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Myth and Conjecture? The "Cost" of the Jones Act

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I
INTRODUCTION

Opponents of the Jones Act have traditionally—and more frequently in recent years—attacked the law by arguing it "increases the cost of shipping." These critics assert that, absent the Jones Act, American shippers and ultimate customers would benefit from cargo moved at lower rates charged by foreign shipping companies currently engaged in international commerce. In many cases, opponents of the Jones Act have actually projected a specific rate differential or overall "cost" of the law by comparing domestic shipping rates with international shipping rates.

In response, the domestic shipping industry has labelled the argument "the big myth" and charged its proponents with "comparing apples to oranges."[1] Supporters of the Jones Act point to statements from the U.S. Government Accountability Office ("GAO") and others contending that if the Act was repealed and foreign shipping companies were allowed to enter the domestic trades, those foreign shipping companies would find themselves subject to additional U.S. laws ranging from employment to tax. As a result, the application of those laws would impose additional costs that would diminish, if not eliminate, any perceived price advantage of foreign shipping companies.

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[1]Thomas Allegretti, Chairman, American Maritime Partnership, Remarks at the TradeWinds Jones Act Forum (Oct. 8, 2014) [hereinafter Allegretti Speech], available at http://www.americanmaritimepartnership.com/wp-content/uploads/2014/10/TradeWinds-Jones-Act-Script-Final.pdf.

This Article explores the validity of the argument that shipping rates in America's domestic trades would drop dramatically if the Jones Act was repealed. In particular, it examines whether American shippers and consumers would witness lower rates in a legal and regulatory environment in which the Jones Act was repealed or relaxed in some way. By evaluating three questions, as described below, this Article ultimately questions the ability of anyone to accurately quantify the "cost" of the Jones Act.[2]

In Part II, this Article surveys which U.S. laws not currently applied to foreign shipping companies would likely apply if those companies were to operate in domestic commerce. The inquiry begins by first determining which U.S. laws would likely apply without controversy to foreign shipping companies operating in domestic commerce under existing statutes and regulations if the Jones Act was repealed.

Part III then considers a related question about the extent to which additional laws may apply to foreign shipping companies operating in domestic commerce. That is, it examines which laws Congress, federal departments or agencies would amend or interpret to apply to foreign shipping companies, beyond those laws that would likely apply without controversy, in order to address resulting competitive disadvantages to American companies.[3] Laws applied under either scenario would result in new and increased compliance costs to foreign shipping companies, which undermines the assertion that permitting foreign companies to operate in the domestic trade would automatically yield cost savings for the American consumer.

Assuming, arguendo, that opening the coastwise trade to foreign shipping companies would result in rate savings, despite increased compliance costs, Part IV examines whether it is reasonable to assume that those rate savings would actually be passed along to consumers. Ultimately, this Article finds that proponents of Jones Act repeal should not assume resulting cost savings, if any, automatically result in price savings for consumers.

Given the complex legal rules and regulations applicable to domestic shipping companies, this Article concludes that it is nearly impossible to

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[2]This Article does not address the likelihood of repeal of the Jones Act—or the lost economic or national security benefits that would occur in the event of repeal, as argued by proponents of the Act. See, e.g., Leigh Munsil, *Coast Guard Chief: Repealing Jones Act Jeopardizes U.S. Fleet*, PoliticoPro (Jan. 15, 2015), https://www.politicopro.com/story/transportation/?id=42734 (quoting Coast Guard Commandant Paul Zukunft, saying that repeal of the Jones Act "will put our entire U.S. fleet in jeopardy").

[3]Indeed, those who argue for the repeal of the Jones Act in the name of free trade would also logically argue for the equal application of the law to domestic and foreign shipping companies—the alternative would result in a competitive advantage for foreign shipping companies operating in domestic commerce.

quantify a "cost" of the Act, let alone a specific rate differential by comparing domestic trade rates to international trade rates.

II
LOWER SHIPPING RATES OR INCREASED COMPLIANCE COSTS? LAWS THAT WOULD LIKELY APPLY WITHOUT CONTROVERSY TO FOREIGN OPERATORS IN DOMESTIC COMMERCE

Opponents of the Jones Act argue that repealing the Act would reduce American domestic shipping rates to international shipping rates and result in large savings to consumers. The Heritage Foundation, for instance, asserted that the Jones Act increases gas prices "by as much as 15 cents per gallon" and that oil could be transported by foreign-flagged vessels at a third of the cost.[4] Senator John McCain, a long time opponent of the Jones Act, alleged that the International Trade Commission had estimated a $656 million annual burden to the American economy, which he described as "a tremendous cost that is passed on to U.S. consumers."[5] Not to be outdone, another political candidate contended that the annual cost exceeded $1 billion *in Puerto Rico alone*.[6]

Putting aside the question of exactly what, if any, rate differential exists—an answer that would vary by trade, cargoes, and a broad range of other elements—there are at least two factors necessary to measure the potential effect on shippers and the ultimate customer of repealing the Jones Act: (i) what laws would likely apply without controversy to foreign operators in domestic commerce, and (ii) what laws would probably be changed or interpreted differently to apply to foreign operators in domestic commerce in order to "even the playing field?" Determining which laws would apply to foreign operators engaged in coastwise trade is essential to understand whether it is possible in the first instance to accurately assess a specific cost of the Jones Act.

This Part begins by providing a brief overview of the Jones Act requirements that opponents assert impose additional costs. Two specific case stud-

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[4] *Factsheet #154: The Jones Act's Costly Impact*, THE HERITAGE FOUND., (Dec. 4, 2014) http://www.heritage.org/research/factsheets/2014/12/the-jones-acts-costly-impact.

[5] 161 CONG. REC. S372-02 (daily ed. Jan. 22, 2015) (statement of Senator McCain citing a study by the International Trade Commission). See more about the 2002 ITC study infra at note 48 and accompanying text.

[6] Jaime Santiago, *The Jones Act Is Good For Puerto Rico!* CARIBBEAN BUS. J. (Apr. 26, 2012), http://www.caribbeanbusinesspr.com/prnt_ed/news02.php?nw_id=6952& (quoting Popular Democratic Party's candidate for Resident Commissioner, Rafael Cox Alomar). The article also noted that Alomar's estimate was greater than total annual revenue for the Puerto Rican domestic trades.

ies of prior attempts to quantify the costs of the Jones Act by the International Trade Commission ("ITC") and the GAO are then examined in Section B. Finally, this Part attempts to identify what laws would likely apply without controversy to foreign-flagged vessels engaged in coastwise trade.

A. Basic Jones Act Requirements.

The Jones Act requires that waterborne merchandise transported between two points in the United States move on American vessels.[7] There exists a large body of law to determine whether an American vessel qualifies to engage in domestic coastwise trades, but the primary characteristics are that the vessel must be owned by American citizens, documented under the laws of the United States, built in America, and crewed by American workers.[8]

The Jones Act ownership requirement mandates that a vessel engaged in coastwise trade must be "wholly owned by citizens of the United States."[9] For business entities, "citizens of the United States" is generally defined as requiring that U.S. citizens own a controlling interest of at least 75 percent of the "corporation, partnership, or association."[10] In addition, corporations must be incorporated under U.S. laws; both the chief executive officer and the chair of the board of directors must be U.S. citizens; and the number of noncitizen directors must be less than the minimum number required to constitute a quorum.[11] Four factors are considered to determine whether a 75 percent controlling interest of the entity is owned by U.S. citizens: (1) whether the title to at least 75 percent of the stock is held by U.S. citizens and "free from any trust or fiduciary obligation" that exists for the benefit of a noncitizen; (2) whether U.S. citizens have at least 75 percent of the voting power; (3) whether there is a contract or understanding that permits more than 25 percent of the voting power to be exercised, directly or indirectly, on behalf of a noncitizen; and (4) whether any other measures exist by which a noncitizen may exercise more than 25 percent control over the corporation.[12]

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[7] 46 U.S.C. § 55102; see also 46 U.S.C. § 55110.

[8] For a general overview, see, e.g., U.S. Customs & Border Prot., What Every Member of the Trade Community Should Know About Coastwise Trade (Jan. 2009), available at http://www.cbp.gov/sites/default/files/documents/merchandise_3.pdf.

[9] 46 U.S.C. § 55102(b)(1) (concerning the transportation of merchandise); 46 U.S.C. § 55103(a)(1) (concerning the transportation of passengers); 46 U.S.C. § 12103 (outlining the requirements for documentation).

[10] 46 U.S.C. § 50501(a); see also 46 C.F.R. §§ 67.36(c), 67.39(c).

[11] 46 U.S.C. § 50501(b).

[12] 46 U.S.C. §§ 50501(c)-(d).

