

BREAKING THE LEGISLATIVE BARRIER TO DISASTER AID:  
THE IMPACT OF THE JONES ACT ON PUERTO RICAN  
DISASTER RECOVERY

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Abstract

In September of 2017 an obscure law caused hurricane disaster aid to sit idle just off the coast of a devastated Puerto Rico. The Jones Act is a legal framework, containing protectionist measures, that establishes obstacles to trade, safeguarding American-flagged ships from foreign rivals. The act, however, also mandates that any ship involved in the commercial conveyance of cargo between two American ports must meet two conditions: (1) the ship must be owned by U.S. citizens and (2) the ship must be registered under the U.S. flag. Such a requirement means that disaster aid from foreign ships cannot immediately enter American ports such as those in Puerto Rico without a waiver, even in the midst of disaster situations. This Note uses Hurricane Maria and the Jones Act's suffocating hold on Puerto Rico as a case study to argue that the Jones Act is in need of major amendments. This Note then presents a simple solution, in the absence of a full repeal, to overcome the Jones Act's negative impacts in disaster situations, ultimately arguing that automatic waivers be implemented for the aid transport to Puerto Rico or any other area of need following an emergency or a disaster.

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## INTRODUCTION

Imagine for a moment that you are living in Iowa. Amongst the corn, you are within one of the United States' fifteen landlocked states. A major disaster strikes the state and the residents around you are pleading with the rest of the country for food, medicine, and other essential supplies. Despite these pleas, the legislators in Washington, D.C. block the necessary and lifesaving deliveries from trucks into the state unless the trucks are United States made, owned, or operated. As a result of these strict specifications, there are only ten eligible trucks and, even worse, only two eligible roads from which these few trucks are able to enter the state. This situation may seem incomprehensible, but this is the reality for Puerto Rico as a result of the Jones Act. If landlocked states were denied aid due to these restrictions, the state would have access to alternatives to get essential supplies. However, Puerto Rico has no accessible alternatives. There are many foreign ships that pass by the waters of Puerto Rico daily, yet are unable to assist even in the face of a major disaster.<sup>1</sup>

“The Jones Act is a protectionist body of law that creates barriers to trade that protect U.S. flagged vessels from foreign competition.”<sup>2</sup> The Jones Act requires any vessel engaged in the commercial transportation of goods between two ports within the United States to be (a) owned by U.S. citizens and (b) registered under U.S. flag.<sup>3</sup> To be registered under U.S. flag, a vessel must be built, although not maintained or refurbished, in the United States. This U.S. flag registry requirement triggers another law, which further requires U.S.-built vessels to be manned by a predominantly American crew.<sup>4</sup> In summary, the Jones Act has four basic requirements for a vessel engaged in coastwise trade:<sup>5</sup> (1) be owned by

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1. Scott Lincicome (@scottlincicome), X (Sept. 23, 2022, 2:57 PM), <https://x.com/scottlincicome/status/1573386193546403841> [<https://perma.cc/CYV4-2LV3>] (raising the hypothetical application of the Jones Act to Puerto Rico).

2. Marie Olga Luis Rivera, *Hard to Sea: Puerto Rico's Future Under the Jones Act*, 17 LOY. MAR. L.J. 63, 70 (2018).

3. See 46 U.S.C. § 55102(b) (2006).

4. U.S. manning laws require that U.S. flagged ships be staffed by a 75% American crew. G.A. Res. 66/288, at 1 (July 27, 2012), [http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_66\\_288.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_66_288.pdf) [<https://perma.cc/T3JU-KMEX>]; see 46 U.S.C. § 8103 (2016).

5. Coastwise trade to the domestic shipping of cargo between any two points within the United States, including its territories. G.A. Res. 66/288, ¶ 15 (July 27, 2012); see 46 U.S.C. § 8103 (2016).

Americans; (2) crewed by Americans; (3) built in America; and (4) repaired in America, unless the carrier is willing to pay the tariff penalty.<sup>6</sup>

There is perhaps no other maritime-based law that occupies such a large part of the collective imagination and attention of policymakers and pundits than the Jones Act. After every major disaster,<sup>7</sup> the Jones Act restrictions become a key topic of discussion.<sup>8</sup> The trade reservation aspect of the Jones Act is only one section in the much broader and more comprehensive Merchant Marine Act, 1920 (1920 Act);<sup>9</sup> however, it has arguably the greatest impact on disaster operations and will thus be the focus of this Note. This singular section creates a restrictive hypothetical where, in the midst of a disaster, even when aid is visible, there is a legislative barrier to accessing it.

This Note calls for the automatic waiver of the Jones Act in an emergency to support the needs of devastated communities. While a complete removal of the provision could certainly be argued, this Note will focus on an intermediary stopgap to ensure Puerto Rico does not get left behind while the bureaucratic wheels in Washington, D.C. creep from stagnant to a crawl. Part I of this Note analyzes the historical context of the creation of the Jones Act and the legislative intent that frames its current structure. Next, Part I explores the key features of the act and will introduce the statutory and real-world implications of the Jones Act. Part II reviews Hurricane Maria as a case study of the impacts of the Jones Act. Part III makes a suggestion to improve the Jones Act and make it more reasonable if a complete overhaul is not possible.

