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MARITIME
PARTNERSHIP

American Jobs. American Security.

HOW THE HERITAGE FOUNDATION MISSED THE BOAT WITH ITS RECENT JONES ACT REPORT

The Heritage Foundation's recent report entitled "*Sink the Jones Act: Restoring America's Competitive Advantage in Maritime-Related Industries*"¹ has earned almost instant status as one of the most inaccurate, error-filled, and biased writings about the American maritime industry in recent memory. Most striking is the extent to which the authors ignore material and relevant facts simply because they are contrary to their conclusions. Among the many outright errors, misstatements, and half truths are the following:

- 1) The authors' claim that repeal of the Jones Act "would yield economic benefits of up to \$682 million per year" is disingenuous and wrong.***

The authors contend that "studies have show that a full repeal of the Jones Act would yield economic benefits of up to \$682 million per year." The primary basis for this assertion is a university student's paper that self-admits to relying on "several key back-of-the envelop estimates," "some notable caveats to its result," and "some important missing pieces."²

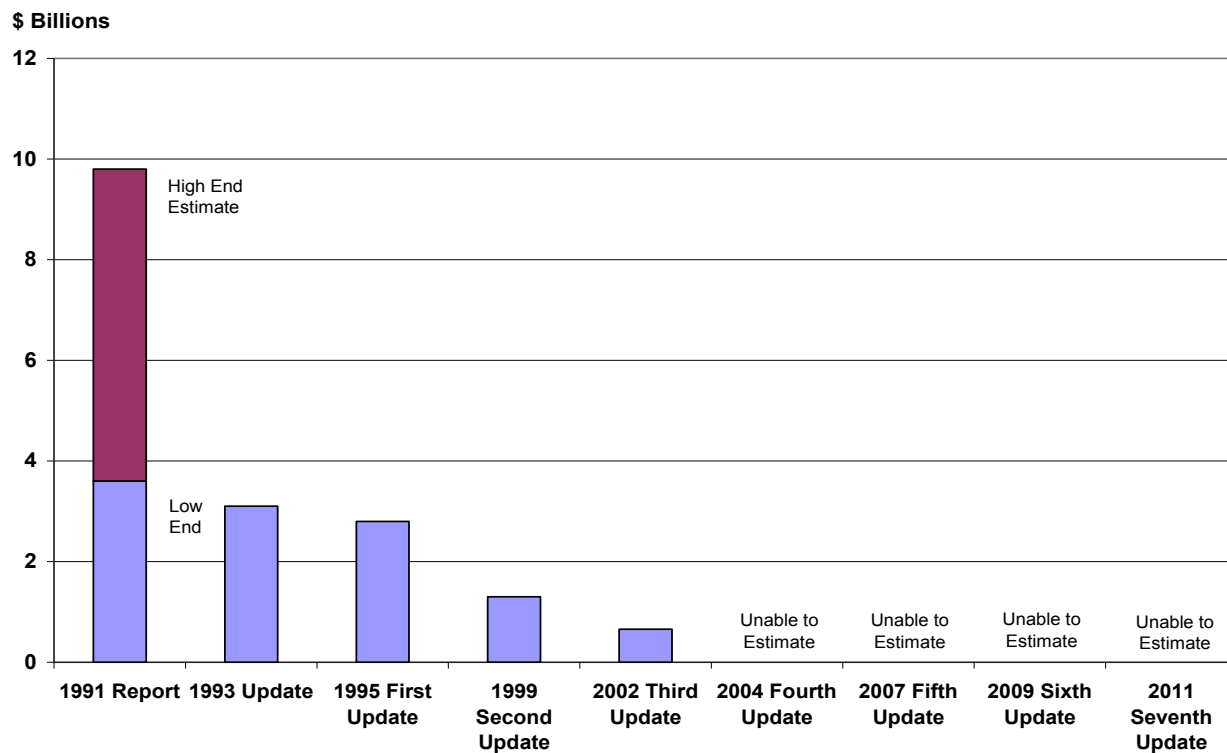
Searching for creditability, the authors add that "U.S. International Trade Commission Studies have found similar welfare benefits." In fact, the opposite is true: Beginning in the early 1990s, the ITC attempted to estimate the "cost" of the Jones Act. Between 1991 and 2002, the ITC issued five estimates; each subsequent cost estimate decreased under withering criticism of the ITC's methodology, such that its 2002 estimate was approximately one-twentieth of its original high-end estimate. In 1998, the U.S. General Accounting Office reviewed the ITC findings and found them to be incomplete, uncertain, and unverifiable.³ Responding to that

