Jones Act “contributes \$150 billion to the U.S. economy” and that “the law is responsible for about 650,000 U.S. jobs.”<sup>175</sup> The problem with AMP’s

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168. Olney, *supra* note 3, at 4, 7. The cross-sectional analysis of this report shows that domestic material “are less likely to be transported via water than imports of the same good into the same state.” *Id.* at 9. This lack of water shipments is felt 91% more in coastal states that would have more capacity to import via water. *Id.* at 10.

169. OECD, LOCAL CONTENT REQUIREMENTS AND THEIR ECONOMIC EFFECT ON SHIPBUILDING 5 (2019).

170. *Id.* at 7. “Between 2010 and 2012, G20 countries put an additional 265 local content requirements in place.” *Id.* at 7 n.2.

171. *Id.* at 8.

172. *Id.*

173. *Id.*

174. Mason & Helton, *supra* note 155, at 7.

175. *Id.* Those that support the Jones Act say that it supports over 650,000 jobs, but this number is dubious for many reasons. First, the number comes from a study conducted by Pricewaterhouse Coopers for the Transportation Institute, which is a pro-Jones Act group, and it has never been publicly released. Second, an executive summary of the study that was leaked stated that only 95,000 jobs were directly supported, and 553,000 were “indirect or induced” jobs. Third, as the OECD study showed, not only would the current shipping industry jobs stay if the Jones Act amended, but in fact output in the shipbuilding industry would greatly expand. GRASSROOT INST. OF HAW, *Jones Act Lobby*



claims are that they are impossible to independently verify because they come from a 2020 private study that has never been made public or been reviewed.<sup>176</sup> This becomes an even more salient issue when the AMP's numbers are compared to numerous public studies that show that the Jones Act is hurting the national economy.<sup>177</sup> AMP's numbers, and the benefits they supposedly show, are even less reliable, given that "[e]conomists who have studied the Jones Act are in near unanimity that it diminishes U.S. prosperity."<sup>178</sup>

The OECD report uses statistical analysis to show that the Jones Act is harming the national economy. The statistical analysis in the report shows how "even on the basis of very conservative assumptions . . . an abolishment of the Act [would] result in net economic gains."<sup>179</sup> The report explores two scenarios, both of which would require amending the Jones Act, that are focused on the shipbuilding industry in the U.S.<sup>180</sup> One scenario amends the Jones Act by "reducing only capital costs" (i.e., lowering the cost of building a ship in the U.S.), and the second scenario amends the Jones Act by reducing "capital and operational costs" (i.e., lowering both costs of shipbuilding and ship sailing).<sup>181</sup>

Both scenarios produce dramatic results that benefit the U.S. shipbuilding industry, and in turn, the national economy. The report finds that U.S. shipbuilding could "increase its final demand by around 70% from approximately USD 841 million to USD 1.43 billion[,] its total output by about 71% from USD 859 million to USD 1.47 billion," and an additional "value added of around USD 44 million."<sup>182</sup> Even more dramatic, the potential increase to the U.S. economy from the two scenarios is between \$22 billion (+0.12%) and \$74 billion (+0.39%) for final demand, between \$40 billion (+0.1%) and \$135 billion (+0.4%) for

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*Sails with Dubious Jobs Estimates to Bolster Defense* (Feb. 17, 2022), <https://www.grassrootinstitute.org/2022/02/jones-act-jobs-claims-err-wildly-on-the-high-side> [<https://perma.cc/F7UF-35MF>].

176. *Id.*

177. See OECD, *supra* note 169; Colin Gabrow, *The Progressive Case for Jones Act Reform*, CATO INSTITUTE STUDY (Sept. 7, 2021), <https://www.cato.org/study/progressive-case-jones-act-reform#disproportionate-impact> [<https://perma.cc/34VS-HY2Y>]; FRITTELLI, *R43653*, *supra* note 65; Olney, *supra* note 3; Grabow, *supra* note 42.

178. Gabrow, *supra* note 178.

179. OECD, *supra* note 169, at 20.

180. *Id.* at 20-21.

181. *Id.*

182. *Id.* at 21.

total output, and between \$19 billion (+0.1%) and \$64 billion (+0.36%) for domestic value added.<sup>183</sup>

To put those numbers in context, the first scenario, final demand, and total output numbers “represent respectively more than 37 and 65 times” what the current value of the U.S. shipbuilding is under the Jones Act. In the same scenario, the further value added to “other [U.S.] industries” is \$19 billion (+0.11%), “which equals 439 times the volume generated . . . under the Jones Act.”<sup>184</sup> In the second scenario, the added final demand and total output “represent respectively two times and three times” what the current value of the U.S. shipbuilding is under the Jones Act.<sup>185</sup> In that second scenario, the further value added to “other U.S. industries” is \$66 billion (+0.4%), “which is 219 times the value added” under the Jones Act.<sup>186</sup> These numbers are clear: the Jones Act is “a net cost to the broader [U.S.] economy[,]”<sup>187</sup> and repealing or amending it would lead to enormous benefits to the U.S. national economy and to the U.S. shipbuilding industry itself.

## 2. Environment

The Jones Act greatly affects our environment “[b]y disincentivizing the use of water transport,” by incentivizing the use of “older—less efficient—vessels,” and by diverting cargo transportation “to more carbon-intensive modes.”<sup>188</sup> Compared to the EU, where “more than 36 percent of freight is transported by sea and inland waterways,” in the U.S. only 6 percent is transported by water, which leads to higher greenhouse gas emissions.<sup>189</sup> Further adding to this disproportionate contribution is the uncompetitive prices of new Jones Act ships, which have made the Jones Act fleet older and less efficient “than is commonly found in other countries.”<sup>190</sup>

Additionally, even when the U.S. tries to reduce its environmental footprint with “the development of offshore wind power,” the Jones Act makes the effort more carbon-intensive, expensive, and difficult.<sup>191</sup> This all stems from the fact that “no . . . vessels currently exist in the Jones Act

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183. *Id.*

184. *Id.* at 22.