## I. LEGISLATIVE HISTORY

Maritime cabotage laws have been part of the U.S. legal landscape since the nation's founding.<sup>10</sup> The Jones Act, also known as the Merchant Marine Act of 1920, is a federal statute that establishes support for the

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6. Rivera, *supra* note 2, at 71.

7. See, e.g., Melanie Zanona, *Trump Administration Considering Jones Act Waiver for Puerto Rico*, THE HILL (Sept. 27, 2017), <https://thehill.com/policy/transportation/352669-trump-administration-considering-jones-act-waiver-for-puerto-rico> [<https://perma.cc/V7TD-FEXP>]; see Bernard L. Weinstein, *America Must Take Steps Now to Sustain Its Energy Dominance*, THE HILL (Apr. 8, 2020), <https://thehill.com/opinion/energy-environment/490949-america-must-take-steps-now-to-sustain-its-energy-dominance/> [<https://perma.cc/M3T4-5CX6>].

8. See, e.g., Christopher J. McMahon, *Double Down on the Jones Act?*, 49 J. MAR. L. & COM. 153, 153 (2018).

9. Merchant Marine Act, 1920 (1920 Act), ch. 250, 41 Stat. 988 (1920). The Merchant Marine Act, 1920 is often cited as the “Merchant Marine Act of 1920.” Section 39 of the Act provides that it may be cited as the “Merchant Marine Act, 1920” and the Act itself (section 3) refers to the “Merchant Marine Act, 1920,” which is the citation form used in this Article unless referred to as the “1920 Act.”

10. Constantine G. Papavizas & Bryant E. Gardner, *Is the Jones Act Redundant?*, 21 U.S.F. MAR. L.J. 95, 97 (2009).

development and maintenance of a merchant marine with the intent to bolster commercial activity and serve as a naval auxiliary in times of war or national emergency.<sup>11</sup> Importantly, for the purposes of this Note, the statute, requires, among other things, shipping between U.S. ports to be conducted by U.S.-flag ships.<sup>12</sup> The 1920 Act was shaped by what preceded it.<sup>13</sup> Thus, understanding the legislative intent and historical context of the act is critical to address the gaps created by the current application of the law.

### A. Historical Background

The policies that laid the groundwork for the Jones Act are entrenched in American history, stretching back to the nation's inception.<sup>14</sup> In the late 1700s, England and France had restrictive cabotage tariffs to protect their merchant fleets from Dutch competition.<sup>15</sup> In response to these laws, the United States, in 1817, codified coast-to-coast trade restrictions in An Act Concerning the Navigation of the United States. This legislation restricted cabotage trade to U.S. flagged vessels.<sup>16</sup>

The United States' flagged fleet in foreign trade reached its apex in 1860 when it was equal to the British commercial fleet, which was the largest in the world.<sup>17</sup> However, by 1914, the foreign trading fleet was equal to roughly ten percent of the whole British fleet.<sup>18</sup> This erosion of the United States' maritime might was met with a lack of coherent government policy that addressed how to improve the United States' maritime posture. The government's inaction was challenged by the start of World War I, as both danger and opportunity arrived.<sup>19</sup> As World War I commenced, shipping capacity was diverted, impounded, requisitioned, or sunk, and United States exports suffered substantially.<sup>20</sup> In 1914, the government responded with partial measures, but this action prompted debate about whether the U.S. government should take more active steps in protecting the industry.<sup>21</sup>

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11. See 46 U.S.C. § 50101.

12. See *id.* § 50102.

13. See generally Constantine G. Papavizas, *The Story of the Jones Act (Merchant Marine Act, 1920): Part I*, 44 TUL. MAR. L.J. 459 (2020).

14. JOHN F. FRITTELLI, CONG. RSCH. SERV., RS21566, THE JONES ACT: AN OVERVIEW 1–2 (2003).

15. *Id.*

16. *Id.* at 1.

17. U.S. Dep't of the Treasury, Bureau of Navigation, Ann. Report of the U.S. Comm'r of Navigation 468–71, 532, 568 (1901).