¹ Nicolas D. Loris, Bryan Rile & Brian Slattery, "Sink the Jones Act: Restoring America's Competitive Advantage in Maritime-Related Industries," The Heritage Foundation, No. 2886, May 22, 2014 [hereinafter "The Heritage Report"], available at http://thf_media.s3.amazonaws.com/2014/pdf/BG2886.pdf.

² Justin Lewis, "Veiled Waters: Examining the Jones Act's Consumer Welfare Effect," *22 Issues in Political Economy* 77-107 (2013).

³ Letter from Gerald Dillingham, associate director, Transportation Issues, U.S. Government Accountability Office to The Honorable John McCain, Chairman, U.S. Senate Committee on Commerce, Science and Transportation, March 6, 1998.

criticism, ITC determined that it was no longer able to estimate Jones Act costs, as the following historical chart of ITC estimates illustrates⁴:



It is disingenuous at best for the authors to rely on the ITC study in a vacuum without considering the material fact that the study has been completely repudiated and that even the ITC itself has disavowed it. The omission of material, highly relevant facts that are contrary to the authors’ conclusion is a pattern repeated throughout the Heritage Foundation’s report.

2) The authors argue the Jones Act “hinders” national security without factoring the critical fact that the Defense Department and U.S. Navy strongly support the Act for its military benefits.

One would expect that any review of the national security implications of the Jones Act would at least mention that the U.S. Navy is a strong, consistent supporter of the Jones Act, as is the U.S. Transportation Command (USTRANSCOM)—the U.S. Defense Department organization in charge of military logistics (including the Military Sealift Command, a component command of USTRANSCOM).⁵ And that every Commander-in-Chief in modern history has supported the Jones Act for its military benefits. And that many military officials and observers have highlighted the important nexus between a strong U.S.-flag maritime industry—

⁴ See a series of reports from the U.S. International Trade Commission titled, “The Economic Effects of Significant U.S. Import Restraints”. For example, see the Seventh Update, 2011 (publication 4253).

⁵ See, The Navy League of the United States, “2013-2014 Maritime Policy Statement,” available at http://navyleague.org/legislativeaffairs/maritime_policy.html; see also, Written Testimony of General William Fraser III, then commander, U.S. Transportation Command, before the House Coast Guard and Maritime Transportation Subcommittee, May 2013.

ships, seafarers, shipbuilding, and logistics network—and national security.⁶ But none of that finds its way into the authors’ analysis. The military’s strong support for the Jones Act is just one of many examples of how far the authors will go to avoid any facts that are inconvenient to their conclusions.

Instead, the authors simply present their own assertion that the Jones Act “hinders” national security. The authors focus virtually all of their attention on the U.S. international fleet—not the Jones Act fleet—and seem to completely miss the difference between the U.S. domestic fleet (i.e., the Jones Act fleet) and the U.S.-flag foreign fleet.

The authors spend little time on the two reasons cited by nearly every expert for the military benefits of the Jones Act—the national security advantages of a strong shipyard industrial base and a robust seafarer base.⁷ The importance of the seafarer base—highlighted in virtually every statement by military officials—is never even footnoted in the report. And the shipyard analysis is error-filled. In one instance, the authors points to an alleged small number of large vessels built or being built in U.S. shipyards.⁸ But there is no mention whatsoever of the domestic ship construction surge in the U.S. today that has virtually every major shipyard working overtime, such an industry renaissance that the authors could have discovered with a simple Google search.⁹