185. OECD, *supra* note 169, at 22.

186. *Id.*

187. Gabrow, *supra* note 42, at 1.

188. *Id.* at 3.

189. *Id.*

190. *Id.*

191. *Id.* at 4.

fleet” that can transport and install the turbines.<sup>192</sup> This has forced companies to find “inefficient workarounds” such as “transport[ing] the turbine components from a nearby port to a foreign installation ship to avoid violating the law,” and “transporting the components from Canada” instead of from the U.S.<sup>193</sup> These workarounds have increased construction time from what “would have taken a matter of weeks in Europe,” to over a year in the U.S.<sup>194</sup>

Reforms to, or repeal of, the Jones Act could contribute anywhere from \$109 million to \$8.2 billion solely in environmental benefits to the national economy alone.<sup>195</sup> The unfortunate fact is that the Jones Act has “unwittingly incentivized alternative modes of transport” that “generate more greenhouse gases and emit pollutants that are in many ways more harmful,”<sup>196</sup> and has “encourage[d] the use of older, less-efficient vessels.”<sup>197</sup> If there is any hope that the U.S. will meaningfully contribute to efforts to stop the devastating effects of climate change, the Jones Act must be changed.

### 3. Effects on U.S. Shipping Industry

To contextualize the potential benefits of repealing or amending of the Jones Act, it is important to understand what the Jones Act has done to the shipping industry since its enactment. As discussed above, the U.S. had a strong shipbuilding industry for much of its early history,<sup>198</sup> but, by the time the Merchant Marine Act of 1920 was being debated, “[t]he relative cost of building ships in the United States versus foreign countries” had already become part of the debate.<sup>199</sup>

From the 1920s, when the Jones Act was passed, to after WWII, the U.S. maritime industry was still a major player in the world market, but since then, the industry has declined.<sup>200</sup> After WWII, although U.S. ship building costs were already 20% higher than foreign-built ships, the U.S.

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192. *Id.*

193. *Id.*

194. *Id.* at 5.

195. Timothy Fitzgerald, *Environmental Costs of the Jones Act*, CATO INSTITUTE POLICY ANALYSIS NO. 886 (Mar. 2, 2020), <https://www.cato.org/policy-analysis/environmental-costs-jones-act#> [<https://perma.cc/4B7X-N6LN>].

196. *Id.*; *see also* Olney, *supra* note 3, at 13.

197. Fitzgerald, *supra* note 195.

198. FRITTELLI, *supra* note 1, at 2; Grabow, *supra* note 42.

199. *Id.* at 3.

200. Olney, *supra* note 3, at 8.

still “had one of the largest shipbuilding industries in the world.”<sup>201</sup> But, shortly after WWII, “Japanese shipyards became twice as productive as” American shipyards, and by “1956[,] Japan was the leading shipbuilder in the world.”<sup>202</sup> Then, beginning in the 1970s, South Korean and Chinese shipyards, using Japanese techniques, quickly surpassed U.S. shipyards in terms of production.<sup>203</sup> By 2000, “the U.S. built 0.25% of the world’s new merchant ships,” and by 2018 Japan, South Korea, and China “built 91% of large merchant ships in the world.”<sup>204</sup>

As foreign shipyards started dominating the world market, U.S. shipyards could not compete, and “[p]roducing ships solely for domestic transportation [has] not [been] a lucrative enough market to keep U.S. shipyards in business.”<sup>205</sup> Because of the U.S. build requirement for domestic shipping, U.S. builders have a captive audience and are in a protected uncompetitive bubble.<sup>206</sup> This has led to “far costlier” ships “than those constructed abroad” and ships that take over twice as long to complete,<sup>207</sup> which in turn has “result[ed] in fewer ships and fewer mariners.”<sup>208</sup> Furthermore, a National Defense University (NDU) report from 2016 stated that “U.S. shipbuilding is ‘an average of twenty years behind international shipyards regarding advanced technology,’” which has “locked” the industry “in a cost/quantity trap, one that it appears unlikely to escape.”<sup>209</sup>

This decline in U.S. shipyard competitiveness led to the closing of over 300 U.S. shipyards from 1983 to 2013.<sup>210</sup> By 2018, nearly half of all U.S. shipyard jobs had disappeared, and by 2021, only four Jones Act-

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 9.

205. *Id.* at 11. From 2007-2017, 91% of ships built in U.S. shipyards were sold domestically, which indicates that there is no competition with foreign shipyards. FRITTELLI, *supra* note 1, at 4.

206. Grabow, *supra* note 42, at 5, 9-10. This “incentivized American shipyards to orient themselves away from the competitive international market and toward this captive domestic shipbuilding market.” *Id.* at 6.

207. The four “self-propelled oceangoing ships” built from “2018 through mid-2019” took 35-42 months to construct, while a ship built in 2017 elsewhere in the world, a ship that had more cargo capacity than all four of the U.S. ships combined, took only 18 months to complete and was \$50 million less than each of the two larger U.S. built ships. *Id.* at 10-11.

208. *Id.* at 5.

209. *Id.* at 7.