18. U.S. Dep't of Commerce, Bureau of Navigation, Ann. Report of the U.S. Comm'r of Navigation 79 (1914).

19. Papavizas, *supra* note 13, at 461.

20. *Id.*

21. *Id.*

The debate over U.S. government action lasted more than two years, until the Shipping Act of 1916 was enacted.<sup>22</sup> This act authorized the creation of two new government entities which, for the first time in U.S. history, were authorized to purchase, construct, own, and operate commercial vessels.<sup>23</sup> These newly created entities eventually put together an enormous fleet of U.S. government-owned vessels, the second-largest fleet in the world in 1920.<sup>24</sup> This newly formed fleet was essentially the spark for the Merchant Marine Act of 1920 with the primary impetus being to “dispose of this war-built and -acquired fleet of merchant vessels.”<sup>25</sup> The legislature debated about how the country should proceed with the vessels.<sup>26</sup> At the time, Senator Wesley Livsey Jones, believed “that the presence of a large U.S.-controlled fleet presented a rare opportunity to rectify the policy void that had existed since the Civil War and to reestablish a substantial U.S. citizen-owned-and-operated fleet in foreign trade.”<sup>27</sup> Senator Jones’s view that “the fleet should be sold with dual, potentially incompatible, goals of maximizing value to the U.S. taxpayer and creating a substantial privately owned foreign trading U.S.-flagged fleet” prevailed in the creation of The Merchant Marine Act of 1920.<sup>28</sup> The Merchant Marine Act of 1920 is the U.S. federal statute that regulates maritime commerce in U.S. waters and among U.S. ports.<sup>29</sup> As a result of Senator Jones’ views, the Act was “created to encourage development of American merchant marine for national defense and commercial purposes.”<sup>30</sup> While the 1920 Act did not succeed on its own in maintaining a substantial privately owned U.S.-flagged fleet, it nevertheless made lasting changes to the industry, seen most evidently in the Jones Act.

### B. *The Jones Act*

The Merchant Marine Act section 27 is commonly referred to as the Jones Act and regulates maritime cabotage laws.<sup>31</sup> The provisions under

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22. Shipping Act (1916 Act), ch. 451, 39 Stat. 728 (1916).

23. Papavizas, *supra* note 13, at 461.

24. *Id.* (citing U.S. Dep’t of Commerce, Bureau of Navigation, Annual Report of the U.S. Comm’r of Navigation 18 (1920)).

25. Papavizas, *supra* note 13, at 461.

26. *See id.*

27. *Id.*

28. *Id.*

29. 46 U.S.C. § 30104 (2006). The Act primarily addresses personal injury to seamen.

30. Press Release, American Maritime Partnership, Admiral Allen Provides Guidance to Ensure Expedited Jones Act Waiver Processing Should It Be Needed (June 15, 2010) (on file with the American Maritime Partnership).

31. Joseph M. Conley, *The Jones Act: Its Effect on The U.S. Response to The 2010 BPBP Deepwater Horizon Oil Spill and Its Relevance In International Law*, 11 WASH. U. GLOB. STUD. L. REV. 151, 154 (2012).

the Jones Act requires that all goods transported by water between U.S. ports be carried by U.S.-flagged ships that are constructed in the United States, owned by U.S. citizens, and crewed by U.S. citizens and permanent residents.<sup>32</sup> The Act reads

[A] vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel -

(1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and

(2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.<sup>33</sup>

The Jones Act is the only provision in the U.S. code concerning cabotage containing the U.S.-build requirement.<sup>34</sup> No such requirement exists for any other United States cabotage modes of transportation, including rail or aviation.<sup>35</sup> The condition, which requires that ships are owned and operated by United States' coastwise citizens, is exclusive to the Jones Act and, thus, is the appropriate focus of any action to improve disaster aid access for Puerto Rico.<sup>36</sup> Even with this unique provision being the focus of such controversy, the Jones Act has remained fundamentally unchanged since 1920.<sup>37</sup>

### C. *The Implications of the Jones Act*

The Jones Act has become widely known as the “best” U.S. coastwise maritime policy, “finding its way into popular fiction such as James A. Michener’s novel *Alaska* and the political mainstream” following “the *Deepwater Horizon* incident and Hurricane Maria.”<sup>38</sup> As noted by Papavizas, this notoriety is ironic, because although the coastwise trade provision “was sought by Senator Jones to promote Washington State’s interests with respect to trade with Alaska, it was merely a refinement of

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32. 46 U.S.C. § 55102 (2006). These requirements are not listed in this section of the statute, but they fall within the requirements for coastwise endorsement; *see also* Papavizas & Gardner, *supra* note 10, at 122 n.198 (“§ 55120 restricts the U.S. coastwise trade to vessels with coastwise endorsements, which can only be issued to vessels built in the United States.”) (citing 46 U.S.C.A. § 12112 (West 2007)).

33. 46 U.S.C. § 55102 (2006).

34. Papavizas & Gardner, *supra* note 10.

35. *Id.*

36. *Id.*

37. *Id.* at 96–97.

38. Papavizas, *supra* note 13, at 463.

a reservation of U.S. domestic trade to U.S.-flagged vessels that started in 1789.”<sup>39</sup> Senator Jones, on a number of occasions, stated that the act did not change preexisting law and that the primary thrust of the law was elsewhere.<sup>40</sup> Nevertheless, the implications of the act has extended far into disaster response and recovery, negatively impacting territorial islands like Puerto Rico.

## II. HURRICANE MARIA

Hurricane Maria, a Category 4 storm, made landfall in Puerto Rico on September 20, 2017, causing extensive damage to the island’s infrastructure and resulting in an estimated 2,975 deaths and \$90 billion in damages.<sup>41</sup> The hurricane devastated Puerto Rico, affecting various aspects of life on the island, including its physical, economic, and social aspects.