Later in their piece, the authors cite a recent government study about the impact of the Jones Act in Puerto Rico.¹⁰ However, the authors ignore the findings in that very same report about the Jones Act and national security. In that report, the U.S. Government Accountability Office (“GAO”)—a leading, unbiased source for analysis—says, “the original goal of the [Jones] Act remains important to military preparedness.”¹¹ The same report says, “The military strategy of the United States relies on the use of commercial U.S. flag ships and crews and the availability of a shipyard industrial base to support national defense needs.”¹² Finally, the GAO highlights, but the authors chose to ignore, the Defense Department’s own statement that without a Jones Act fleet, the military “would have to incur substantial additional costs to maintain and recapitalize a reserve fleet of its own.”¹³

⁶ See, e.g., Rep. Steve Scalise and Rep. Duncan Hunter, “Making Headway with America’s Maritime Industry,” *Washington Times*, March 25, 2014 (“Without 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.”), available at <http://www.washingtontimes.com/news/2014/mar/25/hunter-and-scalise-americas-maritime-industry-lead>.

⁷ See, e.g., Dr. Daniel Goure, *The Contributions of the Jones Act to U.S. Security*, The Lexington Institute, Oct. 2011 (“Without the Jones Act, the United States would face the danger of a rapid decline in its merchant marine fleet. It would then be required to provide massive subsidies to that industry, pay exorbitant prices for naval vessels and rely on foreign-owned or flagged vessels to carry critical military cargoes or to build and maintain at great expense a unique, government owned fleet of cargo vessels.”).

⁸ The Heritage Report, *supra* note 1, at 2.

⁹ See, e.g., Perry Chiaramonte, “Boom in Energy Production Sends US Shipyards into Overdrive,” Fox News, Sept. 20, 2013, available at <http://www.foxnews.com/us/2013/09/20/boom-in-natural-gas-production-sends-us-shipyards-into-overdrive/>.

¹⁰ U.S. Gov’t Accountability Office, “Puerto Rico: Characteristics of the Island’s Maritime Trade and Potential Effects of Modifying the Jones Act,” March 2013.

¹¹ *Id.* at 25.

¹² *Id.* at 5.

¹³ *Id.* at 28.

3) *The authors’ contention that the Jones Act prohibits leasing of foreign-built icebreakers is simply incorrect as a matter of law.*

On this issue, the authors simply and objectively got it wrong. It is one of several instances in the report where the authors misunderstand the underlying law that they are critiquing. The authors argue that repealing the Jones Act “would allow the Coast Guard and other government services to lease foreign-built icebreakers more easily, diminishing U.S. reliance on Russia.”¹⁴ In fact, the Jones Act is in no way an impediment to leasing foreign-built icebreakers, even if such a move would be considered wise public policy. Repeal of the Jones Act today would not change anything in this regard.

First, the Jones Act only applies to the transportation of merchandise between points in the United States.¹⁵ Providing icebreaking services to facilitate navigation does not involve transporting merchandise, regardless of whether the services are provided between points in the United States. Second, a different U.S. law regarding vessel escort operations within the navigable waters of the United States that commence or terminate at a port or place in the United States, which could include icebreaking to facilitate navigation, requires this work to be performed by U.S.-flag vessels that do not have to be U.S.-built.¹⁶ It is this law, and not the Jones Act, which the report applied to the 2011 situation described in Nome, Alaska.¹⁷ Furthermore, no such requirement even applies to vessel escort operations *outside* the navigable waters of the United States, such as Antarctica. Not to mention that the law requiring U.S. Coast Guard vessels to be constructed in the United States is completely separate from the Jones Act.¹⁸ The Jones Act does not impose requirements upon U.S. Coast Guard vessels. Finally, the U.S. government is not prohibited from leasing foreign vessels for icebreaking purposes that do not fall within the previously described activities, as it has already done for Antarctic icebreaking during the years when neither the *Polar Star* nor the *Polar Sea*, both Coast Guard heavy icebreakers, were available.

In short, the authors’ entire argument related to the Coast Guard and icebreakers is factually wrong and misstates applicable law.

4) *The authors don’t understand one of the most basic underlying issues critical for their analysis—the legal difference between the U.S. domestic fleet and the U.S. international fleet.*

Any analysis of the American maritime industry begins with a fundamental fact: domestic ships operating under the Jones Act must comply with a different set of laws and rules than U.S. ships involved in international trade. The authors do not appear to understand this

¹⁴ The Heritage Report, *supra* note 1, at 4.

