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THE JONES ACT: ITS EFFECT ON THE U.S. RESPONSE TO THE 2010 BP DEEPWATER HORIZON OIL SPILL AND ITS RELEVANCE IN INTERNATIONAL LAW

I. INTRODUCTION

On April 20, 2010, the BP Deepwater Horizon oil rig burst into flames in the Gulf of Mexico.¹ Of the 126 people on board the platform, seven workers were critically injured and eleven went missing.² The rig leaked until September 19, 2010,³ spilling an estimated total of five million barrels of oil into the Gulf of Mexico,⁴ making it the largest accidental⁵ oil spill in history.⁶ Citizens along the Gulf Coast in Louisiana, Mississippi, Alabama, and Florida feared that the spill would threaten, if not destroy, their way of life.⁷

The U.S. federal government and President Obama received heavy criticism from politicians and the media for a seemingly slow response to the disaster.⁸ In particular, critics alleged that the United States, at least

1. Roman Antonio Vargas, *Seven Reported Critically Injured, 11 Missing in Oil Rig Explosion South of Venice*, NEW ORLEANS TIME PICAYUNE (Apr. 21, 2010), http://www.nola.com/news/index.ssf/2010/04/at_least_8_injured_in_oil_rig.html.

2. *Id.* The eleven missing oil rig workers were eventually determined to be dead. William M. Welch & Chris Joyner, *Memorial Service Honors 11 Dead Oil Rig Workers*, USA TODAY (May 25, 2010), http://www.usatoday.com/news/nation/2010-05-25-oil-spill-victims-memorial_N.htm. A memorial service was held for them in May 2010 in Jackson, Mississippi. *Id.*

3. Associated Press, *Blown-out BP Oil Well Finally Killed*, WWLTV.COM (Sept. 19, 2010), <http://www.wwltv.com/news/Blown-out-BP-oil-well-finally-killed--103237684.html>. Five months after the explosion, the U.S. Federal Bureau of Ocean Energy Management Regulation confirmed “[a] permanent cement plug sealed BP’s well nearly 2.5 miles below the sea floor in the Gulf of Mexico.” *Id.* The permanent plug replaced a temporary cap that had contained the gusher since mid-July. *Id.*

4. Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 3, 2010, at A14, available at <http://www.nytimes.com/2010/08/03/us/03spill.html>.

5. The label “accidental” is noteworthy because the oil spill off the shore of Kuwait in 1991, intentionally caused by Iraq during its invasion of Kuwait, is still considered the largest oil spill in history. See Oil Spill History, THE MARINER GROUP (Dec. 2004), <http://www.marinergroup.com/oil-spill-history.htm>.

6. Robertson & Krauss, *supra* note 4, at A14.

7. See Diana Courselle, *We (Used To?) Make a Good Gumbo—The BP DEEPWATER HORIZON Disaster and the Heightened Threats to the Unique Cultural Communities of the Louisiana Gulf Coast*, 24 TUL. ENVTL. L.J. 19 (2010) (providing an overview of how the BP Deepwater Horizon oil spill threatens the way of life for many Louisiana citizens). Courselle addresses the environmental and cultural losses and argues that the “same engineering ambition and prowess that helped control the mighty Mississippi, and enabled BP to drill thousands of feet below the ocean’s surface, must now be turned, and turned quickly, to preserving what remains of the wetlands and beginning to restore the vast losses.” *Id.* at 38–39.

8. *The President Does a Jones Act: Why Obama Turned Down Foreign Ships to Clean Up the Gulf*, WALL ST. J. (June 19, 2010), <http://online.wsj.com/article/SB1000142405274870432430457530>

initially, refused the aid of cleanup vessels from foreign nations, such as the Netherlands, Belgium, and Norway.⁹

A number of media sources and conservative Republicans began reporting that the § 27 of the Merchant Marine Act of 1920,¹⁰ known as the Jones Act, hampered the cleanup efforts.¹¹ The Act essentially protects the merchant marine industry by requiring that only American-owned and flagged ships, with primarily American crews, transport goods between American ports.¹² Politicians argued over the correct interpretation of the Jones Act and whether it legitimately affected the United States' ability and willingness to accept offers from foreign nations to help with the cleanup.¹³

The purpose of this Note is to examine how, if at all, the Jones Act affected the BP spill cleanup efforts, and whether the Act continues to serve a purpose. Part II of this Note provides an overview of the Jones Act. Part III of this Note examines whether the portion of the Jones Act at issue actually hindered the timely acceptance of aid from foreign vessels. Part IV compares the Jones Act with similar laws in countries that have experienced oil spills to evaluate the effect maritime cabotage laws¹⁴ have

6881766723718.html#articleTabs%3Darticle [hereinafter *The President Does a Jones Act*].

9. See, e.g., *id.* (noting that “Geert Visser, consul general for the Netherlands in Houston,” claimed the United States turned down offers of assistance from thirteen foreign governments).

10. 46 U.S.C. § 30104 (2006).

11. William Douglas, *GOP's False Talking Point: Jones Act Blocks Gulf Help*, MCCLATCHY NEWSPAPERS (June 30, 2010), <http://www.mcclatchydc.com/2010/06/30/96831/gops-false-talking-point-jones.html>. Douglas noted,

From former Alaska Gov. Sarah Palin to Arizona Sen. John McCain to junior members of the House of Representatives, conservative Republicans have accused President Barack Obama of failing to do all he can to help clean up the Gulf of Mexico oil spill because he hasn't waived a U.S. maritime law called the Jones Act.

Id.

Texas Senator Kay Bailey Hutchison, “also claimed that the Jones Act, which was temporarily lifted by President Bush after Hurricane Katrina, is now standing in the way of foreign vessels bringing assistance to the United States.” Joshua Goldman, *Oil Spill, Foreign Help and the Jones Act*, FACTCHECK.ORG (June 23, 2010), <http://factcheck.org/2010/06/oil-spill-foreign-help-and-the-jones-act/> (last updated July 1, 2010).

12. See *infra* notes 21–26 and accompanying text; see also Douglas, *supra* note 11.

13. See *supra* note 11. For an overview of the politicians and media personalities have blamed Obama for the spill, see Joe Klein, *Who's to Blame for the Gulf Oil Spill?*, TIME (May 27, 2010), <http://www.time.com/time/magazine/article/0,9171,1992399,00.html>; see also *supra* notes 9, 11; *infra* notes 99–102.

14. See BLACK'S LAW DICTIONARY 194 (Bryan A. Garner ed., 8th ed. 2004) (defining “cabotage” as the carrying on of trade along a country's coastline, a practice generally reserved for vessels flying the flag of that country). Cabotage comes “from the French word ‘caboter,’ which means to sail along the coast.” Tom Bell, *Maritime Law Tough to Navigate*, PORTLAND PRESS HERALD / MAINE SUNDAY TELEGRAM (Oct. 3, 2006), <http://business.mainetoday.com/news/061003/jonesact.html>.

had on oil spill cleanup efforts. Part V examines the portion of the Act allegedly affecting the clean up response to determine if those portions should be repealed, modified, or remain unchanged. From that analysis, this Note concludes that the Jones Act, which remains effective law, did not hinder the United States' ability to accept aid from foreign vessels in response to the BP Deepwater Horizon oil spill.