210. Mason & Helton, *supra* note 155, at 8-9.

producing shipyards remained open in the U.S.<sup>211</sup> Furthermore, “three of those four shipyards are not even American[-]owned.”<sup>212</sup> During this decline, cost differentials for building ships in the U.S. versus abroad skyrocketed from 20% in 1922, to 50% in the 1930s, to 100% in the 1950s, to 300% in the 1990s.<sup>213</sup> Now, as of 2019, the cost differentials of U.S.-built ships are 400% for tankers and 500% for container ships.<sup>214</sup> As more and more U.S. shipyards closed, fewer Jones Act eligible ships were built, and now the Jones Act fleet is smaller than it has ever been.<sup>215</sup>

The Jones Act fleet has shrunk in both the total number of vessels and the total carrying capacity of those vessels, and it is also one of the oldest fleets in the world.<sup>216</sup> The ocean fleet, for example, “has shrunk from 434 in 1950 to 99 in 2018” and the “aggregate carrying capacity . . . is still less than in 1950.”<sup>217</sup> Meanwhile, although “[i]nternationally, the useful life of a ship tends to fall between 20 and 25 years,” in the Jones Act fleet ships “are usually not scrapped until after they reach[] 40 years of service.”<sup>218</sup> Currently, 35 of the 99 ships in the ocean fleet are “21 years old or older[,]” which is actually better than it was in 2007 when 64 ships were 21 years old or older.<sup>219</sup> Another example is the Great Lakes Fleet, where a new freighter was launched in 2021, and that was “the first new ship added to the U.S.-flagged Great Lakes fleet since 1983.”<sup>220</sup> In fact, a vessel built in 1906 was still used as a freighter until 2013, and then “it was converted to use as an unpowered barge.”<sup>221</sup>

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211. *Id.*

212. *Id.* at 8.

213. FRITTELLI, *supra* note 1, at 4.

214. *Id.* at 4.

215. Olney, *supra* note 3, at 8, 10.

216. FRITTELLI, *supra* note 1, at 14; *Examination of Reports of the “El Faro” Marine Casualty and Coast Guard’s Electronic Health Records: Hearing Before the Subcommittee on Coast Guard and Maritime Transportation of the Committee on Transportation and Infrastructure*, 115th Cong. (2018) (“[O]ur fleet is almost three times older than the average fleet sailing around the world today”); Grabow, *supra* note 42.

217. FRITTELLI, *supra* note 1, at 14. The Great Lakes Fleet and the Inland River Fleet have also seen domestic tonnage decline since the 1950s and 1990s respectively. *Id.* at 17-18.

218. Grabow, *supra* note 42.

219. FRITTELLI, *supra* note 1, at 17. There are ships in the Jones Act fleet that were built in 1971 and 1973, and “30 of 99 ships—[were] built in 1994 or earlier.” Grabow, *supra* note 42, at 7-8.

220. Colin Grabow, *Aging U.S. Great Lakes Fleet Another Example of Protectionist Failure*, CATO INSTITUTE BLOG (Nov. 4, 2021, 11:03 AM), <https://www.cato.org/blog/aging-us-great-lakes-fleet-another-example-protectionist-failure> [https://perma.cc/S27M-3T5W].

221. *Id.*

Further shrinking the Jones Act fleet, and adding to the exponential costs of maintaining it, are the much higher costs associated with having a U.S. crew.<sup>222</sup> It is estimated that “U.S.-flag ships have an operating cost differential . . . [of] over \$6 million per ship per year compared to foreign-flag ships.”<sup>223</sup> Another estimate comes from 2010, when “the average operating cost of a U.S.-flag ship was 2.7 times greater than a foreign-flag ship,” and that cost has likely increased since then.<sup>224</sup> All of these costs have led to a loss of “market share to land modes even though ships have certain economic advantages,” are more reliable, safer, and more environmentally friendly.<sup>225</sup>

Along with the loss of market share, two other factors are further disincentivizing domestic water transport: (1) as a result of the costs outlined above, “the U.S. market has developed a unique vessel design, a seagoing barge called an articulated tug barge (ATB),” and (2) certain important ship designs are missing from the Jones Act fleet.<sup>226</sup> The Jones Act has incentivized the use of ATBs because they “are both cheaper to build . . . and require fewer crew members.”<sup>227</sup> ATBs are special tug boats and barges that are connected with a hinge.<sup>228</sup> Although theoretically the tug and barges could separate into separate vessels, ATBs sail so badly alone that they rarely switch barges or sail unconnected to a barge.<sup>229</sup> ATBs are called “rule breakers” within the industry because they are crewed by a half or a third of what tankers require.<sup>230</sup> They can do this because the Coast Guard bases crew requirements off of registered tonnage, and for barges, the tonnage is based only on the tug, not the barge.<sup>231</sup> Although ATBs are rarely, perhaps never, separated from their barges, they can use much smaller crews—compared to a ship of comparable size—because of

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222. FRITTELLI, *supra* note 1, at 4.

223. *Id.* This number includes insurance and maintenance costs.

224. *Id.* (citing U.S. MARITIME ADMIN., COMPARISON OF U.S. AND FOREIGN-FLAG OPERATING COSTS (2011)).

225. FRITTELLI, *supra* note 1, at 14.; FRITTELLI, *R43653*, *supra* note 64; Fitzgerald, *supra* note 195.

226. FRITTELLI, *supra* note 1, at 15-16. Robert P Hill, an original designer of ATBs, stated, “The American coastwise shipping business has grown in a way that differs from many other nations. The high cost of manning and building ships has led over the years to a coastwise transportation network dominated by tugs and barges.” FRITTELLI *R43653*, *supra* note 64, at 7.

227. Grabow, *supra* note 42.

228. FRITTELLI, *supra* note 1, at 16.

229. FRITTELLI, *R43653*, *supra* note 64, at 3-4.

230. *Id.* at 7.

231. *Id.* This distinction “has been criticized for distorting the domestic shipping market.” *Id.*

how the regulations have been implemented.<sup>232</sup> This is not only less safe,<sup>233</sup> but it also makes domestic shipping less efficient, reliable, and capable.<sup>234</sup> There is a reason why ATBs are “seldom used” outside the U.S.—they are inferior to actual ships.<sup>235</sup>

However, in the U.S., ATB use is uncommonly prominent because the Jones Act fleet is missing certain ship designs and, of the ones it does have, there are only a small number.<sup>236</sup> The fleet currently has fifty-seven tankers, twenty-four container ships,<sup>237</sup> and nine “relatively small general-cargo” ships.<sup>238</sup> Missing from that list are “heavy-lift” vessels, liquefied natural gas (LNG) tankers, OSVs used to construct offshore oil rigs, large cruise ships, livestock carriers, asphalt and sand tankers, and Wind Tower Installation Vessels (WTIV).<sup>239</sup>

All of the above create a domino effect that starts with the Jones Act restrictions being remarkably “onerous,” which leads to a decrease in “domestic water shipments,” and ends with U.S. industries and consumers

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232. *Id.*

233. ATBs have to sail closer to the coast, and that “pose[s] a higher risk of grounding and provide[s] less time to prevent spilled oil from reaching shorelines.” FRITTELLI, *supra* note 1, at 16.

