

September 2017

Legal Lookout

By [Steve Block](#)

Hurricanes highlight the Jones Act's faults.

In 1920, Congress passed the Merchant Marine Act, colloquially “the Jones Act,” which governs transportation of cargo within the U.S. domestic (or “coastwise”) trade, which includes all fifty states and U.S. territories like Guam and Puerto Rico. Under the Jones Act, only vessels flying the Stars & Stripes, and which are U.S. built, owned, financed and operated may operate in the coastwise trade. Numerous other statutory enactments called “cabotage laws” have added virtually every salty business – from fisheries and towing to transportation of government personnel and property – to the “U.S. boats only” list. If your trade is on this list, you can’t move cargo on a foreign vessel between any two U.S. ports without making an intermediate stop elsewhere.

This politically-charged law has long found salvation and justification in the simple notion that, hey, we need American-flagged vessels. They serve economically and militarily crucial functions. If we want American vessels, we need shipyards to build and service them. And while we’re at it, let’s keep vessel financing, taxing, labor and safety close to home as well. These all promote essential American interests, while increasing tax revenues and keeping a labor force afloat to boot. We’re not alone in this sentiment – other countries have similar laws.

Legally restricting foreign vessels from playing in our backyard is the only way to combat a nasty reality of world economics: foreigners simply can build and operate boats cheaper than we can. Cabotage laws govern the other transportation modes as well, but the added requirement for domestic water carriage that only homebuilt boats be used in the coastwise trade can be onerous. Many a shipper has complained about the higher costs of domestic water carriage resulting from the limited supply of carriers able to run vessels made in the USA. And if you live in a state or territory isolated by water, costs of most all commodities, including food and building supplies, end up being way more expensive. It can be cheaper to fly goods typically sent by ship. Of course, the U.S. shipping industry, including shipyards and the suppliers of countless vessel construction parts, feel differently. Their lobby has been instrumental in keeping the Jones Act afloat.

While the debate has been ongoing and the subject of several organized movements over the last century toward revision, the recent hurricane onslaught in Texas, Florida and Puerto Rico has generated more Jones Act controversy than recent memory recalls. Foreign ships originating transports out of U.S. ports with much-needed supplies were allowed to dock and offload in Texas and Florida in the aftermath of Hurricanes Harvey and Irma. President Trump and the U.S. Department of Homeland Security (“DHS”), which enforces the Jones Act, recognized the exigency, and perhaps political expediency, of getting life essentials to the residents of those (red) states.

But Puerto Rico in the wake of Hurricane Maria – not so fast. The Trump administration refused to lift Jones Act restrictions on our nearby territory for several days after the storm devastated the small island. Why? DHS opponents reportedly believed Puerto Rico’s problem was primarily access to fuel, and U.S. barges are fully capable of delivering adequate supplies. As for food and other humanitarian necessities, opponents urged that Puerto Rico’s problem wasn’t receiving adequate stuff into its ports, but distributing it inland to needy consumers. Thus, they claimed that enlisting foreign ships to run cargo across the Caribbean wouldn’t add any benefit. President Trump agreed for a while, and proclaimed there was no need for a waiver.

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That position certainly didn't look good, with the Trump-friendly populations of Texas and Florida enjoying supplies delivered by foreign vessels at the same time Maria's menacing eye passed over San Juan. Perhaps the current administration's image issues played into President Trump's recent signing a 10-day waiver exempting from Jones Act restrictions imports of all products into Puerto Rico. We haven't seen any sort of legal analysis that might result in a new policy regarding circumstances in which DHS will automatically lift cabotage restrictions. Rather than wait for the next catastrophe to prompt dialogue, perhaps reform should be visited now.

Ref: the Merchant Marine Act of 1920, 46 U.S.C. §55101, *et seq*, available at <http://www.law.cornell.edu/uscode/text>.

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