II. A BRIEF OVERVIEW OF THE JONES ACT

Maritime cabotage laws have been part of the U.S. legal landscape since the nation's founding.¹⁵ The Merchant Marine Act of 1920 is a U.S. federal statute that regulates maritime commerce in U.S. waters and among U.S. ports.¹⁶ The Act was "created to encourage development of American merchant marine for national defense and commercial purposes."¹⁷ However, agricultural groups generally oppose it, for they argue that it increases shipping costs, in turn weakening American farmers' ability to compete internationally.¹⁸ Others critiquing the Act question whether the Jones Act is even necessary when laws such as "the Immigration and Nationality Act, the Fair Labor Standards Act, and the

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

16. 46 U.S.C. § 30104 (2006) (formerly cited as 46 U.S.C. App. § 683). The Act primarily addresses personal injury to seaman. *Id.* The language referring to seamen's rights states:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

Id.

The overwhelming majority of cases involving the Jones Act deal with personal injury claims, not with cabotage laws. *Id.* In fact, an entire field of law is devoted to dealing with personal injury claims under the Act. See David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 34 TUL. MAR. L.J. 443, 518–25 (2010); see also Constantine G. Papavizas & Gerald A. Morrissey III, *Does the Jones Act Apply to Offshore Alternative Energy Projects?*, 34 TUL. MAR. L.J. 377, 380 (2010) ("Adding confusion, another section of the 1920 Act—section 33, which governs claims made by seamen for personal injuries suffered in the course of their employment—is also commonly referred to as the 'Jones Act.'").

17. *Admiral Allen Provides Guidance to Ensure Expedited Jones Act Waiver Processing Should It Be Needed*, RESTORETHEGULF.GOV (June 15, 2010), <http://www.restorethegulf.gov/release/2010/06/15/admiral-allen-provides-guidance-ensure-expedited-jones-act-waiver-processing-shou>.

18. See 112 Cong. Rec. E1593 (2003) (statement of Rep. Ed Case), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=E1593&dbname=2003_record; see also Papavizas & Gardner, *supra* note 15, at 96 (noting the controversy surrounding the Jones Act stemming from allegations that "the cost of domestic ocean shipping would be lower than it is with the Jones Act"); Kirsten Böhmman, *The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law—Policy; Consideration; Comparison*, 66 J. AIR L. & COM. 689, 734 (2001) (talking about the purpose of the Merchant Marine Act to make domestic ships more competitive).

Internal Revenue Code would apply . . . to anyone engaged in U.S. interstate commerce.”¹⁹ The Merchant Marine Act § 27 is commonly referred to as the Jones Act²⁰ and regulates maritime cabotage laws. The provisions under § 27 require 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.²¹ 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.²²

The Jones Act is the only provision in the U.S. code concerning cabotage containing the U.S.-build requirement.²³ This requirement does not exist in “other U.S. cabotage modes of transportation, such as aviation or rail.”²⁴ The condition requiring that ships are owned and operated by U.S. coastwise citizens is also exclusive to the Jones Act.²⁵ Despite the unique yet controversial provisions, the Jones Act has fundamentally stayed the same since 1920.²⁶

19. *Id.*

20. “The Jones Act gets its name from the principal sponsor of the Merchant Marine Act of 1920, Senator Wesley L. Jones from the State of Washington.” Papavizas & Morrissey, *supra* note 16, at 380. For a history of Maritime Law, including the Jones Act, see generally ANDREW GIBSON & ARTHUR DONOVAN, *THE ABANDONED OCEAN: A HISTORY OF UNITED STATES MARITIME POLICY* 119 (2000).

21. 46 U.S.C. § 55102 (2006) (formerly cited as 46 U.S.C. App. § 883). Although these requirements are not listed in this section of the statute, they fall within the requirements for coastwise endorsement. As Papavizas & Gardner explained, “§ 55120 restricts the U.S. coastwise trade to vessels with coastwise endorsements, which can only be issued to vessels built in the United States.” Papavizas & Gardner, *supra* note 15, at 122 n.198 (citing 46 U.S.C.A. § 12112 (West 2007)).

22. *Id.* at (b).

23. Papavizas & Gardner, *supra* note 15, at 122.

24. *Id.*

25. *Id.*

26. *Id.* at 107.

III. DID THE JONES ACT ACTUALLY HINDER THE RELIEF EFFORT?

A close examination of the plain language of the Jones Act and various media and government reports demonstrates that the statute did not cause a delay in the acceptance of aid from foreign vessels.

The plain language of the Jones Act suggests that it does not apply to foreign vessels assisting in the cleanup effort. First, the statute addresses vessels engaged in the “transportation of *merchandise*.”²⁷ To qualify as merchandise covered by the Jones Act, the owners of the product must be the U.S. government or a state or local government within the United States.²⁸ In this scenario, who owned the oil at the time of the spill is unclear, but the oil is arguably owned by BP since BP is the company that would profit from the sale of the oil after reaching a U.S. port.²⁹ There is no indication or existing court ruling that states oil waste, or unusable oil, recovered by a skimming vessel qualifies as merchandise under the Jones Act.³⁰ Rather, oil waste falls under the definition of other types of waste, such as sludge.³¹ In 1982, Congress amended the Jones Act to “include within its ambit, hazardous waste to be incinerated at sea.”³²

27. 46 U.S.C. § 55102(b) (2006) (emphasis added).

28. *Id.* The statute includes a definition of “merchandise.” It reads: “(a) DEFINITION.—In this section, the term ‘merchandise’ includes—(1) merchandise owned by the United States Government, a State, or a subdivision of a State; and (2) valueless material.” *Id.*

29. It is not clear who owns the oil. Indeed, some of the oil recovered from the spill can still be used by BP, suggesting that the oil is the property of BP. See Brian Palmer, *Oil and Water: What’s Going to Happen to All That Oil in the Gulf of Mexico?*, SLATE (Apr. 27, 2010), <http://www.slate.com/id/2252136/>. “Once it has been separated from the water, refineries can process it for use in cars, furnaces, and the manufacture of milk jugs.” *Id.* Oil waste, on the other hand, has been transported to waste management facilities. See *EPA Response to BP Spill in Gulf of Mexico: Waste Management on the Gulf Coastline*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/bpspill/waste.html> (last visited Feb. 10, 2011).

30. Sludge, by definition, is “valueless material.” *106 Mile Transport Assocs. v. Koch*, 656 F. Supp. 1474, 1481 (S.D.N.Y. 1987). The U.S. district court in *106 Mile Transport Assocs.* further held that “[a]ll concerned are anxious to see the last of it.” *Id.* Similarly, another U.S. district court held that “it would be difficult to label as ‘merchandise’ valueless polluted spoil material, which is being transported only for the purposes of disposal.” *Great Lakes Dredge & Dock Co. v. Ludwig*, 486 F. Supp. 1305, 1310 (W.D.N.Y. 1980).

31. “Not even a tortured reading of the word ‘merchandise’ indicates that Congress meant by the term to include sludge.” *106 Mile Transport Assocs.*, 656 F. Supp. at 1481. Oil has multiple definitions under the Merchant Marine Act of 1920. “Crude oil” is defined as “a liquid hydrocarbon mixture occurring naturally in the earth, whether or not treated to render it suitable for transportation, and includes crude oil from which certain distillate fractions may have been removed, and crude oil to which certain distillate fractions may have been added.” 46 U.S.C. § 2101(7). This definition is different from oil, which means “oil of any type or in any form, including petroleum, fuel oil, *sludge*, oil refuse, and oil mixed with wastes except dredged spoil.” 46 U.S.C. § 2101(20) (emphasis added). Here, the statutory definition includes “sludge,” furthering the notion that the oil recovered from the spill that is unusable does not qualify as merchandise under the statute. *Id.*

32. *106 Mile Transport Assocs.*, 656 F. Supp. at 1482. The U.S. district court also stated that the

Second, this portion of the Jones Act applies to vessels used for “purposes of engaging in the coastwise *trade*.”³³ While “coastwise trade” is defined in the statute,³⁴ “trade” itself is not. U.S. federal courts have generally defined it as trade “between points in the United States, including Districts, Territories, and possessions thereof embraced within coastwise laws.”³⁵ Thus, this definition of trade does not address whether skimming for oil and bringing it back to shore constitutes a form of trade.