234. *Id.*; FRITTELLI, *R43653*, *supra* note 64, at 7.

235. Grabow, *supra* note 42.

236. FRITTELLI, *supra* note 1, at 15. An example is that there is only one chemical tanker in the fleet, and it was built in 1968. Grabow, *supra* note 42, at 7.

237. Two of these container ships are dry bulk ships that are “mostly inactive, possibly because they are nearly 40 years old.” FRITTELLI, *supra* note 1, at 15.

238. *Id.* at 13-14.

239. *Id.* at 15, 19; Aspinwall, *supra* note 5, at 251; Colin Grabow, *Under Mounting Pressure, Jones Act Lobby Claims the Law is Cost-Free to Hawaii*, CATO INST. BLOG (Aug. 24, 2020, 1:08 PM), <https://www.cato.org/blog/under-mounting-pressure-jones-act-lobby-claims-law-cost-free-hawaii> [<https://perma.cc/D3KD-WDVM>]. A Jones Act WTIV is currently being built for \$500 million in Texas, which is “at least \$200 million higher than if it were built abroad,” Colin Grabow, *The Jones Act Continues to Hamper the Development of Offshore Wind Energy*, CATO INST. BLOG (May 19, 2021), <https://www.cato.org/blog/jones-act-adds-costs-complications-offshore-wind-energy#:~:text=The%20Jones%20Act%20continues%20to%20Hamper%20the%20Development%20of%20Offshore%20Wind%20Energy,-By%20Colin%20Grabow&text=The%20Washington%20Post%20recently%20noted,of%20Virginia%20Beach%20last%20year> [<https://perma.cc/V57K-6G7Y>] (quoting Colin Grabow, *Taking the wind out of renewable energies*, WASH. POST (May. 14, 2021), [https://www.washingtonpost.com/opinions/letters-to-the-editor/taking-the-wind-out-of-renewable-energies/2021/05/13/01162ac2-b365-11eb-bc96-fdf55de43bef\\_story.html](https://www.washingtonpost.com/opinions/letters-to-the-editor/taking-the-wind-out-of-renewable-energies/2021/05/13/01162ac2-b365-11eb-bc96-fdf55de43bef_story.html)), and it will not be ready until at least 2023, Kirk Moore, *Industry Report: Offshore Wind Needs More Installation Vessels ASAP*, WORKBOAT (May 5, 2021), <https://www.workboat.com/wind/industry-report-offshore-wind-needs-more-installation-vessels-asap> [<https://perma.cc/NLA6-7KYK>].

having to pay artificially higher prices.<sup>240</sup> As shipbuilding prices and build time increase, there are “higher freight rates,” which then “deter[s] the use of coastwise shipping, which, in turn, decreases the demand for ships,” and this leads to “less repair and maintenance work for U.S. shipyards.”<sup>241</sup> This domino effect continues by decreasing the diverse capabilities of the Jones Act fleet, and by “encourag[ing] the use of vessels that would be considered well past their useful life outside of the protected Jones Act market.”<sup>242</sup>

### *B. National Security Effects*

Since its passage, proponents of the Jones Act have argued that it is “necessary for the national defense” because it helps ensure that there are merchant marines who can “serve as a naval or military auxiliary in times of war or national emergency.”<sup>243</sup> Furthermore, as Senator Wesley Jones wrote after the passing of the Act, it was not only necessary for U.S. “national defen[s]e and national independence,” but also “for the world’s peace and safety.”<sup>244</sup> Today, these contentions are harder than ever to support.

The first way the Jones Act is supposed to increase our national security is by ensuring the U.S. has “the best equipped” merchant marines.<sup>245</sup> However, because of the Jones Act’s negative effects on the shipping industry discussed above, the number of merchant marines has shrunk to a size that “puts in doubt its ability to sufficiently crew a reserve sealift fleet.”<sup>246</sup> From 1990 to 2017, the estimated number of qualified merchant marines have shrunk from 25,000 to 11,768, and of those 11,000 only about 3,000 are crew members on Jones Act vessels.<sup>247</sup> These numbers, although low, are estimated to be able to fulfill the needs of the military and commercial fleets, but only for 180 days.<sup>248</sup> If the military

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240. Olney, *supra* note 3, at 11. The fleets “ships are so expensive that they are essentially only used where there is no alternative form of transport.” Gabrow, *supra* note 42.

241. Gabrow, *supra* note 42, at 7.

242. *Id.*

243. Act of June 5, 1920, ch. 250, 41 Stat. 988 (1920), §1 (codified as amended at 46 U.S.C. § 50101).

244. Wesley L. Jones, *The Merchant Marine Act of 1920*, 9 THE ACAD. OF POL. SCI. 89, 97 (1921).

245. Act of June 5, 1920, ch. 250, §1 (codified as amended at 46 U.S.C. § 50101).

246. FRITTELLI, *supra* note 1, at 20.

247. U.S. MARITIME TRANSP. SYS. NAT’L ADVISORY COMM., MARITIME WORKFORCE WORKING GROUP REPORT 32 (2017).

248. *Id.* at 4, 32.