A vessel also must be "built in the United States" to be coastwise qualified.[13] A vessel satisfies the U.S.-built requirement if "all major components of its hull and superstructure are fabricated in the United States" and assembly of the vessel occurs "entirely in the United States."[14] However, U.S. vessels lose their coastwise eligibility if they are subsequently documented under a foreign flag, sold or transferred to a person or company that does not qualify as a citizen for coastwise purposes, or rebuilt outside the United States.[15]

In addition to citizenship requirements for vessel owners, crew members on U.S.-documented vessels are required to be U.S. citizens.[16] On American vessels, unlicensed seamen must be U.S. citizens, foreign students attending the U.S. Merchant Marine Academy, or lawful permanent residents.[17] However, no more than 25 percent of the unlicensed seamen may be "aliens lawfully admitted to the U.S. for foreign residence."[18] Importantly, the master, chief engineer, radio officer, or any officer in charge of a deck or engineering watch on a coastwise vessel must be a U.S. citizen.[19]

B. Data Deficiencies and Case Studies.

Because existing requirements have limited domestic trade to American vessels, certainly at least since the enactment of the modern Jones Act in the Merchant Marine Act of 1920,[20] empirical data on the rates a foreign vessel would charge for a purely domestic movement between two U.S. points *does not exist*. In light of this information deficiency, Jones Act opponents have resorted to comparing the cost of foreign-flag vessel movements in international commerce to U.S.-flag vessel movements in domestic commerce.[21]

[13] 46 U.S.C. § 12112 (addressing the requirements for a coastwise endorsement); *see also* 46 C.F.R. § 67.19.

[14] 46 C.F.R. § 67.97.

[15] 46 U.S.C. § 12132; 46 C.F.R. § 67.19(d).

[16] There are limited exceptions to the build requirement, and, under certain circumstances, the requirement may be waived upon application. 46 U.S.C. § 8103(b)(2)-(3); see, e.g., 46 C.F.R. § 15.5720(b) (providing exemptions for U.S.-flag offshore supply vessels operating from a foreign port and mobile offshore drilling units not operating above the Outer Continental Shelf).

[17] 46 U.S.C. § 8103(b)(1)(A).

[18] 46 U.S.C. § 8103(b)(1)(B).

[19] 46 U.S.C. § 8103(a).

[20] Pub. L. No. 66-261, 41 Stat. 988 (1920). However, modern cabotage laws actually have their origins back to the First Congress in 1789, when Congress limited the domestic trades to American vessels and instituted a tonnage tax. See Act of Sept. 1, 1789, Ch. 11, 1 Stat. 55; see also Act of July 20, 1789, Ch. 3, 1 Stat. 27.

[21] See, e.g., 161 CONG. REC. S372-02 (daily ed. Jan. 22, 2015) (statement of Sen. McCain) ("There is no doubt that these inflated costs are eventually passed on to shipping customers. In the energy sector, for example, the price for moving crude oil from the gulf coast to the Northeastern United States on Jones Act

However, such comparisons suffer from a baseline problem by comparing a service provided solely in international commerce with a service provided solely in domestic commerce without regard to differences in compliance costs. Efforts to calculate the cost of the Jones Act by the federal government, specifically the ITC and the GAO, have ultimately rejected this approach and are examined below.

1. A Case Study: The ITC's Failed Attempts to Attribute Cost to the Jones Act

Beginning in 1991, the ITC attempted on numerous occasions to quantify the cost of the Jones Act. The resulting reports provide valuable insight into which laws likely would apply without controversy to foreign shipping companies operating in domestic commerce. Importantly, however, the ITC ultimately concluded that it could not quantify the impact of the Jones Act on shipping rates.

The ITC's initial step in what was to become a long and controversial journey began with the release of its report, *The Economic Effects of Significant U.S. Import Restraints (1991)*, which estimated the cost of the Jones Act at somewhere between $3.6 billion and $9.8 billion.[22] Representatives of the American domestic shipping industry responded that the ITC's analysis was faulty on a number of grounds, noting in particular that the agency failed to consider increased compliance costs associated with the application of U.S. laws to foreign ships operating in domestic commerce.[23]

Two years later, in 1993, the ITC released its second biennial review on U.S. import restraints and reduced its Jones Act cost estimate to $3.1 billion.[24] The American shipping industry responded that the ITC's estimate yet

tankers is $5 to $6 more per barrel, while moving it to eastern Canada on foreign flag tankers is about $2."); Jennifer A. Dlouhy, *Refiners Cite Costs of Keeping Up with Jones Act*, HOUS. CHRONICLE (Nov. 28, 2014), http://www.houstonchronicle.com/business/article/Refiners-cite-costs-of-keeping-up-with-Jones-Act-5923828.php#/0; Brian Slattery et al., *Sink the Jones Act: Restoring America's Competitive Advantage in Maritime-Related Industries*, THE HERITAGE FOUND. (May 22, 2014), http://www.heritage.org/research/reports/2014/05/sink-the-jones-act-restoring-americas-competitive-advantage-in-maritime-related-industries.

[22]U.S. INT'L TRADE COMM'N, PUB. NO. 2422, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS, PHASE III: SERVICES (1991). The Jones Act was one of many "import restraints" analyzed in this report.

[23]See, e.g., *Jones Act Draws the Fire at ITC Hearing*, LLOYD'S LIST, Jan. 28, 1992, at 3.

[24]U.S. INT'L TRADE COMM'N, PUB. NO. 2699, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS (1993), http://usitc.gov/publications/332/pub_2699.pdf.

again failed to properly consider the application of U.S. laws,[25] and the ITC again reduced its estimate to $2.8 billion two years later in its 1995 review.[26]

In 1998, the GAO entered the debate at the request of Senator McCain, then chairman of the Senate Commerce, Science, and Transportation Committee.[27] In reviewing the ITC's cost estimates, and in particular the issue of application of domestic laws, the GAO examined the "ITC's methodology for calculating the differential between the shipping rates of domestic and foreign vessels," along with the extent to which the ITC examined additional compliance costs.[28] The GAO devoted much of its report to the question of which U.S. laws would apply, noting first that, "because foreign-flagged vessels are currently prohibited from engaging in the domestic trade, *actual rate differences that might exist for domestic routes cannot be determined*."[29] Furthermore, the GAO found that the "ITC's 1995 analysis did not include an estimate of the additional costs that foreign operators might have to bear in complying with U.S. laws if the Jones Act was repealed and they entered into the domestic trades."[30] In the course of its analysis, the GAO found the ITC's estimates to be "unverifiable,"[31] "uncertain,"[32] "incomplete,"[33] "unclear,"[34] undeterminable,"[35] and "unpredictable"[36] based heavily on the ITC's failure to consider which laws would apply to foreign operators. The ITC conceded that certain U.S. laws would likely apply to foreign-flag vessels in domestic commerce and that it had not considered the additional compliance costs of those laws when reaching its conclusion.[37] The GAO listed three specific categories of U.S. laws that "might result in significant compliance costs for foreign vessel operators if the

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[25]See, e.g., Mercer Management Consulting, Inc., Policy and Economic Impact: The Jones Act Factbook (Feb. 1, 1995) (on file with author).

[26]U.S. Int'l Trade Comm'n, Pub. No. 2935, The Economic Effects of Significant U.S. Import Restraints: First Biannual Update (1995), http://usitc.gov/publications/332/pub_2699.pdf.

[27]Letter from Gerald L. Dillingham, Assoc. Dir., Transp. Issues, U.S. Gov't Accountability Office, to the Hon. John McCain, Chairman, Senate Comm. on Commerce, Science, & Transp., 3 (Mar. 6, 1998), available at http://www.gao.gov/assets/90/87426.pdf [hereinafter The GAO Assessment of the ITC Report].

[28]Id. at 3.

[29]Id. at 8 (emphasis added).

[30]Id. at 10. The ITC responded that it believed foreign vessel operators are already subject to certain laws such as environmental laws. Id. at 10-11. The ITC conceded, however, that it had not included a cost of compliance with other laws; nevertheless, "ITC staff believed that the cost of compliance were not as great as critics have contended." Id. at 11.

[31]Id. at 13.

[32]Id. at 4.

[33]Id. at 10.

[34]Id. at 7.

[35]Id.

[36]Id. at 4.

[37]Id. at 10-11.