Third, a portion of the Act directly addresses vessels responding to oil spills.³⁶ It states that “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.”³⁷

Simply, nothing in the plain language of the Jones Act implies that it prevented the United States from accepting aid from foreign vessels during the BP Deepwater Horizon oil spill.

In addition to the plain language of the Act permitting the use of foreign ships, the vast space over which the oil spill spread also means that the Jones Act did not apply to foreign vessels assisting in the cleanup. The

“fact that Congress thought it necessary to amend the statute to specifically include ‘hazardous waste’ indicates that Congress did not consider waste to be within the meaning of the term ‘merchandise.’”
Id.

33. 46 U.S.C. § 55102(b)(1) (2006) (emphasis added).

34. § 55102(b). Coastwise trade is defined as “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.” *Id.*

35. Böhmann, *supra* note 18, at 734 (quoting another source); see also *The Jones Act*, MARITIME LAW CENTER, http://www.maritimelawcenter.com/html/the_jones_act.html (last visited Feb. 16, 2011) (“The federal courts have given a very wide interpretation of the term. Essentially the term applies to a voyage that beginning at any point within the United States and delivering a type of commercial cargo to any other point within the United States.”).

36. See 46 U.S.C. § 55113 (2006) (formerly cited as 46 U.S.C. § 12101).

37. *Id.* The entire section reads:

Notwithstanding any other provision of law, 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, if—

(1) an adequate number and type of oil spill response vessels documented under the laws of the United States cannot be engaged to recover oil from an oil spill in or near those waters in a timely manner, as determined by the Federal On-Scene Coordinator for a discharge or threat of a discharge of oil; and

(2) the foreign country has by its laws accorded to vessels of the United States the same privileges accorded to vessels of the foreign country under this section.

Id. The definition of “adequate” is potentially troublesome here. While the federal government and BP might think an adequate number of ships are responding to the disaster, regional small business owners and those most impacted by the spill are not likely to share the government’s perspective.

initial blast on the Deepwater Horizon oil rig occurred approximately fifty miles from shore.³⁸ By May 25, 2010, BP estimated that a total of seven million gallons of oil had spilled into the Gulf.³⁹ Traditionally, U.S. sovereignty over coastal waters extends three nautical miles from the coast.⁴⁰ Much of the oil was not within the three mile limit controlled by the United States; rather, the oil had dispersed into the “high seas,” a term referring to waters not controlled by any single nation.⁴¹ On its face, the Jones Act does not apply to ships that are beyond U.S. waters. Consequently, the Act would not apply to ships that are cleaning up oil beyond three nautical miles from the U.S. shore.⁴²

In addition to presuming that the Jones Act was a barrier to foreign assistance, media and news sources have reported conflicting information as to whether foreign aid was used in the cleanup process.⁴³ Multiple blogs run by mainstream media sources such as Fox News and the Wall Street Journal reported that the United States did not accept foreign aid.⁴⁴ For example, the Wall Street Journal published a short blog article blaming the

38. Vargas, *supra* note 1.

39. *Gulf Oil Spill, by the Numbers: Spill Spreads to Mainland as Estimates of Oil Flow Rate Vary Drastically*, CBSNEWS.COM (May 25, 2010), <http://www.cbsnews.com/stories/2010/04/30/national/main6447428.shtml>.

40. Papavizas & Morrissey III, *supra* note 16, at 381 (citing Note from Secretary of State Jefferson to the British Minister on the Subject of the U.S. Territorial Sea (Nov. 8, 1793), *reprinted in* THE EXTENT OF THE MARGINAL SEA 636 (Henry G. Crocker ed., 1919); *United States v. California*, 332 U.S. 19, 33 n.16 (1947)).

41. *See, e.g.*, United Nations Convention on the High Seas art. 1–2, Apr. 29, 1958, 13 U.S.T. 2314, 450 U.N.T.S. 82 (“The term ‘high seas’ means all parts of the sea that are not included in the territorial sea or in the internal waters of a State The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty.”); *see also* Papavizas & Morrissey III, *supra* note 16, at 420.

42. “[A]ll the maritime cabotage laws apply without doubt to U.S. territorial or navigable waters, generally three nautical miles from the coast.” Papavizas & Morrissey III, *supra* note 16, at 378–79. The Jones Act does not include a jurisdictional element extending coverage beyond traditional sovereignty bounds, however, the limit of the Jones Act’s jurisdiction over ships responding to the oil spill is unrelated to off-shore drilling regulations. An entire body of law has developed over time regarding jurisdiction over offshore areas beyond three nautical miles. For example, the International Law of the Sea grants countries jurisdiction twelve miles offshore. United Nations Convention on the Law of the Sea pt. II, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397, 400. For a discussion of U.S. legislation regarding offshore oil activity see *Overview of U.S. Legislation and Regulations Affecting Offshore Natural Gas and Oil Activity*, ENERGY INFO. ADMIN., OFFICE OF OIL AND GAS 6 (Sept. 2005), http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2005/offshore/offshore.pdf.

43. Brian Wilson, *Jones Act Slowing Oil Spill Cleanup?*, FOXNEWS.COM (June 10, 2010), <http://liveshots.blogs.foxnews.com/2010/06/10/jones-act-slowing-oil-spill-cleanup/#ixzz11KxlUGKG> (noting that largely, the foreign technology used in the cleanup was “technology transferred to US vessels. Some of the best clean up *ships* owned by Belgian, Dutch and the Norwegian firms are NOT being used”) (emphasis added).

44. *See, e.g.*, *The President Does a Jones Act*, *supra* note 8; *see also* Wilson, *supra* note 43.

“protectionist” Jones Act for delays.⁴⁵ The article suggested that “clean-up crews have had to outfit American ships with skimming technology airlifted from the Netherlands” in order to “circumvent the Jones Act.”⁴⁶

The proposition that the Jones Act impeded the cleanup process has been widely refuted by government officials, independent researchers, and industry groups. According to a June 2010 statement released by the National Incident Command in charge of the cleanup efforts, there is no indication that the federal government refused any offers of assistance from foreign vessels.⁴⁷ Coast Guard Admiral Thad Allen, also in June 2010, addressed the Jones Act issue, stating that the Coast Guard has “not seen any need to waive the Jones Act as part of this historic response”⁴⁸ Nevertheless, Allen also addressed the prospect of granting waivers to foreign vessels in the event that waivers were deemed necessary: Allen and his team developed “specific guidance to ensure accelerated processing of requests for Jones Act waivers should they be received as a part of the BP oil spill response.”⁴⁹ The guidance directed waivers related to the BP oil spill response to go through the Federal On-Scene Coordinator, who would then immediately forward requests through the National Incident Commander for expedited clearance.⁵⁰ Despite the implementation of this system, Allen declared that he had not received any requests for Jones Act waivers from foreign countries as of June 15, 2010.⁵¹ By January 11, 2011, however, a review of the system showed that waivers and exemptions were granted when requested.⁵²

FactCheck.org, a non-profit research project run by the University of Pennsylvania’s Annenberg Public Policy Center, examined assertions that the Jones Act prevented foreign vessels from assisting in the Gulf of Mexico.⁵³ The group found that “the Jones Act has yet to be an issue in the

45. *The President Does a Jones Act*, *supra* note 8.