needs last more than 180 days, there would be an immediate deficit of over 1,800 merchant marines.<sup>249</sup> Furthermore, this deficit could easily be higher, both before and after the 180-day mark, because the estimates are based on an assumption that the identified merchant marines will be “available and willing to sail.”<sup>250</sup> This assumption is a hopeful one because it requires all identified and qualified merchant marines to voluntarily agree to sail for longer than normal periods of time, with shorter rest times, and in conditions that are more difficult, more dangerous, and completely unfamiliar.<sup>251</sup> Moreover, although these optimistic estimates report that the immediate needs can be met, there is no question that “long[-]term” needs—more than 180 days—will not be met. Clearly the Jones Act has failed at ensuring an adequately equipped merchant marines, and this has been the case for decades.<sup>252</sup>

The second way the Jones Act is supposed to increase our national security is by ensuring that the U.S. fleet includes the “most suitable types of vessels,”<sup>253</sup> but because of the costs of U.S.-built ships, “the military sealift fleet is largely composed of more economical foreign-built ships.”<sup>254</sup> Additionally, unlike commercial vessels that have become more and more specialized, “[t]he military seeks cargo ships with flexible capabilities.”<sup>255</sup> Thus, the vast majority of the sealift vessels are either from the privately-owned international fleet or from the government-owned Military Sealift Command fleet.<sup>256</sup> Further making the suitable vessels requirement nearly impossible to achieve, there are insufficient shipyards in the U.S. to repair the current fleet; many of the shipyards that do exist do not have the necessary infrastructure, and the expense of repairing ships in the U.S. is so high that a fifty percent tariff for repairs made abroad still does not make the overall cost more than what it costs in the U.S.<sup>257</sup> While the U.S. maritime industry stays afloat because of the U.S. military,<sup>258</sup> the conditions created by the Jones Act have created a government-owned

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249. *Id.* 32.

250. *Id.*

251. *Id.* at 4, 14, 24. Prolonged employment aboard the reserve sealift fleet would, in most cases, mean that mariners would forfeit their permanent positions aboard commercial vessels.” Grabow, *supra* note 42, 3 n.19.

252. FRITTELLI, *supra* note 1, at 21.

253. Act of June 5, 1920, ch. 250, 41 Stat. 988, §1 (codified as amended at 46 U.S.C. § 50101).

254. FRITTELLI, *supra* note 1, at 21.

255. *Id.* at 22.

256. *Id.* at 21

257. *Id.* at 22-23

258. Grabow, *supra* note 42.

sealift fleet, that is, on average, more than forty years old on average; even worse, the ships are often unsafe and unsailable.<sup>259</sup>

Recently, in 2019, the Navy reported that it was trying to build new ships in domestic shipyards, repair existing ships to extend their lives to sixty years, and buy used foreign-built ships to improve the sealift fleet; however, the domestic builds and repairs were not progressing as needed.<sup>260</sup> The repairs were taking “twice as long as originally” planned, and they were costing “three times more” than what had been anticipated.<sup>261</sup> The domestic builds were “estimated to be [twenty-six] times more expensive than purchase of a foreign-built used ship.”<sup>262</sup> This is an obvious issue for the Navy, and so it decided to put its money towards buying foreign-built ships.<sup>263</sup>

In recent examples of wartime shipping needs, the Jones Act has failed miserably. During the first Gulf War, when the U.S. had nearly double the merchant marines available as compared to today, the policy goals of the Jones Act were still clearly unmet.<sup>264</sup> The realities of the degradation of U.S. shipping flowing from the Jones Act were stated clearly by General Darren W. McDew, the head of the U.S. Transportation Command. In 2018, General McDew told Congress that the U.S. needed to “rethink the policies of the past in order to face an increasingly competitive future.”<sup>265</sup> What the Jones Act has done is “create[] an environment where the U.S. government must pay a premium to buy a world-class navy.”<sup>266</sup> Even more damning, “the Jones Act has regularly been suspended in times of war or

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259. FRITTELLI, *supra* note 1, at 23

260. *Id.* at 23.

261. *Id.* at 23.

262. *Id.*

263. *Id.*

264. Grabow, *supra* note 42, at 2-3. (1) After the Iraqi invasion of Kuwait, “[o]f the 281 Ready Reserve Forces (RRF) and commercial ships chartered by the Military Sealift Command . . . a mere 8 were Jones Act-eligible.” *Id.* at 2. (2) Out of the total amount shipped during the conflict, “26.6 percent of total unit cargo” was shipped by foreign-flagged ships, whereas only 12.7 percent was shipped by U.S.-flagged commercial ships. *Id.* (3) During Desert Shield and Desert Storm the U.S. was “nearly 4,200” merchant marines short, and of those that served, many “came out retirement” and were in their 60s, 70s, or 80s (with the oldest being 92) or they were individuals that had just graduated and were teenagers. *Id.* at 3. (4) During the war, “[w]hen MARAD attempted to activate a second wave of 34 RRF [Ready Reserve Forces] ships to follow on its first wave of 55, it ran out of mariners from the U.S. crew pool before the activations could be completed.” *Id.*

265. *Id.* at 4.

266. *Id.* at 7 (quoting SYAMSUL BACHRI ET AL., FINAL REPORT: SHIPBUILDING INDUSTRY, DWIGHT D. EISENHOWER SCHOOL FOR NATIONAL SECURITY AND RESOURCE STRATEGY (2015)).

national emergency.”<sup>267</sup> Thus, “[i]n other words, when the exact situations that the Jones Act was intended to address arise, the law often must be waived because it has failed so abjectly.”<sup>268</sup>

*C. Example of the Jones Act Effects on National Security and Non-Security alike: Shipment of Crude Oil*

One of the best examples of how the Jones Act affects national security and the national economy, while also causing disproportionate regional effects, is the “chicken or the egg” scenario that the Jones Act has created in the oil and gas industry,<sup>269</sup> one in which a solution is getting harder to find.<sup>270</sup> It is important to understand the capacities and speeds of the different oil transportation methods, what unique challenges there are for the industry, and what the ideal shipping procedures are.