Jones Act was repealed" and which the ITC failed to consider in its cost analysis: tax laws, labor laws, and employee protection laws.[38]

The GAO identified tax laws as one area of laws that would impose additional costs on foreign shipping companies. In particular, the GAO asserted that "[i]ncome generated by foreign corporations operating foreign-flagged vessels in domestic trade could be taxable."[39] Referring to the Internal Revenue Code's special provisions concerning "transportation income,"[40] the GAO asserted that transportation income "attributable to transportation that begins *and* ends in the United Sates" would be "treated as income derived from sources in the United States."[41] As long as no exemptions applied, the GAO concluded that such income would be taxable.[42]

Foreign shipping companies would also incur additional costs as a result of labor laws applied to coastwise operations, according to the GAO. Although the GAO could not be certain "which labor laws would apply if the Jones Act was repealed," the agency asserted that minimum wage laws and collective bargaining under the National Labor Relations Act may cover "[c]rews of foreign-flagged vessels engaged in U.S. coastwise trade."[43] In addition to wages, the GAO also considered the effect of immigration laws on foreign vessels' operating costs in coastwise trade; in particular, it noted that the "difficulty of obtaining work visas" might require foreign operators to "hire U.S. citizens, which would greatly increase their costs."[44]

The final category of laws that the GAO concluded might affect foreign-vessel operators' expenses was employee protection laws. Opening coastwise trades, "might subject [foreign-flag] operators to costs associated with merchant mariner benefits and protections."[45] By entering domestic commerce, foreign vessels would likely be exposed to foreign seamen's "legal remedies in the U.S. courts for personal injury and death," and thus face additional litigation-related costs, including potential awards and court judgments.[46]

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[38]Id. at 3-4. Ironically, the GAO's efforts that eventually discredited the ITC's findings were requested by Senator McCain, a present-day vocal critic of the Act.

[39]Id. at 11.

[40]See I.R.C. § 863(c)(3).

[41]The GAO Assessment of the ITC Report, supra note 27, at 11-12 (emphasis in original); see also Letter from Am. Law Div., Cong. Research Serv., to the Hon. Strom Thurmond, (May 19, 1997) [hereinafter CRS Letter].

[42]The GAO Assessment of the ITC Report, supra note 27, at 11-12; see also CRS Letter, supra note 41.

[43]The GAO Assessment of the ITC Report, supra note 27, at 12.

[44]Id.

[45]Id.

[46]Id.

The ITC eventually reacted to the GAO's findings. In subsequent reports, the ITC's estimates dropped further, dipping to $1.3 billion in 1999[47] and $656 million in 2002.[48] In 2004, after its original 1991 Jones Act cost estimate had fallen by 95 percent, the ITC finally conceded that it was actually "unable to estimate" the cost of the Jones Act.[49] Moreover, the ITC reaffirmed its position that it was "unable to provide an estimate" of costs of the Act in subsequent updates in 2007,[50] 2009,[51] and 2011.[52] The ITC succinctly explained its decision to no longer provide an estimate of the cost of the Jones Act, stating "[i]t is not clear to what extent these laws would affect the cost and operation of foreign vessels in the U.S. market, so the Commission is unable to provide an estimate of the welfare gains that would result from removing [the Jones Act].[53]

The results of the ITC's twenty-year quest to determine the cost of the Jones Act is depicted in Figure 1.[54]

2. The GAO Attempts to Quantify the Cost of the Jones Act in Puerto Rico.

More than a decade after the ITC's first report, an entirely separate GAO[55] team faced a similar question concerning the cost of the Jones Act in connection with the Puerto Rico trades. Delegate Pedro Pierluisi, then Resident

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[47]U.S. Int'l Trade Comm'n, Pub. No. 3201, The Economic Effects of Significant U.S. Import Restraints: Second Update iii (1999), http://www.usitc.gov/publications/332/pub3201.pdf.

[48]U.S. Int'l Trade Comm'n, Pub. No. 3519, The Economic Effects of Significant U.S. Import Restraints: Third Update xviii tbl. ES-1 (2002), http://www.usitc.gov/publications/332/pub3519.pdf.

[49]U.S. Int'l Trade Comm'n, Pub. No. 3701, The Economic Effects of Significant U.S. Import Restraints: fourth Update 92 (2004), http://www.usitc.gov/publications/332/pub3701.pdf (asserting that the "report does not provide a model-based evaluation of the economic effects of the Jones Act" because it does not have "this capability").

[50]U.S. Int'l Trade Comm'n, Pub. No. 3906, The Economic Effects of Significant U.S. Import Restraints: Fifth Update 99 (2007), [hereinafter 2007 ITC Report] http://www.usitc.gov/publications/332/pub3906.pdf.

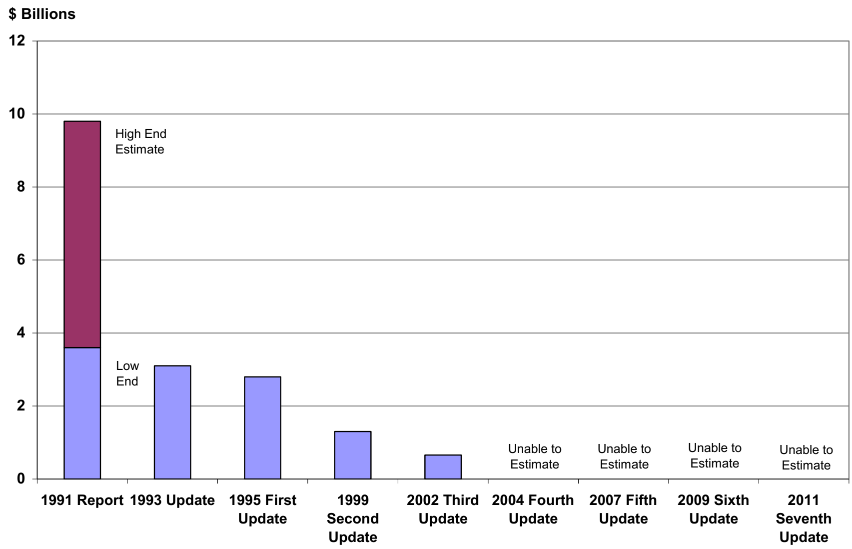
[51]U.S. Int'l Trade Comm'n, Pub. No. 4094, The Economic Effects of Significant U.S. Import Restraints: Sixth Update 13, 15 (2009), http://www.usitc.gov/publications/332/pub4094.pdf. The report briefly discussed the Jones Act but did not estimate the costs imposed by the Jones Act. Instead, the report calculated the effects of elimination of all significant import restraints on broad sectors such as "transportation, communications, and utilities."

[52]U.S. Int'l Trade Comm'n, Pub. No. 4253, The Economic Effects of Significant U.S. Import Restraints: Seventh Update 2-43 (2011), http://www.usitc.gov/publications/332/pub4253.pdf ("This section does not attempt to quantify restrictions.").

[53]2007 ITC Report, supra note 50, at 99.

[54]The GAO also noted the need to account for the benefits of the Jones Act—for example, its contribution to national security—that would be lost if the Act was repealed, which the ITC also failed to consider. The GAO Assessment of the ITC Report, supra note 27, at 4, 13. The ITC responded that its scope of work was limited to reviewing the cost of the Jones Act, not the benefits. Id. at 4.

[55]"GAO" originally stood for Government Accounting Office. In 2004, after the ITC study but before the Puerto Rican inquiry, the agency changed its name to the Government Accountability Office.



Since 1991, the U.S. International Trade Commission (USITC) has periodically estimated the cost to the U.S. economy of what it has identified as significant limitations placed on imported goods and services by U.S. laws and trade policies.

Commissioner for Puerto Rico, requested on May 13, 2011, that the agency study the impact of the Jones Act on Puerto Rico, which was supported by Delegate Gregorio Kilili Camacho Sablan, Ranking Member of the House Committee on Natural Resources' Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs.[56] Delegate Pierluisi asked the GAO to quantify the costs of the Jones Act in the Commonwealth, and to analyze the impact of the law "on both the Puerto Rican economy and the broader U.S. economy."[57] As the GAO pointed out, the study was important because "Puerto Rico—the largest and most populous insular area of the United States—depends heavily on maritime transportation to move goods to and from the island."[58] Puerto Rico also presented an interesting model because the

[56]Letter from Del. Pedro Pierluisi to the Hon. Gene Dodaro, Comptroller Gen., U.S. Gov't Accountability Office (May 13, 2011), http://pierluisi.house.gov/sites/pierluisi.house.gov/files/wysiwyg_uploaded/PDF/letters/2010/5.13.11%20Letter%20to%20GAO%20re%20Jones%20Act%20in%20Puerto%20Rico.pdf.

[57]Id.*; GAO Details Progress in Jones Act Study*, HAW. REP. (Apr. 29, 2012), available at http://www.hawaiireporter.com/gao-details-progress-in-jones-act-study.

[58]U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-260, PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT 1 (2013) [hereinafter GAO PUERTO RICO REPORT], http://www.gao.gov/assets/660/653046.pdf.