46. *Id.*

47. *Jones Act Fact Sheet*, NAT’L INCIDENT COMMAND, RESTORETHEGULF.GOV 1 (July 17, 2010), http://www.deepwaterhorizonresponse.com/posted/2931/MARAD_revised_Jones_Act_Fact_Sheet.670991.pdf (“In no case has the Federal On Scene Coordinator (FOSC) or Unified Area Command (UAC) declined to request assistance or accept offers of assistance of foreign vessels that meet an operational need because the Jones Act was implicated.”). *Id.*

48. *Admiral Allen Provides Guidance to Ensure Expedited Jones Act Waiver Processing Should It Be Needed*, *supra* note 17.

49. *Id.*

50. *Id.*

51. Douglas, *supra* note 11.

52. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 143 (Jan. 2011).

53. Goldman, *supra* note 11.

response efforts.”⁵⁴ The Center’s research also noted that none of the fifteen foreign-flagged ships working on the oil spill cleanup needed a waiver because the Jones Act did not apply to them.⁵⁵ Furthermore, industry groups have stated that they would have no objection to allowing foreign vessels to assist in the cleanup effort.⁵⁶ This position is notable because these groups generally favor the protection that the Jones Act provides to the maritime labor industry.⁵⁷

Finally and perhaps most importantly, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling⁵⁸ report on the BP oil spill found that the Jones Act did not affect the cleanup process.⁵⁹ The report “flatly rejects claims that the federal government was forced to turn away foreign offers of assistance because of the Jones Act.”⁶⁰ While the

54. *Id.*

55. *Id.* As of July 1, 2010, “25 countries and four international organizations have offered support in the form of skimming vessels, containment and fire boom, technical assistance and response solutions, among others. A chart provided by the State Department shows that as of June 23 offers from six foreign countries or entities had been accepted.” *Id.*

56. Joseph Bonney, *McCain Seeks Jones Act Repeal*, THE J. OF COM. (June 25, 2010), <http://www.joc.com/government-regulation/mccain-seeks-jones-act-repeal>. The Maritime Cabotage Task Force, “a lobbying group representing Jones Act carriers, shipyards and dredgers” stated that “if foreign-flag vessels are needed for cleanup within domestic waters, it would not oppose waivers to the Jones Act.” *Id.* Furthermore, “Michael Sacco, the president of the 80,000-member Seafarers International Union, called claims of organized-labor interference in the cleanup efforts ‘ridiculous.’” Douglas, *supra* note 11. Sacco added, in a statement on the union’s website, “It is offensive for anyone to suggest that American maritime labor would hinder cleanup operations in the Gulf, in any way, shape or form.” *Id.* “Speaking with one voice, U.S maritime labor and management have said that we wouldn’t try to stand in the way of using foreign-flag assistance if no qualified, viable American-flag tonnage was available.” *Id.*

57. Douglas, *supra* note 11. Despite these statements by maritime labor groups, “James Carafano, a foreign policy analyst for the Heritage Foundation, a conservative policy-research center, suggested on Fox News that labor unions are pressuring the Obama administration not to waive the act.” *Id.* Indeed, James Henry, chairman of the Maritime Cabotage Task Force, was delighted to learn that the federal government stated that the Jones Act did not hinder the relief effort. *Jones Act Didn’t Hinder Gulf Cleanup, National Oil Spill Commission Finds*, NEW ORLEANS TIMES PICAYUNE (Jan. 15, 2011), http://www.nola.com/politics/index.ssf/2011/01/report_jones_act_didnt_hinder.html. Henry said,

“This report confirms what Adm. Thad Allen and so many others have been saying all along: The Jones Act in no way, shape and form hindered the BP clean-up effort,” . . . “We are pleased the president’s commission has concluded the Jones Act did not obstruct efforts to clean up the worst oil spill in U.S. history.”

Id.

58. *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling*, *supra* note 52. This Commission, announced on May 22, 2010, by President Barack Obama, is “an independent, nonpartisan entity, directed to provide a thorough analysis and impartial judgment. The President charged the Commission to determine the causes of the disaster, and to improve the country’s ability to respond to spills, and to recommend reforms to make offshore energy production safer.” *Id.* at vi.

59. *Id.*

60. *Jones Act Didn’t Hinder Gulf Cleanup, National Oil Spill Commission Finds*, *supra* note 57.

report acknowledges that government leaders did refuse to purchase foreign oil cleanup vessels, such as a super-skimmer from Taiwan, decision-makers did so for “operational reasons” rather than because of restrictions set up by the Jones Act.⁶¹

Despite politicians’ contentions and media reports to the contrary, the Jones Act did not delay the United States’ response to the BP oil spill. Both the plain language of the statute and official government reports issued during and after the spill establish that the Jones Act did not impede the United States’ ability to accept assistance from foreign vessels to clean up the BP oil spill in the Gulf of Mexico.

IV. HOW DOES THE JONES ACT COMPARE TO MARITIME LAWS IN FOREIGN COUNTRIES THAT HAVE EXPERIENCED OIL SPILLS?

Many countries that have experienced oil spills in the past have laws similar to the Jones Act. India, Australia, Nigeria, and Indonesia are countries that either have markedly similar cabotage laws or are in the process of creating similar laws.⁶² Like the United States, India recently experienced an oil spill disaster. On August 7, 2010, two cargo ships collided off the coast of Mumbai,⁶³ spilling over 800 tons of oil into the Arabian Sea.⁶⁴ India’s maritime law strongly resembles that of the United States. Sections 407 and 408 of India’s Merchant Shipping Act of 1958 state that “no ship other than an Indian ship or a ship chartered by a citizen of India shall engage in the coasting trade of India except under a license granted by the Director-General.”⁶⁵ Nevertheless, the law does not appear

61. *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, *supra* note 57, at 142–43.

While decision-makers did decline to purchase some foreign equipment for operational reasons—for example, Dutch vessels that would have taken weeks to outfit and sail to the region, and a Taiwanese super-skimmer that was expensive and highly inefficient in the Gulf—they did not reject foreign ships because of Jones Act restrictions.

Id.

62. *See infra* notes 65, 69, 75, and 84.

63. *Battle to Contain India Oil Spill*, BBC NEWS (Aug. 9, 2010), available at <http://www.bbc.co.uk/news/world-south-asia-10912989>. An Indian ship, the MSC Chitra, collided with a Panamanian cargo ship, the MV Khalijia-III. *Id.* “The Chitra was carrying about 1,200 containers, which had nearly 270 tonnes of fuel, say officials. Up to 400 of the containers have fallen into the sea.” *Id.*

64. Megha Sood & Bhavika Jain, *City Ship Collision: Reports Find Port, Captain at Fault*, HINDUSTAN TIMES (Oct. 10, 2010), <http://www.hindustantimes.com/City-ship-collision-Reports-find-port-captain-at-fault/Article1-610703.aspx> (“The collision led to a massive oil spill, which authorities are still struggling to clean. Eight hundred tonnes of oil leaked from the Chitra and its cargo fell in to the sea, blocking the main navigation channel.”).