First, the capacities and speeds of oil transportation are as follows: trains can carry 70,000 to 80,000 barrels of oil per trip at speeds of 40-50 mph; ATBs can carry 50,000 to 340,000 barrels of oil in one shipment at a maximum speed of 12 mph; tankers can carry 300,000 to 3,000,000 barrels of oil in one shipment at speeds of 14-18 mph;<sup>271</sup> and pipelines can transport 400,000 to 800,000 barrels of oil a day at speeds of 3-8 mph.<sup>272</sup> Second, some unique challenges for the industry are (1) not all crude oil is the same, and each refinery is set up to refine certain types of crude oil, and (2) similar to refineries, tankers “do not readily alternate between carrying [crude] oil . . . and refined [] petroleum products.”<sup>273</sup> Third, in the crude oil industry, the larger the ship and the longer the trip, the better the economies. Although not ideal for the economies of scale, if routes are shorter, it is better to use smaller ships because they take less time to load

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267. *Id.* at 9

268. *Id.*

269. In 2019, the U.S. was “the world’s largest gas producer.” The Editorial Board, Opinion, ‘America First’? Kill the Jones Act, WALL ST. J. (Nov. 4, 2019), <https://www.wsj.com/articles/america-first-kill-the-jones-act-11572822910> [<https://perma.cc/SBB5-4V5P>].

270. See generally FRITTELLI, R43653, *supra* note 64. The solution is getting harder to find because U.S. shipyards cannot meet domestic shipping needs, and domestic shipping is not meeting the needs of the U.S. economy.

271. The Jones Act fleet only has 11 tankers that have a maximum carrying capacity of 1,300,000 barrels of oil, and they are all used in the Alaska to West Coast routes. *Id.* at 4. However, there are 42 ATBs that “can carry more than 130,000 barrels. *Id.*

272. *Id.* at 3-4. That said, “recent increases in domestic crude oil production” has convinced some tankers to shift what they carry. *Id.* at 4.

273. *Id.* at 1, 4.

and unload.<sup>274</sup> Comparative evidence suggests that, if the U.S. had more tankers, they “would be the preferred vessels for shipments from Texas” to the East Coast, a route that is around 2,000 nautical miles.<sup>275</sup>

Now, in the U.S., tankers do not transport the amount of oil that they could because of the Jones Act. Tankers are the ideal transporters for refineries because most refineries are located on a coast, and “a tanker’s capacity is [best] matched to the daily consumption rates of a single refinery.”<sup>276</sup> However, in the U.S., because the Jones Act has shrunk its fleet, “some refineries with direct ocean access [had] to ship domestic oil by barge or train or to continue to rely on foreign sources.”<sup>277</sup> Although railroads have a speed advantage, they are inefficient, have less capacity, are less safe, and can have significant detrimental effects to other railroad-using industries.<sup>278</sup> Pipelines also have a disadvantage when it comes to speed of shipping, but that are more dependable than water-borne shipping, it takes fewer people to operate a pipeline, and can more easily increase shipping amounts.<sup>279</sup> Additionally, a major disadvantage for both pipelines and railroads is the need to “acquire, build, maintain, and pay property taxes” for their use when compared to shipping “infrastructure in harbors . . . and [] inland waterways . . . [that] is largely provided by the federal government.”<sup>280</sup> Even with all these hurdles for other methods of transportation, the Jones Act has proved to be the biggest hurdle, so railroads and pipelines are used more often than tankers.

The hurdles imposed by the Jones Act make it next to impossible for the U.S. oil industry to achieve ideal shipping methods.<sup>281</sup> For example, the price for shipping crude oil from the Gulf Coast to the northeastern U.S. is almost three times more (five to six dollars per barrel versus two dollars per barrel) than Gulf Coast shipping to eastern Canada.<sup>282</sup> This has led to shipment distances being reduced over water, barges replacing tankers in the Jones Act fleet, and train and pipeline transportation becoming more prevalent even though they are less safe and more

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274. *Id.* at 5.

275. *Id.*

276. FRITTELLI, *R43653*, *supra* note 64, at 2, 4.

277. *Id.* at 4.

278. *Id.* at 16-20; Olney, *supra* note 3, at 13.

279. Olney, *supra* note 3, at 14-16.

280. FRITTELLI, *R43653*, *supra* note 64, at 14-15, 17.

281. *Id.* at 14-16.

282. *Id.* at 9. This is not the only example, as shipping regular merchandise from East Coast to Puerto Rico costed twice that of sending the same to Jamaica or the Dominican Republic. Grabow, *supra* note 42.

costly.<sup>283</sup> Although tankers can operate in worse weather, are faster, have better fuel economy, and are estimated to cut the cost of shipping oil by barges in half,<sup>284</sup> a Jones Act tanker that is carrying 300,000 barrels will receive \$1 million less per shipment because of the costs the Jones Act imposes.<sup>285</sup> The secondary effect of this is that at the same time U.S. oil exports are booming, regions like New England must resort to importing foreign oil.<sup>286</sup>

This pattern of needing to import oil, even though the U.S. produces more than enough of it, is the same across the country. California has to import a “substantial portion of its refined product needs,” Hawaii gets most of its crude oil from Asia, and “Puerto Rico does not consume any petroleum products of U.S. origin.”<sup>287</sup> It is even worse when it comes Liquid Natural Gas (“LNG”).<sup>288</sup> Even though “the U.S. is the world’s largest [LNG] producer,” Russian natural gas is being delivered to Puerto Rico because the Jones Act effectively bars gas shipments from the continental U.S. to Puerto Rico.<sup>289</sup> This is because there are “zero LNG tankers that meet Jones Act rules.”<sup>290</sup> This Russian delivery of gas is not new, as New England had to have gas imported from Russia during the winter of 2017 because of a “lack of pipeline capacity” in New England.<sup>291</sup> This is not limited to the New England area; Hawaii has the highest prices for natural gas because of the Jones Act, and Puerto Rico imports almost all of its natural gas from Trinidad and Tobago.<sup>292</sup> Furthermore, because there are no LNG tankers in the Jones Act fleet, “Alaska would be prohibited from shipping any of its LNG to [] domestic ports.”<sup>293</sup> Thus, “Alaska will be forced to sell its natural gas exclusively to Asia.”<sup>294</sup> This inability to transport sufficient, or, in some cases, any oil and gas within the U.S. is not only costly to Americans, but makes the United States more economically insecure as it has to rely on foreign sources of energy to meet its demands.