Commonwealth imports goods from, and exports goods to, both domestic points in the United States, as well as somewhat comparable nearby international points.[59]

In response to these requests, the GAO conducted a detailed investigation—its third study of a Jones Act-related issue in the last two decades.[60] The Puerto Rico study was more detailed and complete than its prior review of the ITC's findings, or its 1998 study of the U.S.-build requirement in Alaska.[61] In fact, the GAO's 2013 Puerto Rico study was probably the most significant study of the costs and benefits of the Jones Act ever completed by an unbiased, federal government entity.

The GAO found that "because so many other factors besides the Jones Act affect rates, it is difficult to isolate the exact extent to which freight rates between the United States and Puerto Rico are affected by the Jones Act."[62] The agency cited other factors apart from the Jones Act that affected shipping rates: "freight rates . . . set on a negotiated basis under contract," which can "vary substantially;"[63] the use of barges, which tend to be slower but less expensive;[64] the need for refrigerated cargo, often more expensive but crucial to an island economy;[65] and the "backhaul" nature of some northbound cargoes out of Puerto Rico, which tends to reduce shipping rates because of lower demand.[66]

Reiterating the analyses of its prior studies, the GAO addressed its ability to determine the effect of the Jones Act on rates in light of the issue of the application of U.S. laws. The GAO found that foreign carriers operating in the coastwise trades "could be required to comply with other U.S. laws and regulations, even if Puerto Rico were exempted from the Jones Act, which could increase foreign carriers' costs and may affect the rates they could charge."[67] Repeating its position from years before, the GAO found that "arriving at an accurate estimate of the costs to foreign carriers of complying with U.S. laws would be very difficult, in part, because the estimate would depend heavily on which laws are considered applicable and how they are applied."[68] The GAO noted that federal government officials "were reluctant to speculate on the extent to which U.S. laws might be applicable

[59]See id. at 4.

[60]See id. at 3 (providing a detailed description of the GAO's methodology).

[61]Letter from U.S. Gov't Accountability Office to the Hon. Ted Stevens, Ranking Member of the Subcomm. on Merchant Marine (Sept. 30, 1998) [hereinafter GAO ALASKA REPORT], available at http://archive.gao.gov/d17t6/137061.pdf.

[62]GAO PUERTO RICO REPORT, supra note 58, at 13.

[63]Id. at 16.

[64]Id.

[65]Id. at 17.

[66]Id.

[67]Id. at 23.

[68]Id. (citing GAO ALASKA REPORT, supra note 61).

to such foreign carriers in the absence of the Jones Act."[69] However, stakeholders interviewed by the GAO in connection with its study, stated "that if these costs were estimated and included, any rate advantage foreign carriers may have over Jones Act carriers would be lessened."[70]

The cumulative findings of the GAO's three reports sparked no controversy because there is little dispute that foreign-flag vessels are generally cheaper to operate than U.S.-flag vessels.[71] However, the reports do highlight the difficulty and need to consider the true costs of the Jones Act when considering the consequences of repeal.

3. MARAD's Analysis of U.S.-Flag and Foreign Flag Operating Costs

The U.S. Maritime Administration ("MARAD") addressed a similar issue in its 2011 report, *Comparison of U.S. and Foreign-Flag Operating Costs*.[72] The MARAD report compared "the operating costs of U.S.-flag vessels engaged in foreign commerce to the costs incurred by foreign-flag vessels."[73] Although MARAD's analysis did not compare the cost of operating an American vessel in coastwise service with a foreign-flagged vessel in coastwise service, the report did provide basic data about the difference in cost between operating under the U.S. flag and operating under a foreign flag.

The agency began its analysis with a survey of the most obvious cost differences between vessels operating under the U.S. flag and "other national-flag registries."[74] Foreign-flag operators often pay "no tax on income,"[75] comply with "no manning requirements,"[76] and are scrutinized by "no government safety inspections of vessels (safety rests only with the classification society and insurance underwriters)."[77] Ultimately, the agency focused most of its attention on the difference in operating costs between U.S. and foreign vessels, defining elements of those costs to include crews, store/lubes, vessel maintenance and repair, insurance, and overhead costs.[78] Based on those factors, MARAD found that "U.S.-flag carriers face a sig-

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[69] Id.

[70] Id.

[71] See, e.g., MAR. ADMIN., U.S. DEP'T OF TRANSP., COMPARISON OF U.S. AND FOREIGN-FLAG OPERATING COSTS (2011), http://www.marad.dot.gov/documents/Comparison_of_US_and_Foreign_Flag_Operating_Costs.pdf [hereinafter MARAD REPORT]; *The Impact of U.S. Coastwise Trade Laws on the Transportation System in the United States: Hearing Before the Subcomm. on Coast Guard and Mar. Transp., Comm. on Transp. and Infrastructure*, 104th Cong. (1996).

[72] MARAD REPORT, supra note 71.

[73] Id. at 1.

[74] Id.

[75] Id. (citing MARTIN STOPFORD, MARITIME ECONOMICS (3d ed. 2009)).

[76] Id.

[77] Id.

[78] Id. at 4.

nificantly higher cost regime than do foreign-flag carriers."[79] Using available data, MARAD found that the "total average cost of operating a U.S.-flag vessel in foreign commerce was *2.7 times higher* than the costs incurred by foreign flag equivalents."[80]

The agency was quick to point out that the cost differential was hardly unique to the maritime industry. According to MARAD, many of the additional costs can be attributed to the cost of doing business in the United States.[81] In fact, the agency made that same point several times throughout its analysis, noting that many elements of the operating cost differential would be "true for most industries employing U.S. citizens"[82] and are attributable in part simply to the higher "standard of living in the U.S."[83]

MARAD took a particularly hard look at the difference between crew costs, finding that a U.S.-flag vessel operator pays 5.3 times the cost of a foreign-flag vessel.[84] Moreover, the agency determined that 68 percent of total operating costs for U.S. vessels was attributed to crewing costs, whereas crewing costs accounted for only 35 percent of foreign-flag vessels' average total operating costs.[85] Again, MARAD emphasized that much of the difference was simply "reflective of the U.S. economy."[86] In fact, many of the higher U.S. crewing costs would be common to any U.S. industry that competed with foreign companies that can literally "shop around the world for the cheapest crews available."[87] The obvious result: American companies face higher manning requirements; pay higher wages, payroll taxes, and benefits; and sometimes contribute to mariner education and training.[88] The agency also identified "work rules" in the United States, including "restrictions on the number of hours a mariner can work and the type of work he or she can perform" as additional costs imposed on U.S. vessels.[89]

C. Examples of the Application of U.S. Laws to Foreign-Flagged Vessels Operating in Domestic Commerce

Implicit in MARAD's analysis is that many foreign vessels, particularly those operating under foreign flag-of-convenience nations, can function out-

[79] Id. at 1.
[80] Id. at 1 (emphasis added).
[81] Id. at 6.
[82] Id. at 5.
[83] Id. at 6.
[84] Id.
[85] Id.
[86] Id.
[87] Id. at 5.
[88] Id. at 5.
[89] Id. at 5-6.

side of even the most basic labor, wage, and hour protection laws. Some opponents of the Jones Act argue that this situation is no different than that faced by companies in all industries throughout the United States.[90] Jones Act opponents would assert that a toy manufacturer in the United States, for example, must compete in the marketplace with a toy manufacturer in China, adding that such competition is the consequence of a global economy. That logic is misguided. Although the United States participates in the global marketplace, and American companies must compete against companies producing goods around the world, there is no similar situation in which American companies must compete with foreign companies in American *domestic* commerce without fully complying with U.S. law. To put it another way, no U.S. manufacturer competes with a Chinese company that is located in the United States but exempt from U.S. law. That scenario, of course, would never happen in any U.S. industry; yet, that is exactly what Jones Act opponents propose. The ITC's 1991 study similarly erred because it "assumed wrongly that the tax-free cost structure of foreign-flag operators could be imported into domestic transportation markets."[91]

During a recent speech at a New York conference sponsored by TradeWinds, Thomas Allegretti, the Chairman of the American Maritime Partnership, a pro-Jones Act organization, mocked the suggestion that replacing Jones Act ships with foreign ships could result in cost savings.

> [Allowing foreign ships in domestic commerce?] Well, that's an unconventional idea! We'll replace all the American workers with foreign workers, pay them third world wages, and see if we can't reduce the cost of domestic shipping! And when we are done with shipping, perhaps we can do the same with [other U.S. industries]. Then eventually we can replace all American workers with cheaper foreign workers. This is not a serious proposal, and comparing domestic shipping rates to foreign shipping rates is comparing apples to oranges.[92]

American companies are subject to different, more expensive, and extensive laws than foreign shipping companies—wage-and-hour laws, immigration laws, and tax laws, just to name a few. Once the cost of complying with U.S. laws is included in operating costs, then any perceived cost differential between U.S. and foreign shipping starts to disappear.