65. *Local Shipping Industry Fears Loss Of Cabotage Protection After SCI Selloff*, THE FIN. EXPRESS (May 19, 2003), <http://www.financialexpress.com/news/local-shipping-industry-fears-loss->

to have limited India's ability to accept aid from foreign vessels, as a team from Holland has been assisting with the cleanup.⁶⁶

Australia suffered an oil spill on July 11, 1995, when the Iron Baron shipwrecked on a reef off the southern coast of Australia.⁶⁷ The ship spilled more than 500 tons of fuel oil, causing a "major pollution scare" for the island state of Tasmania.⁶⁸ Like the waiver system in the United States, Australia employs an "operating permit" system, which allows foreign-flagged vessels to apply for a license to move domestic cargo.⁶⁹ In responding to the 1995 oil spill caused by the shipwreck, the Australia Maritime Safety Authority⁷⁰ utilized provisions from several maritime laws to effectively respond to the spill.⁷¹ These laws generally granted the federal government of Australia the authority to enter Tasmanian water, recover the wreckage of the ship, and begin the cleanup process.⁷²

Nigeria represents a compelling comparison, if only because "no place on earth has been as battered by oil."⁷³ The Niger Delta region "has endured the equivalent of the Exxon Valdez spill every year for 50 years by some estimates."⁷⁴ Nigerian courts are currently undertaking the

of-cabotage-protection-after-sci-selloff/83547/.

66. Shoaib Ahmed & Toral Varia, *Mumbai Oil Spill Plugged, But Threat Remains*, CNN-IBN (Aug. 10, 2010), <http://ibnlive.in.com/news/mumbai-oil-spill-now-an-environmental-disaster/128515-3.html>.

67. Oil Spill History, *supra* note 62. Australia also experienced a large oil spill in the Brisbane River in March 2003. *Id.*

68. *Id.* The spill caused environmental damage and "[t]housands of fairy penguins were fouled with oil." *Id.*

69. *Navigation Act 1912* (Cth) s 267K(1) (Austl.), available at <http://www.comlaw.gov.au/Details/C2012C00196>; *Use of International Marine Containers in Canada: SECTION I—Comparison of Cabotage Regulations, 1.5 Summary of Global Cabotage Reforms*, TRANSP. CAN. (Mar. 15, 2010), <http://www.tc.gc.ca/eng/policy/report-acg-containers-c1-1044.htm>.

70. *See generally About AMSA*, AUSTL. MAR. SAFETY AUTH., http://www.amsa.gov.au/about_amsa/ (last visited Jan. 15, 2011).

71. *See The Response to the Iron Baron Oil Spill*, AUSTL. MAR. SAFETY AUTH., http://www.amsa.gov.au/marine_environment_protection/National_Plan/Incident_and_Exercise_Reports/Iron_Baron_Spill/Part_A.asp (last visited Jan. 15, 2011) [hereinafter *The Response*]. These laws included the Protection of the Sea (Powers of Intervention) Act 1981, *The Marine Act 1976*, the Navigation Act 1912, and the Tasmanian Pollution of Waters by Oil and Noxious Substances Act 1987. *Id.*

72. *Pollution of Waters by Oil and Noxious Substances Act 1987* (Tas.) s 37 (Austl.), available at [http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=95%2B%2B1987%2BAT%40EN%2B20120313000000;histon=;prompt=;rec=;term=](http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=95%2B%2B1987%2BAT%40EN%2B20120313000000;histon=;prompt=;rec=;term=;); *see also The Response, supra* note 71 ("The exercise of powers of intervention by the Commonwealth [of Australia] met the requirements of this incident. Tasmania could not have exercised such powers without Commonwealth cooperation.") However, the "legal extension of Commonwealth powers to within the limits of a State is not clear. Some States have their own powers of intervention under marine legislation. These are normally exercised by a Minister for Transport." *Id.*

73. Adam Nossiter, *Half a World from the Gulf, a Spill Scourge 5 Decades Old*, N.Y. TIMES, June 16, 2010, at A1, available at <http://www.nytimes.com/2010/06/17/world/africa/17nigeria.html>.

74. *Id.*

process of developing maritime cabotage laws and appear to utilize an approach similar to the Jones Act.⁷⁵ In a recent case, *Noble Drilling Limited v. Nigerian Maritime Administration and Safety Agency (NIMASA)*,⁷⁶ the Federal High Court of Nigeria held that an oil rig is not listed as one of the vessels registered under the Cabotage Act.⁷⁷ The court determined that an oil rig is not involved in “the transportation of goods or passengers from one point in Nigeria to the other.”⁷⁸ Similarly, the United States Supreme Court has established that the Jones Act does not apply to private employees working on oil rigs.⁷⁹ Under U.S. case law, oil rig workers are not considered seamen because oil rigs are “man-made islands” and, therefore, not vessels.⁸⁰ The similar holdings by courts in Nigeria and the United States regarding the status of oil rig workers under cabotage laws and Nigeria’s current development of cabotage laws similar to those of the U.S. demonstrate the relevancy of U.S. cabotage laws.

Indonesia has also experienced several oil spills and virtually every spill has involved a foreign-flagged tanker.⁸¹ For example, in February 2001, an oil tanker registered in Honduras crashed near Indonesia’s Java Island. As a result of this crash, approximately forty percent of an

As many as 546 million gallons of oil spilled into the Niger Delta over the last five decades, or nearly 11 million gallons a year, a team of experts for the Nigerian government and international and local environmental groups concluded in a 2006 report. By comparison, the Exxon Valdez spill in 1989 dumped an estimated 10.8 million gallons of oil into the waters off Alaska.

Id. at A20. “Oil companies also contend that they clean up much of what is lost. A spokesman for Exxon Mobil in Lagos, Nigel A. Cookey-Gam, said that the company’s recent offshore spill leaked only about 8,400 gallons and that ‘this was effectively cleaned up.’” *Id.*

75. See Adedoyin Afun, *Nigerian Courts Continue to Develop the Law in Relation to Cabotage*, WORLD SERVS. GROUP (May 2010), <http://www.worldservicesgroup.com/publications.asp?action=article&artid=3260>.

76. *Noble Drilling (Nigeria) Ltd. v. Nigerian Mari. Admin. and Safety Agency (NIMASA)* [2008] FHC/L/CS/78/2008 (Nigeria).

77. Afun, *Nigerian Courts Continue to Develop the Law in Relation to Cabotage*, *supra* note 75. “Prior to this decision, NIMASA’s position was that the Cabotage regime applied to every commercial activity on, in or under Nigerian territorial waters and as a result, required all operators of all drilling rigs operating in Nigerian territorial waters to register with NIMASA.” *Id.*

78. *Id.*

79. See *Rodrigue v. Aetna Cas. and Surety Co.*, 395 U.S. 352, 366 (1969) (holding that maritime jurisdiction did not apply to the deaths of two workers occurring on artificial drilling islands); *see also*, e.g., *Lormand v. The Superior Oil Co.*, 845 F.2d 536, 540 (5th Cir. 1987) (holding that a welder was not a seaman covered by the Jones Act); *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067, 1076 (5th Cir. 1986) (same).

80. *Hufnagel v. Omega Service Indus., Inc.*, 182 F.3d 340, 346 n.1 (5th Cir. 1999) (“Such platforms are legally man-made islands, not vessels.”).