### A. *The Hurricane and Impacts to the Island*

On September 6, 2017, Hurricane Irma, which had reached Category 5 status, hovered north of San Juan, Puerto Rico.<sup>42</sup> Four people were killed by Irma, and two-thirds of the island’s recipients of electricity lost power. Thirty-four percent of the population was cut off from clean water supplies.<sup>43</sup> Just ten days later, on September 16, the National Weather Service identified a tropical depression moving 700 miles east-southeast of the Lesser Antilles.<sup>44</sup> Hurricane Maria hammered Puerto Rico on September 20th, with winds reaching speeds of up to 155 miles per hour, just three miles per hour shy of Category 5 intensity.<sup>45</sup> Thirty inches of rain fell, and the entire island lost power.<sup>46</sup> President Trump declared “that a major disaster exists” in Puerto Rico and ordered federal

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39. *Id.*

40. *Id.* (citing e.g., 59 Cong. Rec. 6863 (1920) (statement of Sen. Jones) (“The bill deals primarily with our foreign ocean-going shipping in the foreign trade.”)).

41. Mary Rodríguez-Rabassa et al., *Impact of a Natural Disaster on Access to Care and Biopsychosocial Outcomes Among Hispanic/Latino Cancer Survivors*, 10(1) SCI. REP. 10376, 10376 (2020).

42. Robinson Meyer, *What’s Happening With the Relief Effort in Puerto Rico?*, THE ATLANTIC (Oct. 4, 2017), <https://www.theatlantic.com/science/archive/2017/10/what-happened-in-puerto-rico-a-timeline-of-hurricane-maria/541956/> [<https://perma.cc/NQR8-W2W4>].

43. *Id.*

44. Yxta Maya Murray, “FEMA Has Been a Nightmare:” *Epistemic Injustice In Puerto Rico*, 55 WILLAMETTE L. REV. 321, 336 (2018) (citing *Major Hurricane Maria - September 20, 2017*, NAT. WEATHER SERV., <https://www.weather.gov/sju/maria2017> [<https://perma.cc/YTY9-BG7P>]).

45. Meyer, *supra* note 42.

46. *Id.*

assistance to the Commonwealth and local recovery efforts,<sup>47</sup> triggering FEMA relief efforts to be performed under the powers vested by the federal Stafford Act.<sup>48</sup> Nine days after landfall, President Trump signaled that aid would not be easy to deliver to Puerto Rico, complaining during public remarks that Puerto Rico was surrounded by water.<sup>49</sup> A May 2018 Harvard study estimated the death toll from the disaster to be somewhere between 800 and over 8,000,<sup>50</sup> and, in August 2018, George Washington University estimated 2,975 excess deaths occurred in the six months after landfall.<sup>51</sup>

### B. *The Jones Act and Maria*

Hurricane Maria created a humanitarian disaster of immense magnitude in Puerto Rico.<sup>52</sup> As a result of the devastation, there was an unprecedented need for humanitarian relief supplies and equipment to begin the long process of rebuilding the island's infrastructure.<sup>53</sup> Following landfall, then President Trump admitted to being hesitant to grant a Jones Act waiver because "a lot of people who work in the shipping industry . . . don't want the Jones Act lifted."<sup>54</sup> Trump eventually agreed to a mere ten-day waiver, which was too short of a waiver for a Norwegian ship to transport fifty-three containers of aid from New Orleans to Puerto Rico or for a Dutch vessel, owned by Greenpeace,

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47. Press Release, The White House, President Donald J. Trump Approves Puerto Rico Disaster Declaration (Sept. 21, 2017) (on file with FEMA).

48. See 42 U.S.C. § 5195 (2018) (FEMA is administered via the powers conferred by the Stafford Act).

49. Jordan Fabian, *Trump says Puerto Rico relief hampered by 'big water, ocean water'*, THE HILL (Sept. 10, 2017, 12:05 PM), <https://thehill.com/homenews/administration/353094-trump-says-puerto-rico-relief-hampered-by-big-water-ocean-water/> [https://perma.cc/X6XV-VT3J].

50. Nishant Kishore et al., *Mortality in Puerto Rico after Hurricane Maria*, 379(2) NEW ENG. J. MED. 162, 166 (2018), <https://www.nejm.org/doi/pdf/10.1056/NEJMsa1803972> [https://perma.cc/7WA2-RLDL]; see Sheri Fink, *Puerto Rico's Hurricane Maria Death Toll Could Exceed 4,000, New Study Estimates*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/us/puerto-rico-deaths-hurricane.html> [https://perma.cc/F8GR-ZJ35] (reporting on the study's findings).

51. Carlos Santos-Burgoa, *Ascertainment of the Estimated Excess Mortality From Hurricane María in Puerto Rico*, at iii, 9 (2018), [https://hsrc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?article=1287&context=sphhs\\_global\\_facpubs](https://hsrc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?article=1287&context=sphhs_global_facpubs) [https://perma.cc/2N6J-HPPW] (reporting on the study's findings).

52. *The facts: Hurricane Maria's effect on Puerto Rico*, MERCY CORPS (Sept. 9, 2020), <https://www.mercycorps.org/blog/facts-hurricane-maria-puerto-rico> [https://perma.cc/3LTG-2U6Z].