¹⁵ *See*, 46 U.S.C. §§ 55102 *et seq.*

¹⁶ 46 U.S.C. § 55112. Because this particular law does not include a U.S.-built requirement, this represents a broader category of vessels than just the Jones Act fleet.

¹⁷ The Heritage Report, *supra* note 1, at 3.

¹⁸ *See*, 14 U.S.C. § 665.

most basic fact and repeatedly confusing the two fleets. For example, the authors offer this *non sequitur*:

In fact, by artificially inflating prices, protectionist measures such as the Jones Act may have given foreign competitors a competitive edge in international shipping.¹⁹

Of course, this statement makes little sense as the Jones Act has no bearing whatsoever on foreign and U.S. competitors in international shipping. The paper is filled with similar references to the U.S. *international fleet*, frequently conflating the international fleet and the Jones Act fleet.²⁰ At one point, the authors announce that the “Jones Act-eligible fleet” is made up of only 90 ships.²¹ In fact, there are *nearly 40,000 vessels* in the U.S.’s Jones Act-eligible fleet.²²

The authors’ inability to understand the most basic difference between the domestic fleet, regulated by the Jones Act and the international fleet distorts every conclusion reached in the report. Primarily, it undermines the authors’ conclusion that the Jones Act has “fostered stagnation” in the American maritime industry. In fact, the American domestic fleet includes 40,000 vessels that are highly productive in the mode of transportation that is by far the most environmentally friendly, cost-efficient, and safe. Far from stagnant, the American domestic fleet is the envy of the world.

5) The authors offer a proposal that is radical and would be unprecedented.

The authors appear to be arguing that the Jones Act should be repealed and foreign shipping companies with foreign crews should be allowed to operate in domestic commerce. The proposal is *radical*—there is currently no industry in U.S. domestic commerce where a foreign company can use foreign workers to provide services delivered exclusively in domestic commerce. The authors’ proposal is the equivalent of allowing a manufacturing facility to operate on U.S. soil with manpower provided by foreign workers and in accord with foreign laws. Most Americans would dismiss such a proposal out of hand, and even the greatest proponent of the free marketplace would find such a proposal objectionable. No American company could be expected to compete in the provision of domestic services against a foreign company set up on U.S. soil but paying its workers Third World wages and operating outside the constructs of U.S. law.

The authors do allow that foreign vessels operating in domestic service would have to live by some “sensible” regulations, whatever that means, including paying U.S. taxes. In its 1998 report, the GAO mentioned multiple categories of laws that could be applied to foreign ships operating in the U.S. domestic trades: taxes (e.g., corporate taxes, individual withholding

¹⁹ The Heritage Report, *supra* note 1, at 2.

²⁰ *Id.* at 1.

²¹ *See, e.g.*, The Heritage Report, *supra* note 1, at 2 (erroneously attributing the counts of the U.S. international fleet to the Jones Act fleet).

²² *See, e.g.*, Eric Haun, “Allegretti Addresses API Tanker Conference,” MarineLink, Aug. 26, 2014, (noting a 25% increase in Jones Act capacity from shipyard orderbooks alone from 2014 to 2017), *available at* <http://www.marinelink.com/news/allegretti-conference371899.aspx>.

taxes), labor laws (e.g., minimum wage laws, the right to collectively bargain under the National Labor Relations Act), and employee protection (merchant mariner benefits and protections), among others. Imposition of American immigration laws alone would present an enormous additional cost and challenge to foreign shipping companies, forcing them to revamp their entire crewing system. Notably, once these U.S. laws are applied to foreign vessel operators, the cost advantages that the authors seek begin to evaporate completely. At that point, the authors' proposal becomes the worst of all worlds—little or no cost savings but the loss of American jobs, national security, and homeland security. At that point, the authors' proposal becomes a “lose-lose” proposition where American jobs are outsourced for no good reason, a reality that the authors never address.

In conclusion, the authors set out on a free market mission and let no facts— no matter how relevant or contradictory—stand in their way. The errors, misstatements, and material omissions cited above from this report are nonexhaustive and destroy any attempts to foster a credible and educated public discussion on these matters.