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283. *Id.* at 11, 14-15, 16-20.

284. *Id.* at 12.

285. FRITTELLI, *R43653*, *supra* note 64, at 9; Olney, *supra* note 3, at 13.

286. *Id.* at 10.

287. *Id.* at 10, 16, 21.

288. *Id.*, at 21.

289. Editorial Board, *supra* note 269.

290. *Id.*

291. *Id.*

292. FRITTELLI, *R43653*, *supra* note 64, at 13.

293. Hurst, *supra* note 154.

294. *Id.*

V. UNEVEN COSTS OF THE JONES ACT TO SHIPPING DEPENDENT  
REGIONS IN THE U.S.

As described above, the negative effects of the Jones Act are national in scope; however, islands like Hawaii and Puerto Rico that depend heavily upon shipping for importing goods, are disproportionately impacted.<sup>295</sup> As a result of the Jones Act, Hawaii and Puerto Rico face higher costs for basic supplies, thus disrupting industries and depressing local economies.<sup>296</sup> These effects not only make these regions suffer more, but they also make these regions pay a higher proportion of the Jones Act bill.<sup>297</sup>

A. Hawaii

Hawaii, made up of islands in the middle of the Pacific Ocean, is completely dependent on shipping for all its needs; thus, the Jones Act impacts the state more than most others. For Hawaii, in 2020, the Jones Act cost the average family about \$1,800 per year, or about \$1.2 billion in total.<sup>298</sup> These costs are borne from the Jones Act, forcing Hawaii to look abroad for most of its energy needs and to import all of its sand and asphalt, even though the U.S. “is the world’s leading exporter of both.”<sup>299</sup> If the state could import energy, asphalt, and sand, it could “reduce electricity rates that are the country’s highest” and “lower the cost of construction and boost [the] quality of Hawaii’s infrastructure,” which some analysts show as the country’s second-worst.<sup>300</sup>

For exporters in the state, the “capital freed up through reduced shipping expenses [could] expand their business[;]” even though “[t]here are more than 100 kinds of ships being built in the world, [Hawaii] only

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295. Erik Olsen, *An Arcane American Law Protected by Powerful interests is Causing Insane Traffic Jams*, QUARTZ (Aug. 7, 2017), <https://qz.com/1032288/how-a-100-year-old-american-law-helps-make-your-commute-miserable> [<https://perma.cc/U262-R7WV>]; CONG. RSCH. SERV., IF10878, U.S. LNG TRADE RISING, BUT NO DOMESTIC SHIPPING (May 4, 2018), <https://crsreports.congress.gov/product/pdf/IF/IF10878/2>.

296. See Colin Grabow, Inu Manak & Daniel J. Ikerson, *The Jones Act: A Burden America can No Longer Bear*, Cato Institute (June 28, 2018), <https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear#> [<https://perma.cc/946Y-TW6Q>].

297. See THOMAS GRENNES, AN ECONOMIC ANALYSIS OF THE JONES ACT 25-28 (2017).

298. Jonathan Helton, *Jones Act Closed Loophole that Could Help Hawaii*, GRASSROOT INST. OF HAW (Jan. 31, 2021), <https://www.grassrootinstitute.org/2021/01/jones-act-closed-loophole-that-could-help-hawaii> [<https://perma.cc/T9FH-6AL7>].

299. Grabow, *supra* note 239.

300. *Id.*

ha[s] access to three kinds.”<sup>301</sup> For example, Hawaiian cattle ranchers are greatly affected because, although “about 75% of their cattle” is sent to the U.S. mainland, there “are no Jones Act-compliant livestock vessels.”<sup>302</sup> Before the outbreak of “mad cow” in 2003, Hawaiians were able to use Canada to work around the Jones Act, but since then, that loophole has been closed.<sup>303</sup> Instead, Hawaiian cattle ranchers have to use “cowtainers”—specialized shipping crates just for cattle” that cause “in-harbor cattle waste, disposal challenges, higher in-transit cattle mortality and lower-weight cattle delivery to market.”<sup>304</sup>

A study commissioned by Grassroot Institute of Hawaii found that, similar to what the OECD report had concluded about Jones Act’s effects on the national economy, repealing the Jones Act could add 5,600 direct jobs and 6,800 indirect and induced jobs in Hawaii.<sup>305</sup> As discussed above, proponents of the Jones Act claim that it is responsible for adding 13,000 jobs and over \$3.3 billion to the Hawaiian economy, but these claims come from a private study that cannot be verified, and no other evidence supports the claim.<sup>306</sup> An example of how that private study does not match public data is that the Hawaii Department of Transportation estimated in 2016 that “there were only 2,486 positions in the state’s maritime cargo sector.”<sup>307</sup> The Grassroot Institute’s study concluded that more jobs would be created by repealing the Jones Act because it would allow “U.S. companies to buy less expensive foreign-built ships,” and that would create more shipping jobs.<sup>308</sup> Furthermore, although the claim of \$3.3 billion benefits to the state economy cannot be confirmed because “it’s impossible to know how that figure is calculated,” even if the claim is correct, the study commissioned by the Grassroots Institute shows that amending or repealing the Jones Act could add another \$531 million or \$1.2 billion respectively.<sup>309</sup> The numbers speak for themselves: the Jones

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301. Beverly Creamer, *Jones Act: Pro and Con*, HAWAII BUSINESS MAGAZINE (Sep. 3, 2019), <https://www.hawaiiibusiness.com/jones-act-pro-and-con> [<https://perma.cc/A9SP-C8LH>].