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[90]See, e.g., Scott Lincicome, *If You Like Higher Prices, Enriched Cronies, and Weak National Security, Then You'll Love the Jones Act*, CATO INST. (Jan. 22, 2015), http://www.cato.org/publications/commentary/you-higher-prices-enriched-cronies-weak-national-security-then-youll-love.

[91]Warren L. Dean, Jr., *Jones Act Reflects Fundamentals of US Legal System*, J. COM., Dec. 1998, at 5A, available at http://www.joc.com/jones-act-reflects-fundamentals-us-legal-system_19981130.html.

[92]Allegretti Speech, supra note 1.

1. One Example: Increased Tax Burdens

To look at tax specifically, foreign ships pay very little to no taxes, whereas U.S. shipping companies have effective tax rates as high as 38 percent. That alone is a huge difference in cost structures. One major cost specifically missing from the MARAD analysis is the basic corporate income tax.[93] A U.S.-flag international operator does not need to pay the basic American corporate income tax, according to MARAD, because it is eligible for the "tonnage tax," a levy "based on tonnage rather than on annual income—consistent with foreign-flag operators."[94] However, there is no tonnage tax for the hypothetical foreign-flag vessel that finds its way into the domestic trades.

Although foreign corporations deriving U.S.-source income from vessel operations may escape U.S. tax under a bilateral income tax treaty that reduces the tax rate or eliminates the tax altogether, it is highly likely that a foreign vessel operating in American domestic trades would be subject to the U.S. corporate income tax. In 1997, the Congressional Research Service ("CRS") interpreted Internal Revenue Code § 863 concerning "transportation income" to impose taxes on foreign-flag vessels should they engage in domestic trade.[95] Because any income derived from transportation that begins and ends in the United States is considered U.S. source income, the CRS found that "a foreign flag vessel engaged in the coastwise trade would have 100 percent U.S. source income," which is subject to taxation.[96] As discussed earlier, the GAO also directly addressed the issue, finding that "[t]o the extent that foreign corporations have transportation income from transportation that began and ended in the United States, that income would be taxable if no other exemptions applied."[97]

A 2008 article that reviewed the application of U.S. laws aside from the Jones Act also considered whether tax laws would be imposed on foreign-flag vessels, and answered in the affirmative.[98] Although a potential exception exists under the Internal Revenue Code that allows for exemptions if a reciprocal exemption is granted to U.S. corporations, such as under a bilateral income tax treaty, that exception arguably applies only to international opera-

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[93] MARAD's comparison is helpful, but because it compares U.S.-flag international with foreign-flag international commerce, it does not include all additional costs that the hypothetical foreign vessel would face should it ever be allowed to enter domestic commerce.

[94] MARAD Report, supra note 71, at 4 n.8.

[95] CRS Letter, supra note 41, at 2.

[96] Id.

[97] The GAO Assessment of the ITC Report, supra note 27, at 11-12. "For example, income generated by foreign corporations operating foreign-flagged vessels in the domestic trade could be subject to U.S. taxation, depending on the circumstances." Id. at 23.

[98] Constantine G. Papavizas & Bryant E. Gardner, *Is the Jones Act Redundant?*, 21 U.S.F. Mar. L.J. 95, 128 (2008).

tions of a vessel. The provision, as well as the exception, concerning transportation income "defines U.S. coastwise trade income as subject to U.S. net income tax."[99] Ultimately, the article concluded that foreign-flag vessels operating in the domestic trades would likely be subject to U.S. taxation because "U.S. domestic trade income will likely be deemed taxable U.S. source income."[100]

How much of a cost would be added to a foreign vessel suddenly subject to U.S. tax law for its domestic movements? The answer would depend on many factors, of course. But one clue is that the effective tax rate of the Kirby Corporation, the largest American domestic shipping company, is 38 percent.[101] Although there are far too many factors to allow a precise answer to the question of what additional cost would be incurred by the application of U.S. tax law, there would at least be a baseline cost associated with income taxation, and that baseline would be significant.

In addition to the added corporate tax burden stemming from "transportation income" generated within the United States, foreign shipping companies would face further compliance costs navigating the U.S. tax code, generally. For example, in general, all compensation for service performed within the United States by nonresident aliens is subject to federal income tax withholding.[102] Consequently, compensation for nonresident crews aboard foreign vessels operating in domestic commerce would be subject to federal income tax withholding. Furthermore, foreign employers who hire nonresident alien employees to work solely within the United States are generally subject to federal insurance and unemployment taxes.[103] Taking into account these additional federal tax burdens, notwithstanding additional state tax obligations that would apply, foreign operators would have to increase compensation paid to foreign crews to adjust for income tax withholding, as well as insurance and unemployment taxes—all of which would create new, additional compliance costs for operating exclusively within domestic commerce.

Foreign cruise lines, for example, have long resisted entrance into American domestic commerce for this very reason.[104] In 1997, the CRS

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[99]Id. at 130; see also I.R.C. § 883.

[100]See Papavizas & Gardner, supra note 98, at 128.

[101]Press Release, Kirby Corporation, Kirby Corporation Announces Record 2011 Fourth Quarter and Year Results, available at http://www.sec.gov/Archives/edgar/data/56047/000114036112005130/ex99_1.htm.

[102]*Nonresident Aliens - Exclusions From Income*, INTERNAL REVENUE SERV., http://www.irs.gov/Individuals/International-Taxpayers/Nonresident-Aliens—Exclusions-From-Income.

[103]See Federal Insurance Contributions Act, 26 U.S.C. §§ 3121-3128; Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 et seq.

[104]See, e.g., Ross A. Klein, *Treacherous Waters*, FOREIGN POLICY (Apr. 6, 2012), http://foreignpolicy.com/2012/04/06/treacherous-waters/.

issued a memorandum to Senator Strom Thurmond on whether "foreign flag corporations would be subject to U.S. income taxes if legislation were adopted to waive the Passenger Vessel Service Act to permit foreign flag cruise ships to engage in the coastwise passenger trade and sail between U.S. ports."[105] The CRS noted that a foreign-flag vessel engaged in the coastwise trade would have 100 percent taxable, U.S. source income if the vessel went from U.S. port to U.S. port, even if the ship traveled to international waters in between, *i.e.*, a "cruise to nowhere."[106] The CRS further clarified, however, that if the foreign vessel went from a U.S. port to a foreign port and then back to a U.S. port, only 50 percent of the outbound voyage and 50 percent of the inbound voyage would be U.S. source income.[107] Consequently, to avoid or limit this liability, foreign lines operate based on carefully crafted itineraries that are deemed international and fall outside of American domestic commerce and the full consequence of U.S. tax liability.

2. Another Example: Adverse Immigration Laws

America's immigration laws would be another substantial obstacle to any foreign shipping company entering U.S. domestic commerce. Immigration law today is geared toward allowing a foreign vessel operator in international trades to enter and exit a U.S. port with cargo. In most cases, the workers on those ships never stray far from or even leave the foreign vessel. Contrast that with the hypothetical case of a foreign operator in domestic commerce, with foreign workers crewing the vessel for an extended period as it visits ports, cities, fleeting operations, terminals, and other facilities along the inland waterways through the American heartland. Such a system would place significant new burdens on foreign shipping companies that attempted to continue to use foreign workers (not to mention new burdens on American immigration agencies whose job it is to track those foreign workers). Based on these burdens, commentators have noted that "[i]t makes no sense to allow foreign-owned ships operated by foreign crews to move freely throughout America's inland lakes, rivers and waterways."[108]

The Immigration and Naturalization Act ("INA") generally prohibits the employment of unauthorized aliens in the United States.[109] Foreign crews aboard foreign vessels that enter the United States by way of international commerce, however, while subject to the immigration laws of the United

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105 CRS Letter, supra note 41.

106 Id.

107 Id.

108 Dr. Daniel Goure, Lexington Institute, The Contribution of the Jones Act to U.S. Security (2013),http://www.lexingtoninstitute.org/wp-content/uploads/2013/11/Contribution_of_the_Jones_Act.pdf

109 8 U.S.C. §§ 1101 et seq.