53. McMahon, *supra* note 8, at 168.

54. Josh Siegel, *Trump: Shipping Industry Doesn't Want Jones Act Lifted for Puerto Rico*, WASH. EXAM'R (Sept. 27, 2017), <https://www.washingtonexaminer.com/trump-shipping-industry-doesnt-want-jones-act-lifted-for-puerto-rico/article/2635827> [https://perma.cc/2JQU-L2SP].



to carry supplies to the island.<sup>55</sup> A general waiver was issued on September 28, 2017 under 46 U.S.C. § 501(a).<sup>56</sup> The stated reason for the DHS waiver was “widespread damage to its infrastructure.”<sup>57</sup> While the waiver duration was short, the scope was broad; for the first time in connection with hurricane Jones Act waivers, the waiver extended beyond petroleum to cover “all products.”<sup>58</sup> The waiver was helpful as evidenced by the fact that ten foreign ships were used to transport aid as noted in the figure below.<sup>59</sup>

Known vessels that moved under the September 8 and 12, 501(a) waiver:

Vessel Name	IMO Number	Commodities	Port of Lading	Port of Discharge
River Shiner	9289752	Gasoline	Bayonne, NJ	Jacksonville, FL
Nave Jupiter	9657038	Gasoline	New Orleans, LA	Tampa, FL
Evinos	9667928	Gasoline, diesel	Garyville, LA	Tampa, FL
STI Battery	9688362	Diesel	Baltimore, MD	Port Everglades, FL
Crystal Bay	9697624	Jet fuel	Beaumont, TX	Port Everglades, FL
Zircon	9746205	Gasoline Jet fuel	Port Arthur, TX	Port Everglades, FL Tampa, FL
Stena Impression	9667461	Gasoline	Bayonne, NJ	Port Everglades, FL
DS Promoter	9252187	Fuel oil Fuel oil	Houston, TX	Port Canaveral, FL Port Everglades, FL

Known vessels that moved under the September 28, 501(a) waiver:

Vessel Name	IMO Number	Commodities	Port of Lading	Port of Discharge
Betty K VI	8801216	Restoration equipment	Miami, FL	San Juan, PR
Apollon	9289532	Diesel	New Orleans, LA	Yabucoa, PR
Maersk Messina	9544592	Gasoline	Bayonne, NJ	San Juan, PR
MBC Rose	9497000	Rice, dried grains	New Orleans	San Juan, PR
Clipper Newhaven	9473248	Drinking water	Baltimore, MD	Ponce, PR
Lolland	9480124	Drinking water	Houston, TX	San Juan, PR
Nera II	8502365	Utility trucks	Miami, FL	San Juan, PR
Adventure of the Sea	9167227	Baby food, diapers, canned food, consumables, AC units, generators	Fort Lauderdale, FL	San Juan, PR
Meridian Express	9596272	Heating oil	Beaumont, TX	San Juan, PR
Iver Experience	9207716	Diesel	New Orleans, LA	San Juan, PR

55. Lydia DePillis, *Relief Groups Hit Major Hurdles Getting Aid to Puerto Rico*, CNN MONEY (Oct. 23, 2017), <http://money.cnn.com/2017/10/23/news/economy/puerto-rico-ad-hoc-aid-groups/index.html> [https://perma.cc/RD7Q-XKSU]; Ryan Schleeter, *Our Power, Our Future: Puerto Rico’s Road to a #JustRecovery*, GREENPEACE (Oct. 19, 2017), <https://www.greenpeace.org/usa/our-power-our-future-puerto-ricos-road-to-a-justrecovery/> [https://perma.cc/LQP5-W2H7].

56. U.S. DEP’T OF HOMELAND SEC., WAIVER OF COMPLIANCE WITH NAVIGATION LAWS (Sept. 28, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0928\\_AS1\\_Jones-Act-Waiver.pdf](https://www.dhs.gov/sites/default/files/publications/17_0928_AS1_Jones-Act-Waiver.pdf) [https://perma.cc/3K78-HNHT].

57. *Id.*

58. *See id.*

59. Colin Grabow (@cpgrabow), X (July 16, 2024, 11:42 AM), <https://x.com/cpgrabow/status/1813237732933529945> [https://perma.cc/U5N3-44LB].