81. See *Oil Spill History*, *supra* note 62. Indonesia has also experienced oil spills in 1992, 1993, twice in 2000, and 2004. *Id.*

estimated 800 tons of oil leaked from the ship and reached the shore.⁸² Local vessels, the coast guard, and police authorities participated in the cleanup process.⁸³ Similar to the Jones Act, Indonesia law, specifically Maritime Law No. 17, “reserves coastal trades for Indonesian-flag vessels, provides operating subsidies for vessels used on selected inter-island routes, construction subsidies for vessels used for domestic trades, and requires that crews be Indonesian citizens.”⁸⁴

In some countries, however, cabotage laws have no effect oil spill cleanup responses from private entities. In January 1991, Kuwait experienced one of the biggest oil spills in history, as “[a]n estimated 240 million gallons of oil were spilled from terminals, tankers and oil wells during the final phase of the Iraqi invasion of Kuwait.”⁸⁵ Saudi Aramco, an oil company based in Saudi Arabia,⁸⁶ led the cleanup efforts.⁸⁷ While the response got off to a rocky start,⁸⁸ the spill resulted in relatively little long-term damage.⁸⁹ Although Kuwait passed a Maritime Law Act in May 1980,⁹⁰ which is the standard for the Gulf Cooperation Council (“GCC”) countries,⁹¹ the Act did not influence the cleanup response.⁹²

82. *Id.* The Honduras-registered ship, *Steadfast*, “partially sank in shallow waters, when it was battered by massive waves and winds off Tegal, some 250 km east of Jakarta.” *Id.*

83. *Id.*

84. Shipping Law (Act No. 17/2008) (Indon.), available at http://www.setneg.go.id/index.php?option=com_perundangan&id=1995&task=detail&catid=1&Itemid=42&tahun=2008; Vincent Bellamy, *The Implementation of Cabotage Principle in Indonesia*, SIMBOLON & PARTNERS (Aug. 22, 2010), <http://www.hg.org/article.asp?id=19607>. Maritime Law No. 17 was passed in 2008, so it was not in place during the cleanup for the 2001 oil spill. *Id.*

85. Oil Spill History, *supra* note 5.

86. See generally *Our Company*, SAUDI ARAMCO, <http://www.saudiaramco.com/en/home.html#our-company%257C%252Fen%252Fhome%252Ffour-company.baseajax.html> (last visited Mar. 17, 2012).

87. See A.S. Zaindin, *Saudi Aramco Oil Spill Contingency Plan*, Oil Spill Symposium in Tokyo 2 (Mar. 23–24, 1995), http://www.pcs.gr.jp/doc/esymposium/12169/95_a_s_zaindin_e.pdf.

88. Eric Schmitt, *WAR IN THE GULF: The Fouled Sea; The Gulf Oil Spill Cleanup Flounders in Bureaucracy*, N.Y. TIMES, Feb. 21, 1991, at A12, available at <http://www.nytimes.com/1991/02/21/world/war-gulf-fouled-sea-gulf-oil-spill-cleanup-flounders-bureaucracy.html?src=pm>. According to Saudi and Western officials, “[t]he cleanup of the Persian Gulf oil spill, the largest in history, has been severely hampered by poor coordination among Saudi agencies, an ill-equipped ministry leading the operation and a lack of money for equipment.” *Id.*

89. *Gulf Found to Recover from War’s Oil Spill*, N.Y. TIMES, Mar. 18, 1993, at A6, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE4DB1739F93BA25750C0A965958260>. “The vast amount of oil that Iraqi occupation forces in Kuwait dumped into the Persian Gulf during the 1991 war did little long-term damage, international researchers say.” *Id.*

90. Richard J. Price, *Maritime Litigation in the GCC States*, 4 ARAB L. QTRLY. 224, 225 (1989), available at <http://www.jstor.org/pss/3381322>.

91. *Id.* “[I]t cannot be denied that the Maritime Codes of Qatar, Oman, the UAE and Bahrain are substantially copied from that of Kuwait.” *Id.* GCC refers to Cooperation Council for the Arab States of the Persian Gulf, also known as the Gulf Cooperation Council. See *The Cooperation Council for the Arab States of the Gulf Secretariat General*, THE GULF COOPERATION COUNCIL art. 1 (Feb. 7, 2011),

Strong similarities exist among the cabotage laws of the United States and many foreign nations that have experienced oil spills. Because of these similarities, the fact that the laws did not encumber oil spill cleanup efforts in many foreign nations strengthens the notion that the Jones Act did not and would not actually hinder the BP Deepwater Horizon response efforts.

V. IS REPEAL OR MODIFICATION OF THE JONES ACT WARRANTED?

The Jones Act remains a relevant and effective law governing maritime cabotage. Other countries employing similar laws do not seem to have any difficulty accepting assistance from foreign-flagged ships in response to an oil spill.⁹³ A number of countries have recently implemented laws that resemble the Jones Act, suggesting that the Jones Act may have contributed to the international model for maritime cabotage laws.⁹⁴

From the standpoint of the original intent of the Maritime Marine Act, the Jones Act in § 27 is designed as a maritime law to directly address international trade. Scholars contend that maritime law was developed to “assist and regulate the practice of maritime commerce.”⁹⁵ Thus, 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

<http://www.gcc-sg.org/eng/indexfc7a.html?action=Sec-Show&ID=1>. The GCC consists of Kuwait, Qatar, Oman, United Arab Emirates, Bahrain and Saudi Arabia. *Id.*

92. The lack of influence of the Act on the oil spill response does not undermine its efficacy. Rather, the special circumstances in which the oil spill occurred—the first Gulf War—made it so the Kuwaiti government could not respond. *See* Zaindin, *supra* note 87, at 3–4. Furthermore, much of the oil was moving towards Saudi Arabian shores, giving Aramco, as the largest oil company in the world, impetus to address the spill. *See id.* at 2–3.

93. *See* discussion of foreign oil spills and related cabotage laws *supra* notes 62–92 and accompanying text.

94. Indonesia’s 2008 implementation of a similar law is particularly notable because its topography makes its maritime and shipping extremely vital to its economy. “Indonesia is heavily dependent on maritime transport for international as well as for domestic trade especially because of her archipelagic nature. In this vein, maritime shipping provides essential links between different parts of the country.” Bellamy, *supra* note 84. Indonesia is further adjusting its Maritime law in 2011:

After January 2011, foreign vessels which still operate in Indonesia can be imposed with both administrative and criminal sanctions. Article 284 of the Maritime Law No. 17 of 2008 stipulate that the breach of the cabotage principle may be imposed by fines in the maximum amount of Rp 600.000.000,00 (six hundred million rupiah) and imprisonment for the maximum of 5 (five) years.

Id.

95. Price, *supra* note 90, at 227. “However, the relationship between maritime trade and maritime law is not one that is just of historic interest. It is, or should be, a continuing, vital, organic relationship and inter-dependence that must not be allowed to become one-sided or disjointed.” *Id.*

encourage that trade.”⁹⁶ The similarity in international maritime customs and usages has resulted in a unity in maritime law and practice that is suitably common to most of the world’s maritime jurisdictions.⁹⁷ “Maritime law was made for international trade and not vice versa.”⁹⁸ The purpose of the Jones Act, therefore, is not to impede the use of foreign vessels to help with the oil spill, as that contradicts its purpose as a maritime law to collaborate with foreign countries.

Nevertheless, the BP oil spill represented a convenient political opportunity to criticize President Obama and his administration. In her criticisms of the Obama Administration’s cleanup efforts, former Republican vice presidential candidate Sarah Palin questioned whether the President’s relationship with BP influenced his response.⁹⁹ Criticism was not limited to members of the Republican Party, however, as Democrats also criticized his handling of the spill.¹⁰⁰ Democratic strategist Donna Brazile labeled Obama’s initial management of disaster as “not tough enough” on BP.¹⁰¹ James Carville, a Louisiana native and Democrat, engaged in perhaps the most stringent criticism of President Obama’s handling of the BP Oil Spill, calling it “political stupidity.”¹⁰²

96. *Id.*

97. *Id.*

98. *Id.*

99. Trish LaMonte, *Sarah Palin Criticizes Obama Administration’s Handling of Gulf Oil Spill*, SYRACUSE POST-STANDARD (May 24, 2010), http://www.syracuse.com/news/index.ssf/2010/05/sarah_palin_criticizes_obama_a.html. Noting that 2008 Republican Vice President Candidate Palin’s criticisms are purely political, LaMonte points out that Palin does not cite the Jones Act as one of the reasons for the slow response. *Id.* Rather, as quoted by LaMonte, Palin stated: “I don’t know why the question isn’t asked by the mainstream media and by others if there’s any connection with the contributions made to President Obama and his administration and the support by the oil companies to the administration.” *Id.*

100. See Glynnis MacNicol, *Is this the Week the BP Oil Spill Officially Turns Into Obama’s Katrina?*, MEDIAITE (May 25, 2010), <http://www.mediaite.com/online/is-this-the-week-the-bp-oil-spill-officially-turns-into-obamas-katrina/>.