302. Helton, *supra* note 298.

303. *Id.*

304. *Id.*

305. GRASSROOT INST. OF HAW., *supra* note 179.

306. *Id.* This report came from the AMP, and another AMP report also claims to show that there is not any effect on everyday items in Hawaii. However, both the Grassroots Institute and the CATO institute dissected the second AMP report, and that dissection showed glaring methodological flaws. Grabow, *supra* note 242.

307. GRASSROOT INST. OF HAW., *supra* note 179.

308. *Id.*

309. *Id.*

Act is harming Hawaii and repealing or amending the Act would result in huge benefits with minimal drawbacks.

*B. Puerto Rico*

Like Hawaii, Puerto Rico is an island that depends on shipping to get necessary goods and, as a result, it is disproportionately impacted by the Jones Act. A 2010 study from the University of Puerto Rico stated that the Jones Act costs the island \$537 million per year because of the higher shipping costs.<sup>310</sup> The Federal Reserve Bank of New York found that it cost nearly twice as much to ship identical containers from the U.S. East Coast to Puerto Rico than to other independent Caribbean islands.<sup>311</sup> The territory also has the second highest electricity rates in the U.S. (only exceeded by Hawaii).<sup>312</sup> Additionally, the Jones Act allowed an oligopoly in shipping to Puerto Rico to form when “just two firms control[] 85 percent of the container capacity.”<sup>313</sup> This oligopoly led to “one of the largest domestic price-fixing conspiracies ever investigated by the United States,” one that resulted in prison sentences and fines for shipping executives.<sup>314</sup> Yet, none of these adverse effects have changed the law, or in Puerto Rico’s status within the law.<sup>315</sup>

Not only does the Jones Act harm Puerto Ricans by increasing shipping prices and creating a fertile environment for corruption, but the Act also makes the island less competitive than its neighbors. In international shipping, there is a model that is prevalent throughout the world called transshipment, but because of the Jones Act, it cannot be used in the U.S.<sup>316</sup> Transshipment is when cargo is transferred from “one vessel to another before it is brought to its final destination.”<sup>317</sup> Essentially, it is a method of using major ports to unload international shipments and then use those same ports to reload smaller ships for domestic shipments.<sup>318</sup> This method of shipment could be a huge economic boost for Puerto Rico

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310. GRENNES, *supra* note 297, at 26.

311. *Id.*

312. *Id.*

313. Grabow, *supra* note 178.

314. *Id.*

315. GRENNES, *supra* note 297, at 26. The U.S. Virgin Islands were granted exemptions from the Jones Act in 1922 and that has greatly benefited them. *Id.*

316. Colin Grabow, Examining the Jones Act’s Harm to U.S. Ports, CATO INSTITUTE BLOG (April 7, 2021, 10:27 AM), <https://www.cato.org/blog/transshipment-of-overlooked-cost-jones-act> [<https://perma.cc/453V-HLJU>].

317. *Id.*

318. *Id.*



because the Caribbean is the “crossroads,” or “the ‘Singapore,’ of the Americas.”<sup>319</sup> But, because of the Jones Act, “[w]hile neighboring Jamaica and the Dominican Republic have emerged as major transshipment hubs . . . Puerto Rico isn’t even a part of the transshipment conversation.”<sup>320</sup> In addition to the transshipment hub, the island’s “proximity to shipping routes for U.S. LNG exports” could make it an energy exporting hub, but again the Jones Act thwarts this.<sup>321</sup> The Jones Act is extremely damaging to the island’s economy and is arguably one of the factors that hinders the island from getting itself out of bankruptcy.<sup>322</sup>

Both Hawaii and Puerto Rico experience enormous negative effects, in micro and macro terms, that stem from the Jones Act. Both could easily be set free from its grip. However, neither have much political power (Puerto Rico much less than Hawaii), and the entrenched interests from the proponents of the Jones Act have not budged.<sup>323</sup> Until the Jones Act is amended or repealed, both islands will continue to suffer its disproportionate effects.

#### CONCLUSION

The U.S. has not meaningfully changed the laws that control domestic shipping in U.S. waters since its founding, and because of that the U.S. suffers consequences that worsen each year. The national economy, the environment, the shipping industry, national security, and individual states and territories are harmed because of the Jones Act policy of only allowing American-made, -owned, and -crewed ships in domestic shipping. At a minimum, the U.S.-built requirement should be repealed, but ideally, the entire Jones Act should be reviewed, revised, and replaced. It is time to shed the relics of the past and bring the U.S. shipping industry into the 21<sup>st</sup> Century.

As the world becomes more chaotic amidst the COVID-19 pandemic, escalating armed conflicts, and environmental catastrophe, the U.S. must take all available steps to modernize our shipping fleet and bolster our economy. The Jones Act, a law that was created to protect Americans, is now directly harming them and thwarting those goals. Additionally, with

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319. Greg Miller, Inside Box Shipping’s Caribbean ‘Transshipment Triangle’, FREIGHTWAVES (July 11, 2019), <https://www.freightwaves.com/news/inside-container-shippings-caribbean-transshipment-triangle> [<https://perma.cc/YBJ5-ZQ6M>].

320. Grabow, *supra* note 316.

321. CONG. RSCH. SERV., *supra* note 297.

322. See Olsen, *supra* note 295; Grabow, *supra* note 178.

323. See generally, Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. 1249, 1294 (2019).

prices increasing because of material shortages and inflation, the costs that Americans pay for the Jones Act, directly and indirectly, are becoming increasingly untenable. Congress could help the American people, improve the U.S. economy, improve national security, mitigate the country's impact on the environment, and reduce the disproportionate burdens simply by repealing the U.S.-built requirement of the Jones Act, or by repealing the entire U.S.-built, -owned, and -operated policy of the Jones Act. Congress should take immediate action to implement such changes.