When President Trump finally did waive the Jones Act, Senator John McCain retook his efforts to repeal the Jones Act for Puerto Rico.<sup>60</sup> Senator McCain proposed legislation to exempt Puerto Rico from the Jones Act under an expedient procedure that would have allowed it to bypass the normal committee process.<sup>61</sup> There was bipartisan support for an exemption for Puerto Rico to assist with their long-term recovery after Hurricane Maria because an exemption would (1) provide an avenue for economic growth and (2) could facilitate the transportations of materials (e.g., steel, concrete, lumber) required for reconstruction post Hurricane Maria.<sup>62</sup>

The ten-day waiver in 2017 was requested by the Secretary of Defense and thus automatically granted. The only condition for Secretary of Defense waivers is that they be in the interest of national defense.<sup>63</sup> However, a law passed by Congress in 2020 restricted Secretary of Defense waivers to those “consider[ed] necessary in the interest of national defense to *address an immediate adverse effect on military operations*,” which disaster aid to Puerto Rico is unlikely to qualify for.<sup>64</sup>

### III. RECOMMENDATION

Maritime commerce is regulated both internationally and domestically. The laws that govern the domestic transportation of goods and passengers are called “cabotage laws.”<sup>65</sup> The cabotage legislation within the United States is the Merchant Marine Act of 1920, also known as the Jones Act.<sup>66</sup> Both the international community and United States jurisdictions have lobbied for a repeal or at least a common sense replacement of the Jones Act in order to promote a free market economy and lower domestic transportation costs.<sup>67</sup> Independent studies have found that Puerto Rico is the most negatively impacted jurisdiction within the United States because the onerous restrictions imposed by the Act

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60. Press Release, John McCain, Senator, Senator John McCain urges DHS to waive the archaic Jones Act for Puerto Rico to aid hurricane recovery efforts (Sept. 26, 2017) (on file with Library of Congress).

61. Melanie Zanona, *Trump faces decision on new Jones Act waiver for Puerto Rico*, THE HILL (Oct. 6, 2017, 4:08 PM), <http://thehill.com/policy/transportation/354301-trump-faces-decision-on-new-jones-act-waiver-for-puerto-rico> [<https://perma.cc/599C-MZ9D>].

62. Rivera, *supra* note 2, at 111 (citing David A. Graham, *Is the Jones Act Waiver All Politics?*, THE ATLANTIC (Sept. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/09/jones-act-waiver-puerto-rico-trump/541398/> [<https://perma.cc/BC96-H54U>]).

63. U.S. DEP’T OF HOMELAND SEC., *supra* note 56.

64. 46 U.S.C. § 501(a)(1).

65. U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-260, PUERTO RICO: CHARACTERISTICS OF THE ISLAND’S MARITIME TRADE AND POSSIBLE EFFECTS OF MODIFYING THE JONES ACT 4 (2013); *see also* OCDE pg. 12 (2011).

66. JAISON ABEL ET AL., 13 FED. RSRV. BANK OF N.Y., REPORT ON THE COMPETITIVENESS OF PUERTO RICO’S ECONOMY (2012).

67. *Id.*

have a direct effect on Puerto Rican consumers.<sup>68</sup> By limiting domestic transportation to Jones Act compliant vessels, transportation costs have increased and are passed down to the consumer.<sup>69</sup> This Note, however, presumes that no action will be taken to more broadly address the flaws of the Jones Act. Instead, acknowledging that no changes will likely be made suggests a narrowly tailored amendment to better protect the needs of Puerto Rico, or any other area in need following an emergency or disaster.

The recommendation for improving the Jones Act is simple; the Act should be automatically waived for the transport of aid to Puerto Rico or any other area of need following an emergency or a disaster. While waiver processes already exist, the bureaucratic delays are unnecessary and could be politicized, which could have great implications on human life and safety. In order to determine under what circumstances the waiver would be automatically given, there is no need to create any new legislation. Rather, the waiver could be tied to any Stafford Act declaration which is enacted for major emergencies or disasters in which a waiver would be applicable.

#### A. Legal Authority

The Jones Act contains no intrinsic waiver provision and nothing in the law provides that it may be waived for any reason.<sup>70</sup> Nor does anything in the Jones Act indicate that an exception can be made. If the Jones Act applies to a vessel movement, then a qualified U.S.-flag vessel must be utilized regardless of cost, safety, or other considerations.<sup>71</sup> The legal authority for a waiver to the act, however, has already been conceptualized. There has been a more general waiver authority that encompasses the Jones Act since immediately after the attack on Pearl Harbor with the authority focusing on national security.<sup>72</sup> Considering the complex history of waiver law,<sup>73</sup> there was a change that would amend

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68. Sam Ori, *Puerto Rico's Challenges After Hurricane Strengthen Case Against the Jones Act*, FORBES (Nov. 7, 2017, 1:01 PM), <https://www.forbes.com/sites/ucenergy/2017/11/07/puerto-rico-has-had-a-hard-time-getting-fuel-for-our-next-disaster-lets-fix-the-problem/#352239286646> [https://perma.cc/6UKY-S867].

69. Thomas Grennes, *An Economic Analysis of the Jones Act* 6, MERCATUS CTR. GEORGE MASON UNIV. (May 2, 2017).

70. See, e.g., U.S. Customs & Border Protection (CBP), Cust. Service Dec. 79-230 (1978) (“The only general authority to waive the provisions of the navigation laws (including the coastwise laws) is contained in the act of December 27, 1950 . . . [the Jones Act waiver law] which provides for waivers deemed necessary in the interest of national defense.”); CBP Cust. Service Dec. 80-186 (May 30, 1980).