101. Ben Geman, *Donna Brazile Calls Obama’s Oil Spill Response ‘Not Tough Enough,’* THE HILL (May 23, 2010), <http://thehill.com/blogs/e2-wire/677-e2-wire/99375-donna-brazile-calls-obamas-oil-spill-response-not-tough-enough>. Brazile went on to say that the Obama administration was “waiting for BP to say, ‘oh, we’ve got a new plan to stop the oil leak.’ They need to stop it, contain it, clean it up, and try to help us conserve our coastal wetlands.” *Id.* For a brief survey of other entities receiving blame for the oil spill response, see Christopher Beam, *The Buck Stops Over There: Whom Should We Blame for the Oil Spill in the Gulf? Take your pick*, SLATE (May 25, 2010), <http://www.slate.com/id/2254979/>. The list includes BP, Transocean, Ltd., Halliburton, Minerals Management Service (MMS), President George W. Bush, President Barack Obama, and Congress. *Id.*

102. Jake Tapper & Huma Khan, *‘Political Stupidity’: Democrat James Carville Slams Obama’s Response to BP Oil Spill*, ABCNEWS (May 26, 2010), <http://abcnews.go.com/GMA/Politics/bp-oil-spill-political-headache-obama-democrats-slam/story?id=10746519>.

The “political stupidity is unbelievable,” Democratic strategist James Carville said “The president doesn’t get down here in the middle of this. . . . I have no idea of why they didn’t seize this thing. I have no idea of why their attitude was so hands off here.”

Politicians on both sides also used this criticism of the government's handling of the oil spill to suggest repealing the Jones Act, a law long viewed by Democrats and Republicans as an obstruction to economic freedom.¹⁰³ In 2003, Ed Case, a Democratic Congressman from Hawaii, introduced a bill into the House of Representatives aiming to repeal the Jones Act, describing it as a “crippling drag on an already-challenged economy and the very quality of life in Hawaii.”¹⁰⁴ On June 25, 2010, Republican Senator John McCain of Arizona introduced a similar bill attempting to repeal the Jones Act in the wake of the BP oil spill.¹⁰⁵ Neither bill passed.¹⁰⁶

Arguably, the existence of the waiver means that repealing the Jones Act in response to a disaster such as an oil spill is unnecessary. A waiver had been granted as recently as 2005, when Department of Homeland Security Secretary Michael Chertoff suspended the Jones Act during the aftermath of Hurricane Katrina.¹⁰⁷ Chertoff deemed action necessary in the wake of Hurricane Katrina, for it caused widespread damage to infrastructure, limiting the accessibility of vital resources such as oil, gas,

Id. Carville then delivered a drastic message when he exclaimed, “We’re about to die down here.” *Id.*

103. Senator John McCain’s latest attempt is a pertinent example of how the Jones Act is a long-standing political issue:

“The best course of action is to permanently repeal the Jones Act in order to boost the economy, saving consumers hundreds of millions of dollars,” McCain said. “I hope my colleagues will join me in this effort to repeal this unnecessary, antiquated legislation in order to spur job creation and promote free trade.”

Douglas, *supra* note 11 (quoting McCain).

104. 112 Cong. Rec. E1593 (2003) (statement of Rep. Ed Case), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=E1593&dbname=2003_record. Congressman Case also referred to the Jones Act as an “anachronism.” *Id.* Conversely, the aforementioned recent implementation of similar laws in Nigeria and Indonesia suggest otherwise. See *supra* note 75, 84.

105. Open America’s Waters Act, S. 3525, 111th Cong. (2010), available at http://www.mccain.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=244846c7-d436-4704-87fb-ccff411ebae7. The bill seeks “[t]o repeal the Jones Act restrictions on coastwise trade and for other purposes.” See *id.* Specifically, McCain aims to amend 46 U.S.C. § 12112(a), 46 U.S.C. § 3703a(c)(1)(C), 46 U.S.C. § 12120, 46 U.S.C. § 12121(b), and 46 U.S.C. § 121. *Id.* The bill proposes repealing 46 U.S.C. § 12132. *Id.* On one hand, McCain said the Jones Act “is preventing non-U.S.-flag vessels from helping clean up the Gulf of Mexico oil spill.” Joseph Bonney, *McCain Seeks Jones Act Repeal*, THE J. OF COM. (June 25, 2010), <http://www.joc.com/government-regulation/mccain-seeks-jones-act-repeal>. Yet McCain goes on to argue that “the law restricts shipping and raises costs to consumers in Hawaii, Alaska, Puerto Rico and Guam. He cite[s] a 1999 U.S. International Trade Commission Study that suggested Jones Act repeal would cut shipping costs in those markets by 22 percent.” *Id.*

106. See S. 3525: *Open America’s Waters Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s111-3525> (last visited Mar. 17, 2012); H.R. 2845: *United States Noncontiguous Shipping Open Market Act of 2003*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h108-2845> (last visited Mar. 17, 2012).

107. Waiver of Compliance with Navigation and Inspection Laws, 70 Fed. Reg. 53236 (Sept. 1, 2005), available at <http://www.gpo.gov/fdsys/phg/FR-2005-09-07/pdf/05-17829.pdf>.

electricity and other refined products.¹⁰⁸ The Secretary of Homeland Security is vested with the authority and discretion to waive the coastwise laws “to such extent and in such manner and upon such terms as he may prescribe, either upon his own initiative or upon the written recommendation of the head of any other Government agency, whenever he deems that such action is necessary in the interest of national defense.”¹⁰⁹

In contrast to Hurricane Katrina, however, the BP oil spill did not effectively inflict damage to infrastructure or limit the availability of oil and gas.¹¹⁰ Instead, the spill caused massive economic¹¹¹ and environmental damage.¹¹² Although it is difficult to measure the

108. *Id.* Hurricane Katrina “significantly disrupted production of oil and gas in the Gulf of Mexico, has caused many Gulf Coast oil refineries to go out of service because of flooding, lack of electric power.” *Id.* These disruptions “caused large run-ups in the price of oil, gasoline and other refined products.” *Id.* The Department of Homeland Security “receiv[ed] reports of threatened or actual shortages of gasoline, jet fuel, and other refined products, and of the rationing of these fuels, both in the Southeast U.S. and in other locations throughout the country.” *Id.* Furthermore, numerous companies that produce and ship petroleum products submitted requests for waivers of the Jones Act. *Id.*

109. *Id.*

110. According to Coast Guard Commandant Admiral Thad Allen, “[t]he Gulf of Mexico spill has not significantly disrupted US oil and gas production or vital shipping lanes along the southern US coast.” *US Oil Production, Shipping Unaffected by Spill So Far*, AGENCE FRANCE-PRESSE (May 1, 2010), http://www.google.com/hostednews/afp/article/ALeqM5hew_8EkXXu79vuYRZ96WrFWDzQOw. Admiral Allen “stressed that production in the region, which accounts for a major proportion of US oil and gas, was not seriously affected.” *Id.*