States, may continue to perform work *on board* that vessel.[110] Alien crewmembers can work on the foreign vessel in a U.S. port so long as the work has a direct relationship to the normal operation of the vessel. However, landing from that vessel for any purpose or entering the United States by any other means requires specific authorization under the INA. Typically, alien crewmembers obtain this entry authority for temporary shore leave or other activity "solely in support of his calling as a crewman" under D visa status, which allows entry for up to 29 days.[111] Importantly, an alien crewmember with D visa status is not deemed to be employed in the United States, even if the vessel is within U.S. territorial waters.[112]

While D-visa status provides entry authority for aliens temporarily within the United States resulting from traditional international commerce, if the Jones Act were repealed, and foreign vessels with foreign crews were allowed to permanently operate in domestic commerce, D-visa status would be insufficient to permit alien crews to permanently reside or be employed in the United States. Notwithstanding a D visa's time limitation, which is typically not extendable, an alien with D visa status explicitly may not be employed in connection with domestic movements of a vessel.[113] Consequently, alien crewmembers employed in the United States in connection with domestic movements of a vessel would have to apply and receive a B or H category visa, which allow for temporary entry based on certain criteria.

In both instances, however, Immigration and Naturalization Services ("INS") has suggested that alien crewmembers may not qualify for such visas. In the case of B visas, INS has stated that navigating a vessel or otherwise servicing passengers on board a vessel does not qualify as a type or line of business endeavor required to qualify for B-1 visa classification ("visitor for business").[114] Nor would such aliens qualify under B-2 classification ("visitors for pleasure") as that status bars employment in the United States.[115]

The prospect of alien crewmembers receiving H visas is similarly bleak. INS has stated that to qualify for an H-2B visa, an alien must be "coming

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[110]See Warehousemen's Union v. Messe, 897 F.2d 1374, 1384 (9th Cir. 1989) ("[T]he ILWU does not seriously contend that bona fide 'alien crewmembers' must cease their normal duties upon entering United States territorial waters.").

[111]8. U.S.C. § 1101(a); 8 U.S.C. § 1282.

[112]8 C.F.R. § 247a.1(h).

[113]8 C.F.R. § 214.2(d).

[114]Office of Gen. Counsel, Immigration & Naturalization Servs., *Legal Opinion: Classification of Alien Crewmen and Casino Operators Aboard "Cruises to Nowhere" - the M/V SOUTHERN ELEGANCE* (Jan. 11, 1991) [hereinafter Southern Elegance].

[115]8 C.F.R. § 214.1(e).

temporarily to the United States to perform temporary [nonagricultural] services or labor, is not displacing United States workers capable of performing such services . . . and whose employment is not adversely affecting . . . United States employees."[116] In this case, not only does H-visa eligibility depend on Department of Labor findings of an insufficient U.S. labor pool and the temporary nature of the work, but H visas can only be sought by *United States employers*—excluding foreign-owned or -operated vessels.[117] Aside from various unlikely visa categories, alien crewmembers would have to apply and be granted permanent resident status, *i.e.,* a green card, to permanently reside and work in the United States. Not only would these complications and obstacles to ensuring permanent employment in the United States for alien crewmembers result in additional costs for foreign operators, but they may in fact make it *cheaper* for foreign operators to use U.S. crews in domestic commerce.

Immigration and tax are just two of the many laws that appear likely to be automatically applied, increasing the cost for a foreign shipping company. A full listing of all similar laws is beyond the scope of this Article. It does seem relatively clear, however, that other laws beyond immigration and tax would apply, as one commenter succinctly explained:

> A foreign-flag vessel could not carry America's domestic commerce, regardless of the Jones Act, unless it were to: 1) pay federal and state taxes; 2) employ U.S.-citizen crews; 3) withhold payroll and income taxes for those crews; 4) comply with federal and state labor standards; 5) allow its crews to organize; and 6) meet federal and state workplace-safety standards, to name but a few of the applicable requirements. Of course, a foreign-flag vessel that complies with those laws no longer operates under the laws of a foreign flag, and the cost "savings" disappear.[118]

III
LEVELING THE PLAYING FIELD. THE APPLICATION OF ADDITIONAL U.S. LAWS TO FOREIGN VESSELS IN DOMESTIC COMMERCE TO ELIMINATE COMPETITIVE DISADVANTAGES

A far greater unknown is the extent to which Congress or federal agencies would apply additional requirements to foreign shipping operators in domestic commerce if the Jones Act was repealed in efforts to eliminate

[116] See Southern Elegance, supra note 114.
[117] 8 C.F.R. § 214.2(h).
[118] Dean, supra note 91, at 5A.

competitive disadvantages for U.S. operators—or to put it another way, in order to "level the playing field." It seems unlikely that Congress would allow foreign vessels to operate in domestic commerce wholly outside of U.S. laws. Such an approach would give foreign vessel operators an institutionalized and potentially significant cost advantage over American shipping companies, not to mention American truckers, railroads, pipelines, airlines, and other modes of transportation operating in direct competition.[119] In addition, allowing foreign vessel operators to operate outside of American laws but in the domestic trades would undermine the very purpose of those laws in the first instance. Indeed, Congress would not likely "subsidize" foreign operators in domestic commerce by effectively forbearing application of U.S. law.[120] A fundamental principle of American jurisprudence is that companies operating in U.S. domestic commerce do so under American laws. One such example of Congress's likely action to "level the playing field" would be to apply specific security requirements for marine transportation not currently applied to foreign vessels—the Transportation Worker Identity Credential card ("TWIC").

A. Congress Would Surely Look to Apply U.S. Security Laws to Foreign Workers in the United States. For Example, Although TWIC Is Generally Required for Maritime Security Purposes, Foreign Vessels and Certain Employees Are Currently Exempt

If the Jones Act were repealed or relaxed, Congress would almost surely act to apply a panoply of American security laws to foreign vessel operators in U.S. domestic trades. Dr. Daniel Goure, a national security expert with the Lexington Institute, addressed that specific issue:

> Although the Jones Act was not written with today's threats to homeland security in mind, its provisions provide an important base on which to build the systems, processes, and procedures needed to secure America. The provisions in the Jones Act regarding vessel ownership and manning simplify efforts to ensure that rogue regimes and international terrorists cannot strike at this country via its ports and waterways. One could readily assert that were there no Jones Act, Congress would have to invent one . . . . Without the Jones Act, the Department of Homeland Security would be confronted by the difficult and very costly task of monitoring, regulating, and overseeing all foreign-controlled, foreign-crewed vessels in internal U.S. waters.[121]

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[119]Papavizas & Gardner, supra note 98, at 137 ("Undoubtedly, there are those who would argue that the laws that apply to U.S.-flag vessels should apply as a matter of fundamental fairness to foreign-flag vessels competing in the same trades and receiving the same benefits of U.S. commerce.").

[120]Id.

[121]Goure, supra note 108, at 17.

In a recent editorial, Congressmen Steve Scalise, the House Majority Whip, and Duncan Hunter, chairman of the House Coast Guard and Maritime Transportation Subcommittee, made the same point, arguing that "[w]ithout the Jones Act, vessels and crews from foreign nations could move freely on U.S. waters, creating a more porous border, increasing possible security threats and introducing vessels and mariners who do not adhere to U.S. standards into the bloodstream of our nation."[122]

As result of the terrorist attacks on New York City on September 11, 2001, vessel owners and operators are now subject to a wide range of additional security requirements. Shortly after 9/11, Congress rushed to enact the Maritime Transportation Security Act of 2002 ("MTSA"), which required American vessel operators to develop security plans and comply with a range of other security-related requirements.[123] One such security requirement for the maritime sector under the MTSA is the TWIC program, which requires identity cards for all individuals seeking unescorted access to secure areas.[124] TWIC regulations, however, specifically exempt certain vessels and employees. Although entire vessels generally are considered to be a secure area, foreign-flagged vessels are entirely exempted from TWIC requirements.[125] In addition, TWIC requirements do not apply to any "mariners employed aboard vessels moored at U.S. facilities only when they are working immediately adjacent to their vessels in the conduct of vessel activities" whether they are employed on a vessel or at a facility, including Outer Continental Shelf facilities.[126]

Among the broad range of security rules for vessels, TWIC illustrates the difficulties in execution and compliance of new domestic safekeeping requirements. Even among Americans, the execution of TWIC has been highly complex and often difficult. For example, TWIC requires detailed biographical information, data that would be difficult if not impossible to secure for foreign nationals aboard foreign vessels. TWIC implementation also requires detailed background checks, another potential significant hurdle for individuals who had never domiciled in the United States. In fact, should the Jones Act be relaxed to allow foreign workers here, many of those who might theoretically apply for a TWIC would have never set foot in the United States.

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[122]Duncan Hunter & Steve Scalise, *HUNTER AND SCALISE: Making Headway With America's Maritime Industry*, WASH. TIMES (Mar. 25, 2014), http://www.washingtontimes.com/news/2014/mar/25/hunter-and-scalise-americas-maritime-industry-lead/#!.

[123]Pub. L. No. 107-295, § 70105(a), 116 Stat. 2068, 2073 (2002).