71. See Pub. L. No. 107-295, § 213, 116 Stat. 2064, 2099 (2002).

72. Constantine G. Papavizas & Brooke F. Shapiro, *Jones Act Administrative Waivers*, 42 TUL. MAR. L.J. 317, 325 (2018).

73. *Id.* at 320–33 (for an in-depth discussion of the waiver law history).

46 U.S.C. § 501, which covers waivers of navigation and vessel-inspection laws. In 2008, there was an amendment to apply the terms of the existing Memorandum of Agreement to all waiver requests originating outside the U.S. Department of Defense (DoD) following a memoranda of agreement that was entered, which required a U.S. Maritime Administration (MARAD) determination on whether qualified U.S.-flag vessels were available before a waiver of the Jones Act could issue.<sup>74</sup> The DoD waiver requests would not require a MARAD vessel availability determination.<sup>75</sup> Legislative history suggests that the change was “consistent with the stated U.S. policy, to encourage and aid in the development and maintenance of a U.S. merchant marine as necessary for the national defense.”<sup>76</sup>

The Jones Act waiver law “has remained stable since early 2013 and continues to be bifurcated, as originally set forth in the 1941 Executive Order, between waiver requests made by a defense agency (now the Secretary Defense) and other waiver requests.”<sup>77</sup> For DoD requests covered by 46 U.S.C. § 501(a), the requests “shall” be granted by the head of the agency “responsible for the administration of the navigation or vessel-inspection laws” without any determinations relating to U.S.-flag vessel availability.<sup>78</sup> The Secretary of Defense instead makes a judgment call as to whether the waiver is in the interest of national defense. Other requests, such as those under 46 U.S.C. § 501(b), require MARAD to make a vessel non-availability determination and provide notice to Congress.<sup>79</sup> CBP, part of DHS, is the agency charged with administering navigation laws. As Jones Act waiver requests are encompassed under “navigation laws,” the Secretary of the DHS issues Jones Act waivers requested by DoD or issues Jones Act waivers based on other requests.

Several waivers have been employed during times of emergencies because the Secretary of Homeland Security has deemed it necessary in the interest of national defense. Administrations have executed waivers during oil spills and hurricanes, such as during Hurricane Katrina and Sandy.<sup>80</sup> The Jones Act delayed relief for New Jersey during a snowstorm “because the only supply-able and readily available rock salt was on

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74. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 501(b), 122 Stat. 4356, 4769 (2008).

75. See S. Rep. No. 110-457, at 7 (2008); see Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 501(b), 122 Stat. 4356, 4769 (2008).

76. S. Rep. No. 110-457, at 8.

77. Papavizas & Shapiro, *supra* note 72, at 333.

78. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 3512, 126 Stat. 1632, 2227 (2013).

79. *Id.*

80. Grennes, *supra* note 69.

board a foreign ship, and the administration opted against granting the discretionary waiver.”<sup>81</sup> Some have argued that the waiver was not granted because New Jersey failed to properly apply for the waiver, but this argument is “only buttresses the conclusion that the Jones Act is a bureaucratic obstacle even in times of emergency.”<sup>82</sup>

### B. *Original Intent Upheld*

The recommendation for automatic waiver authority does not offend the original intent of the Maritime Marine Act as from the standpoint of the Jones Act in section 27, the act was designed as a maritime law to directly address international trade. Scholarship has contended that maritime law was developed to “assist and regulate the practice of maritime commerce.”<sup>83</sup> As a result, from its inception “maritime law was impregnated with the customs and usages of international trade—as was inevitable if the law was both to recognize and encourage that trade.”<sup>84</sup> The similarities that exist between international maritime customs and usages has unified maritime law and practice.<sup>85</sup> As noted by Price, “[m]aritime law was made for international trade and not vice versa.”<sup>86</sup> A focus on international trade suggests that the purpose of the Jones Act, looking through the lens of its original intent, was for international trade and not meant to impede the use of foreign vessels for disaster aid. In fact, such action offends the purpose of maritime law as a way to collaborate with foreign countries. The recommendations to allow foreign vessels to provide necessary aid following a disaster without having to wait for a waiver that is subject to the bureaucratic delays that are associated with Washington, D.C. is within the intent of the Jones Act. The limited purposes-based exception would not offend the international trade considerations associated with the creation of the Jones Act, although these considerations are outdated and in need of reconsideration.

### C. *Corollary Allowances Under the Jones Act*

The imposition that the Jones Act is intended as a way to collaborate with foreign countries has also been suggested for dealing with oil spills after the BP Deepwater Horizon oil rig burst into flames in the Gulf of Mexico in 2010.<sup>87</sup> Interestingly, the discussion and evaluation of original

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81. The Heritage Foundation, *Jones Act vs. Free Markets*, YOUTUBE (Dec. 5, 2014), <https://www.youtube.com/watch?v=V-eU7rp5GtQ> [<https://perma.cc/7REX-RRYS>].