111. A \$20 billion fund has been set up by BP to “settle legitimate claims against BP resulting from the Deepwater Horizon explosion.” Nancy Fowler Larson, *WUSTL Law Dean to Oversee \$20 Billion BP Gulf Fund*, WASH. UNIV. NEWSROOM (Aug. 9, 2010), <http://news.wustl.edu/news/Pages/21000.aspx>. Kenneth Feinberg is the government appointed administrator of the fund, and Kent Syverud, Dean of Washington University Law School, and John S. Martin, Jr., are the two trustees. *Id.* While Feinberg was appointed by the government, he has been under fire for being seen as affiliated with BP. John Schwartz, *BP Says Spill Settlement Terms Are Too Generous*, N.Y. TIMES (Feb. 17, 2011), <http://www.nytimes.com/2011/02/18/us/18bp.html>. “Lawyers for those suing BP have alleged that Mr. Feinberg, while claiming to be independent of BP, is actually working in the oil company’s interests.” *Id.* Judge Carl J. Barbier of a Federal District Court in New Orleans, who is overseeing the federal lawsuits, agreed in a recent opinion, writing that “Mr. Feinberg should not refer to himself as fully independent of BP, that he must make clear to potential litigants that he is ‘acting for and on behalf of BP in fulfilling its legal obligations.’” *Id.* The tourism and seafood industries were especially devastated. Alabama, the “hardest hit of all the Gulf Coast states,” received \$16 million from BP to “promote tourism events and travel along the Alabama Gulf Coast.” *See Governor Bentley Announces Projects Receiving BP Tourism Promotion Funds*, OFFICE OF THE GOVERNOR OF ALABAMA (Apr. 19, 2011), available at http://governor.alabama.gov/news/news_detail.aspx?ID=4969.

112. Goldman, *supra* note 11. “Through November 1, 2010, wildlife responders had collected 8,183 birds, 1,144 sea turtles, and 109 marine mammals affected by the spill—alive or dead, visibly oiled or not.” NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *supra* note 52, at 181. “Given the effects of hiding, scavenging, sinking, decomposition, and the sheer size of the search area, many more specimens were not intercepted.” *Id.* “Because the *Deepwater Horizon* spill was unprecedented in size, location, and duration, deepwater ecosystems were exposed

effectiveness of the Jones Act waiver during Hurricane Katrina, the waiver nevertheless serves as recent precedent of the availability and practicality of a Jones Act waiver when necessary.¹¹³ As of June 15, 2010, “any interested party” could apply for a Jones Act waiver.¹¹⁴

VI. CONCLUSION

The Jones Act on its face did not affect the United States’ ability to accept aid from foreign vessels in response to the BP Deepwater Horizon oil spill. Nevertheless, the fact remains that significant lag time existed between the spill on April 20, 2010¹¹⁵ and the June 15 statement from the Deepwater Horizon response team indicating that fifteen foreign-flagged ships were currently helping with the cleanup.¹¹⁶ The plain meaning of the statute and the reality that foreign vessels did partake in the cleanup demonstrate that the Jones Act was not the reason for the U.S. federal government’s seemingly tepid and slow response to the disaster.

to large volumes of oil for an extended period. It will take further investigation and more time to assess the impacts on these ecosystems.” *Id.* at 182.

113. Keith Hennessey, former senior White House economic advisor to President Bush, offers some insight to the positive effects of the Jones Act waiver during Hurricane Katrina. See Keith Hennessey, *How to Waive the Jones Act*, KEITHHENNESSEY.COM (June 18, 2010), <http://keithhennessey.com/2010/06/18/how-to-waive-the-jones-act/>. He notes that the “waiver allowed foreign-flagged short haul ships to transport these liquids between ports on the Gulf Coast.” *Id.* Hennessey stated that, because the pipelines normally serving all the southeastern states were without power, the government was concerned about a shortage in the fuel supply. Hennessey asserted, “The waiver did not increase the total amount of fuel within the U.S., but it provided flexibility for that fuel to move as rapidly and efficiently as possibly [sic] to where it was most needed.” *Id.* Hennessey also points out that a waiver was also granted in the wake of Hurricane Rita in 2005 for the same reasons. *Id.* Hennessey acknowledged that the “direct benefits” of the waiver after Hurricane Katrina were “small and diffuse.” The waivers enabled the shipment of 50,000 to 100,000 barrels per day to reach the southeastern states several days earlier than without the waivers. *Id.* In Hennessey’s opinion, “The fuel situation was so dire that every little bit helped. The direct benefits were small but still worth doing.” *Id.*

In contrast, the Maritime Cabotage Task Force question the value of the waiver at all. See Stephanie Mencimer, *The Right’s Faux Jones Act Outrage: Is Obama’s support for an arcane maritime law really preventing other countries from assisting in the Gulf?*, MOTHERJONES (June 18, 2010), <http://motherjones.com/politics/2010/06/jones-act-bp-spill>. “‘You cannot find a person in Bush’s administration who can explain why that was a good idea, or how it helped,’ says Mark Ruge, counsel to the Maritime Cabotage Task Force, a coalition of labor unions, shipbuilders and operators, and ‘pro-defense’ organizations.” *Id.* “Ruge says that the waiver may have enabled some foreign cruise ships to house displaced residents, but that didn’t require the sort of blanket waiver the GOP is now demanding from Obama.” *Id.*

114. *Admiral Allen Provides Guidance to Ensure Expedited Jones Act Waiver Processing Should It Be Needed*, *supra* note 17. “Any interested party” applies to a party “either inside or outside the U.S. government.” *Id.*

115. Vargas, *supra* note 1.

116. *Admiral Allen Provides Guidance to Ensure Expedited Jones Act Waiver Processing Should It Be Needed*, *supra* note 17.

Furthermore, many foreign nations that have experienced oil spills have enacted remarkably similar maritime cabotage laws and have not been hindered by those laws during spill-cleanup efforts. Much of the criticism of the Jones Act is either misplaced or patently incorrect.¹¹⁷ Perhaps widespread ignorance among politicians and media pundits regarding the actual purpose and scope of the Jones Act is the real culprit.¹¹⁸ If anything, the misplaced assignment of blame on the Jones Act for the slow response to the BP Deepwater Horizon can serve as a lesson for responses to future off-shore disasters.

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117. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *supra* note 52.

118. Maybe the oil industry will lead the way in developing a faster way to respond to future spills. "ExxonMobil, Chevron Corp., Conoco Phillips and Shell Oil said Tuesday they have agreed to pool \$1 billion to form a new company" that would respond to offshore oil spills at up to 10,000 feet underwater. Chris Kahn, *Big Oil Plans Rapid Response to Future Spills*, NOLA.COM (July 21, 2010), http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/07/big_oil_plans_rapid_response_t.html. The system would deploy equipment that could arrive at a spill within twenty-four hours and be fully operational within weeks. *Id.* This agreement represents a marked change of direction in oil cleanup technology. Less than a month earlier, the New York Times published an article lambasting the minor advances in oil spill cleanup technologies since Exxon Valdez. Henry Fountain, *Advances in Oil Spill Cleanup Lag Since Valdez*, N.Y. TIMES, June 24, 2010, at A23, <http://www.nytimes.com/2010/06/25/us/25clean.html>. The article blamed the delay on a "lack of money for research and laws and regulations that make it difficult to test new ideas and introduce improved equipment." *Id.*

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