[124]Id.; 33 C.F.R. § 101.514(a).

[125]33 C.F.R. § 104.105(d) ("The TWIC requirements found in this part do not apply to foreign vessels.").

[126]33 C.F.R. § 104.105(e), §105.105(d), § 106.105(b).

Because the MTSA was drafted consistent with the Jones Act, Congress, the Transportation Security Administration, and the U.S. Coast Guard would arguably need to amend the laws and regulations to apply TWIC requirements to foreign vessels were the Jones Act repealed. Otherwise, the underlying national security concerns that motivated the establishment of the TWIC program in the aftermath of 9/11 in the first instance would be undermined if foreign-flagged vessels were wholly exempted from TWIC but nonetheless allowed to operate in domestic commerce. Application of these requirements to foreign vessels and their crews would certainly increase compliance costs.

1. TWIC Eligibility Requirements

Under the MTSA, Congress required the establishment of transportation security cards for all individuals seeking unescorted access to secure areas of a vessel or facility engaged in maritime transportation, including Coast Guard-credentialed U.S. merchant mariners.[127] The MTSA requires the broad issuance of TWICs to vessel pilots, individuals holding a Merchant Mariners Document or an STCW endorsement,[128] individuals holding an active license or certificate of registry,[129] "individuals engaged on a towing vessel that pushes, pulls, or hauls alongside a tank vessel," "individuals with access to security sensitive information," and "individuals engaged in port security activities."[130] By regulation, certain security officers are also required to maintain a TWIC.[131] According to the Transportation Security Administration, vessel crew, longshoremen, and other maritime professionals thus will require a TWIC to comply with the statutory and regulatory requirements.[132]

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[127]Pub. L. No. 107-295, § 70105(a), 116 Stat. 2068, 2073 (2002); 33 C.F.R. § 101.514(a); *TWIC: Frequently Asked Questions*, TRANSP. SEC. ADMIN., http://www.tsa.gov/stakeholders/frequently-asked-questions-0. Generally, the requirements, applicability, and enrollment process for TWIC is outlined in 49 C.F.R. Part 1572.

[128]46 C.F.R. § 12.01-11; 46 C.F.R. § 15.415.

[129]46 C.F.R. § 15.415.

[130]Pub. L. No. 107-295, § 70105(b)(1)-(2), 116 Stat. 2068, 2073 (2002).

[131]33 C.F.R. §§ 104.210(a)(5) (company security officers); 104.215(a)(6) (vessel security officers); 105.205(a)(4) (facility security officers); 105.210 (facility personnel with security duties); 106.205(a)(4) (company security officer); 106.210 (facility security officer); 106.215 (company and OCS facility personnel responsible for security duties).

[132]U.S. COAST GUARD, NAVIGATION AND VESSEL INSPECTION CIRCULAR NO. 03-07, GUIDANCE FOR THE IMPLEMENTATION OF THE TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL (TWIC) PROGRAM IN THE MARITIME SECTOR, ENCLOSURE 2: TRANSPORTATION SECURITY ADMINISTRATION, ENROLLMENT AND ISSUANCE PROCESS DESCRIPTION, (July 2007) http://www.tsa.gov/sites/default/files/publications/pdf/twic/twic_nvic_notice.pdf.

Importantly, an applicant may be denied a TWIC if the individual poses "a terrorism security risk to the United States."[133] In addition, if the individual "may be denied admission to the United States or removed from the United States under the Immigration and Nationality Act," then the individual also may be denied a TWIC.[134]

2. Application of TWIC Requirements to Foreign Vessels Would Impose Additional Costs

Based on the broad application of the TWIC program, foreign operators would undoubtedly incur additional costs, above and beyond the $128 TWIC fee,[135] if they were required to ensure crewmembers were TWIC-eligible, and to comply with TWIC procedures related to enrollment, security assessment, and renewal.[136]

One major obstacle is the U.S.-presence requirement for TWIC enrollment process. To enroll, TWIC applicants must visit a TWIC Enrollment Center in the United States. In addition, TWIC applicants may need to return to the center at which they enrolled to pick up their TWIC, or to another center if previously specified at the time of enrollment.[137] At a minimum, the process requires at least one physical visit to an enrollment center. Otherwise, an applicant may be precluded from providing maritime services within the United States. This would require alien crewmembers to lawfully be in the United States in the first instance, which as discussed above, may be difficult given limited visa options.

Foreign companies would also face additional costs due to these stringent visa requirements. Aside from U.S. citizens, only individuals that fall into certain immigration categories are eligible for TWIC enrollment.[138] For

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[133]Pub. L. No. 107-295, § 70105(c)(1)(A)(i), (c)(1)(D), 116 Stat. 2068, 2073 (2002); 49 C.F.R. § 1572.103.

[134]Pub. L. No. 107-295, § 70105(c)(1)(C), 116 Stat. 2068, 2073 (2002); 49 C.F.R. § 1572.103.

[135]*Transportation Worker Identification Credential (TWIC)*, Transp. Sec. Admin., http://www.tsa.gov/stakeholders/transportation-worker-identification-credential-twic%C2%AE (last visited February 13, 2015).

[136]The additional cost to the government to process and monitor compliance by foreign workers with TWIC is beyond the scope of this Article.

[137]*TWIC: Frequently Asked Questions*, Transp. Sec. Admin., http://www.tsa.gov/stakeholders/frequently-asked-questions-0 [hereinafter TWIC FAQs]. The TSA recently announced a "TWIC OneVisit" program, which may allow some TWIC applicants to receive their credentials via mail, as opposed to returning to an enrollment center to pick up an issued TWIC. See *TWIC TSCC Monthly Meeting Presentation*, Transp. Sec. Admin., Aug. 14, 2014 (on file with author). However, at the time of this Article's publication, the OneVisit program was not detailed on the TSA's website as a method of obtaining an issued TWIC.

[138]49 C.F.R. § 1572.105(a)(1)-(8); Transp. Sec. Admin., TWIC Immigration Reference Guide: Eligible Categories for Non-U.S. Citizens, (Oct. 2013), https://www.tsa.gov/sites/default/files/publications/pdf/twic/immigration_status_documents_10-11-13.pdf.

example, foreign nationals providing maritime services in the United States on a vessel or a facility that requires access to secure areas that have a TWIC-annotated B-1 visa are eligible for TWIC. Therefore, foreign-flagged vessels seeking to engage in coastwise trade will have to ensure that every crew member falls within one of the eight enumerated immigration categories to ensure that the crew is TWIC-eligible, including the fees and other resources required to secure an eligible status for each crew member.

Compliance with the TWIC program, if even possible, will require significant expenditures of foreign companies' time. Although the actual enrollment process may not be time-intensive, the entire enrollment process is currently projected to take eleven to twelve weeks based on the extensive background and security review that is required for each applicant, which may take longer based on eligibility concerns or insufficient documentation, as well as processing delays.[139] Keep in mind that this process would be longer, if not practicably impossible, if the United States would need to conduct background checks on foreign nationals. Moreover, TWICs expire every five years, or earlier if the visa or employment document upon which the TWIC is issued expires or is terminated.[140] Therefore, this process must be repeated routinely and requires additional costs in both time and money to continuously comply with TWIC requirements.[141]

Although quantifying the exact costs resulting from the TWIC program is difficult, foreign vessels not currently subject to these requirements would clearly incur additional costs if the TWIC requirements were applied to them in the absence of the Jones Act. Congress certainly would not allow foreign workers to operate in the domestic commerce without a TWIC card, while requiring TWIC cards for the U.S. crews operating in the same routes.

B. Other Laws That Would Be Applied in Order to Level the Playing Field

Beyond the security context, other U.S. laws, such as environmental and safety laws,[142] also currently explicitly exclude foreign vessels from sig-

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[139]Pub. L. No. 107-295, § 70105(d), 116 Stat. 2068, 2074 (2002); 49 C.F.R. §§ 1572.5, .9-.21; *Transportation Worker Identification Credential (TWIC)*, TRANSP. SEC. ADMIN., http://www.tsa.gov/stakeholders/transportation-worker-identification-credential-twic%C2%AE (last visited February 13, 2015).

[140]49 C.F.R. § 1572.23(a).

[141]Admittedly, it is not a given that foreign shipping companies would pay this cost; instead they could simply impose these costs on the foreign crew, directly or by taking it out of their paycheck. Foreign cruise lines are notorious for taking such expenses out of the pay of their workers.