82. *Id.*

83. Richard J. Price, *Maritime Litigation in the GCC States*, 4 ARAB L.Q. 224 (1989).

84. *Id.*

85. Conley, *supra* note 31, at 165.

86. Price, *supra* note 83, at 227.

87. *See generally* Conley, *supra* note 31.

intent is less critical in an oil spill recovery sense as a portion of the act directly addresses vessels responding to oil spills.<sup>88</sup> The act states, “an oil spill response vessel documented under the laws of a foreign country may operate in waters of the United States on an emergency and temporary basis, for the purpose of recovering, transporting, and unloading in a United States port oil discharged as a result of an oil spill in or near those waters.”<sup>89</sup> The plain language of the act conceptualizes the United States accepting aid from foreign vessels during an oil spill.<sup>90</sup> The language of the act specifically carves out an exception under an oil spill for “an oil spill response vessel.” However, the argument that the consideration is not for foreign vessels assisting in an oil spill disaster is flawed. While oil spill response vessels may not be carriers of cargo that would implicate international trade, an exception for international assistance in a disaster has been recognized by other portions of the statute. During the Colonial Pipeline outage, it took the Department of Homeland Security just a day to issue two different Jones Act waivers for fuel.<sup>91</sup>

#### CONCLUSION

As stated by U.S. Senator John McCain, “if there was ever a law that has long ago outlived its usefulness-if it ever had any-it is the Jones Act. On the Jones Act, it is time to change course-today.”<sup>92</sup> Puerto Rico has never enjoyed full autonomy. From a constitutional perspective, Puerto Rico is under Congressional authority, and although it may continue its relationship with the mainland under its current political status, it is subject to Congress’ ability to change or revoke the relationship unilaterally.<sup>93</sup> The broad political status and economic impact debates regarding Puerto Rico are generally outside of the scope of this Note. However, according to the Puerto Rico Bar Association, Puerto Rico’s political status is interlinked to the Jones Act.<sup>94</sup> In effect, Puerto Rico’s

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88. See 46 U.S.C. § 55113 (2006).

89. *Id.*

90. Conley, *supra* note 31, at 156.

91. Letter from Lucinda Lessley to Lisa Burley (May 13, 2021), <https://www.maritime.dot.gov/sites/marad.dot.gov/files/2021-05/Determination%2013%20May%202021.pdf> [<https://perma.cc/MV5S-GJVT>]; Statement by Secretary Mayorkas on Approval of an Additional Jones Act Waiver in Response to Eastern Seaboard Oil Supply Constraints (May 13, 2021), <https://www.dhs.gov/news/2021/05/13/statement-approval-additional-jones-act-waiver-response-eastern-seaboard-oil-supply> [<https://perma.cc/7K57-KV7W>].

92. Floor Statement By Senator John McCain on Amendment to Repeal the Jones Act (Jan. 22, 2015), <https://web.archive.org/web/20150127024759/https://www.mccain.senate.gov/public/index.cfm/2015/1/floor-statement-by-senator-john-mccain-on-amendment-to-repeal-the-jones-act> [<https://perma.cc/86WN-VLPD>].

93. Rivera, *supra* note 2 (citing Report by the President’s Task Force on Puerto Rico’s Status at 5–6 (2007)).

94. *Id.*

ambiguous sovereignty often leaves Puerto Rico with the worst of both worlds of full Jones Act imposition and sufficiently broad preclusion of full sovereign decision-making afforded to other states.

By any evaluation, the Jones Act can be deemed a disappointment. During its enforcement, the U.S. shipbuilding sector has deteriorated, the national shipping fleet has shrunk, and its contribution to the military's sealift capacity has been minimal, if any. Furthermore, the Jones Act's inability to fulfill its intended goals has resulted in significant economic damage through both direct and indirect means. Instead of enhancing national security, the Jones Act has hindered domestic shipbuilding, reduced the size of America's merchant marine reserve, and impeded our ability to promptly and efficiently respond to natural and human-made crises. Critics have said that a full repeal of the Jones Act would actually benefit the U.S. shipbuilding industry, increasing demand, output, and final value-added by hundreds of millions of dollars per year.<sup>95</sup>

In the absence of a full repeal, it is necessary for the United States to modify the Jones Act to meet the modern demands of disaster relief, especially in relation to Puerto Rico, where the lack of political power prevents the island from protecting itself against the overly-burdensome impact of the Jones Act.<sup>96</sup> It is critical that the island of Puerto Rico have the maximum flexibility needed to obtain relief supplies following a disaster. While good faith debates can revolve around fully repealing the Jones Act, there are no good faith arguments that should prevent a commonsense amendment allowing automatic waivers to be given for the Jones Act in the face of a disaster or emergency. It is truly "hard to sea" a future in which disaster aid and recovery is not impacted by a lack of movement on the Jones Act. Only once we break the legislative barrier to disaster aid can we truly promote resiliency in the face of increasing natural disasters.

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95. See Karin Gourdon & Joaquim Guilhoto, *Local Content Requirements and Their Economic Effect on Shipbuilding: A Quantitative Assessment*, OECD SCI., TECH. & INDUS. POL'Y PAPERS 6 (Apr. 2019), <https://doi.org/10.1787/90316781-en> [<https://perma.cc/A3PR-2AR8>].

96. See Grennes, *supra* note 69, at 45–46.