[142]The commandant of the Coast Guard Paul Zukunft recently expressed concern about efforts to repeal the Jones Act. Munsil, supra note 2 ("That for me is a real consequence, if we have foreign flagged vessels doing coastalized trade, what are the safety standards, what are the maritime pollution . . . standards, how are they in compliance with the same standards that we apply to our U.S. fleet?").

nificant requirements that impose additional compliance costs on U.S. vessels.[143]

For instance, U.S. tank vessels carrying oil in bulk must comply with requirements concerning how ballast water may be carried,[144] limitations on the discharge of oily mixtures and data reporting and retention for such discharges,[145] restrictions on discharges from machinery space bilges,[146] and informational requirements related to damage stability as well as the loading and distribution of cargo.[147] Regulations of emissions from new and in-use marine compression-ignition engines also exempt foreign-flagged vessels.[148] Under these provisions, U.S. vessels must comply with emissions standards, testing, certification, recordkeeping, and reporting requirements that impose additional costs on U.S. vessels, whereas foreign vessels are not compelled to bear these costs or satisfy these safety requirements.[149] Again, if these foreign vessels were suddenly allowed to operate in domestic commerce, the federal government would not likely allow for disparate treatment between foreign and U.S. vessels operating in the same trades. In order to resolve competitive disadvantages that would result for U.S. vessels, foreign vessels would be subject to the same costs associated with doing business in the United States.

Although TWIC and certain environmental rules would likely be adjusted to level the playing field, no one can know precisely the full extent to which Congress or a federal agency would amend U.S. laws to capture foreign vessels operating in domestic trade. Indeed, there are likely otherwise discreet loopholes and obtuse laws that would be brought to the forefront. For example, the National Labor Relations Act ("NLRA") and the Fair Labor Standards Act ("FLSA") do not currently apply to foreign crews on foreign-flag vessels.[150] However, there is evidence to suggest that, in both instances, these laws would likely apply to foreign companies operating exclusively in

[143]See, e.g., 33 C.F.R. § 157.25.

[144]33 C.F.R. § 157.35.

[145]33 C.F.R. § 157.37.

[146]33 C.F.R. § 157.39.

[147]33 C.F.R. § 157.47 (citing information required under 6 C.F.R. 31.10-30(d)).

[148]40 C.F.R. § 1042.5(a) (excluding engines installed on foreign vessels, that is vessels of foreign registry or vessels operated under authority of a country other than the United States as defined in 40 C.F.R. § 1042.901).

[149]Id.

[150]The U.S. Supreme Court has ruled that the NLRA did not cover a labor dispute between a foreign ship, temporarily in a U.S. port, and its foreign crew. Benz v. Compania Naviera Hidalgo, S.A., 33 U.S. 138 (1957). The minimum wage provisions of the FLSA include a statutory carve out for crews on foreign vessels. 29 U.S.C. § 213(a)(12).

domestic commerce.[151] The full extent to which Congress and the courts would interpret these laws as applicable to foreign operations in domestic commerce is unclear.

What is certain, however, is that this ambiguity only further highlights the futility of quantifying a cost differential. Consequently, anyone attempting to calculate a "cost" of the Jones Act without fully understanding what those additional costs would be for foreign-flag vessels operating in U.S. domestic commerce is guessing at best and disingenuous at worst.

IV
IF THE JONES ACT WAS RELAXED, WOULD FOREIGN SHIPPING COMPANIES STILL MAINTAIN THEIR LOWER RATES AND WOULD THOSE LOWER RATES ULTIMATELY BENEFIT CONSUMERS?

Assuming that a foreign vessel's costs remained lower even after all appropriate U.S. laws were applied, the question remains whether international operators would lower their rates for domestic shippers or simply "pocket the difference." Some critics believe that lower Jones Act costs would necessarily equate to lower rates for shippers and lower costs for customers. Others are not so sure.

The U.S. Department of Commerce ("the Department"), studying the impact of the Jones Act in Puerto Rico, challenged the idea that rates would necessarily fall, arguing that "[s]hipping costs *are not* synonymous with shipping rates."[152] In fact, the Department said "evidence can be marshalled" either way—for a prediction that relaxation of the Jones Act would cause domestic rates to go up or down[153]—while warning that the "cost effects are difficult to predict."[154] The Department summarized, "[t]he introduction of foreign ships into the Puerto Rico trade might or might not lead to reduced

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[151]In the case of the NLRA, the National Labor Relations Board has distinguished foreign operators in international commerce from the U.S. operations of foreign companies, applying the NLRA to the later scenario. State Bank of India, 229 N.L.R.B. 838, 841 (1977) ("Neither case dealt with the issue of foreign governments or their agents as employers doing business within the Territorial United States"). Federal courts have also suggested that the FLSA may apply in scenarios where the employees were engaged in exclusively domestic commerce. See, e.g., Cruz v. Chesapeake Shipping, Inc., 738 F. Supp. 809, 818 (D. Del. 1990) ("[B]alancing these factors . . . [the] significant points of contact giving rise to this dispute are not in the United States.").

[152]Interagency Task Force, U.S. Dep't of Commerce, Economic Study of Puerto Rico: Report to the President 215 (1979) [hereinafter Commerce Department Study] (emphasis added).

[153]Id. at 216.

[154]Id. at 214.

transportation costs in the long run."[155] The Department emphasized highly dynamic factors that go beyond operating costs:

> Because foreign ships can operate more cheaply does not necessarily mean that they would charge proportionately lower rates to Puerto Rico customers. If foreign vessels were allowed to participate in the Puerto Rico-mainland trade, there is a general consensus that rates would be reduced in the short term. That consensus breaks down in judging by how much the rates would be reduced, and whether the reductions would continue over the long term.[156]

The Department focused in particular on the right of foreign carriers to collaborate in rate-setting outside of antitrust laws, as well as the basic economic incentive to set rates higher. "[T]his situation could produce . . . either monopoly or agreement on price maintenance."[157] The Department further "assumed that such 'lawful cartel' agreements would prevent any substantial rate reductions and could possibly result in higher rates than those now existing under the Jones Act.[158]

In its Puerto Rico study, the GAO made clear the difficulty of attempting to project the impact of the Jones Act on prices of goods in part because of the "complexities in how product prices are set," concluding that "[t]he prices of goods sold in Puerto Rico are determined by a host of supply and demand factors, similar to freight rates, and therefore, the impact of any costs to ship between the United States and Puerto on the average prices of goods in Puerto Rico is difficult, if not impossible, to determine with precision."[159]

Even if the Jones Act does add some unquantifiable cost to shipping and retail prices, it remains unclear who is paying it. In 1998, the GAO studied the Jones Act in a different context in connection with the Alaskan trades. Even if there were additional costs, the GAO said, it is not clear who in the extensive supply chain would bear any such costs. Addressing the question that many would find most relevant, the GAO simply demurred, saying "[t]he extent to which the costs of the Jones Act are borne by Alaskans rather than [the ship owners], the federal government, and shippers in the lower 48 states cannot be estimated accurately."[160] In short, if there are ultimately higher transportation costs because of the Jones Act, it is only speculation to suggest that they would result in higher costs to American consumers.

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[155] Id. at 273.
[156] Id.
[157] Id.
[158] Id. at 217 (emphasis added).
[159] GAO Puerto Rico Report, supra note 58, at 21.
[160] Id. at 3.

V
CONCLUSION

Although it is human nature to advocate for points of view through the use of strong, precise, and authoritative statements, those who confidently claim to have calculated a "cost" of the Jones Act are, regretfully, speaking about uncertain things with certainty. In attempts to support repealing or relaxing the Jones Act, these critics compare foreign shipping rates with Jones Act shipping rates, but fail to account for additional U.S. laws that would apply to the hypothetical foreign vessel operating in domestic trade. These include laws of considerable consequence and cost—like tax and labor laws—that would necessarily impact the operating costs of those foreign shipping companies. Jones Act critics also fail to account for laws that Congress or federal agencies would subsequently amend or extend to foreign vessel operators should they be allowed to operate in the American domestic trades to preserve policy interests. Finally, Jones Act critics attempting to assign a cost to the Act have failed to address whether, if lower shipping rates were ultimately achieved, the benefits would be passed along to shippers and consumers.

Statements depicting a specific Jones Act cost differential based on a comparison of foreign and domestic rates or operating costs are deceiving and make good sound bites. However, it is imperative to remember that the GAO, the government's independent federal investigative agency, has now reviewed the Jones Act three times over the last thirty years and found that "precise, verifiable estimates of the impact of the Act are not available."[161] Comparing Jones Act shipping rates to international shipping rates to determine a "cost" is indeed comparing apples to oranges, and the results provide no credible information for critiquing the Jones Act.

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[161]The GAO Assessment of the ITC Report, supra note 27, at 13. Although not the subject of this Article, the GAO asserted that the act of estimating the "cost" of the Jones Act while ignoring the benefits results in an incomplete, one-sided assessment of the law. Id. at 4, 13.