CATO's Continued Attempt to Skin the Jones Act

Sal Mercogliano

December 5, 2018

On December 6, 2018, the CATO Institute is hosting a conference, entitled – "The Jones Act: Charting a new Course after a Century of Failure". This forum aims to discuss the future of the U.S. maritime industry, but the overarching supposition and basis for the entire endeavor is the abject failure of the Merchant Marine Act of 1920, commonly known as the Jones Act.

Specifically, the CATO Institute states, "For nearly 100 years the Jones Act has restricted the transportation of cargo between two points in the United States to ships that are U.S.-built, crewed, owned, and flagged. Meant to bolster the U.S. maritime industry and provide a ready supply of ships and mariners in times of conflict, the act has instead presided over a steady deterioration in the number of ships, sailors, to crew them, and shipyards to build them."

The conference will feature four sessions which aim to systematically take down the Jones Act, with focuses on its status, the economic impact of the act, its national security implications, and what actions to undertake in the realm of Jones Act Reform.

From the start, I would dispute the title and premise that the Jones Act has been a failure. The CATO Institute, in their numerous papers, and even a YouTube video, cite the main goal of the Jones Act was to ensure a domestic shipbuilding capacity in the United States and second, a ready supply of vessels in times of war and emergency. The CATO Institute alleges that in both these cases, the Jones Act has failed.

The issue of domestic shipbuilding relates directly to why the act was passed nearly a century ago. At the start of the First World War, the American merchant marine, which up until the American Civil War transported most American goods, represented only 8% of the world fleet, behind that of Germany at 11% and the United Kingdom, which held more than half of all oceanic tonnage. When the war was declared, German ships sought refuge and ships of the Allied nations were prioritized to support the total war effort of the Entente.

The United States was at the mercy of foreign shipping. The response was the Shipping Act of 1916 which aimed to create a merchant marine to meet the requirements of the commerce of the United States. To accomplish this, the United States established the U.S. Shipping Board to fill the void left from foreign merchant marines and the United States domestic fleet could not handle. When American shipping was directly challenged by German submarines, the Emergency Fleet Corporation was incorporated to oversee a massive shipbuilding program that resulted in the construction of over 2,000 ships.

At the end of the First World War, the US Shipping Board and Emergency Fleet Corporation were left with this large fleet and the aim to get these ships in the hands of private American companies, establish an American presence on key essential trade routes, and ensure that the domestic transportation of goods was not in the hands of foreign shipping that could be diverted. The result was the Merchant Marine Act of 1920, or more commonly referred to as the Jones Act for its author Republican Senator Wesley Jones of Washington. He was particularly interested in the cabotage provision between his home state and the Alaska territory. It manifested itself in Article 27 of the bill that only allowed American-owned, American-crewed, and American-built ships to operate in the coastal trade. Included in the act was a provision to allow injured seamen to make claims against their employers for negligence and poor working conditions, building on the Seaman's Act of 1915.

The current fleet of American merchant ships, over 1,000 gross tons, is 180 with 96 falling under the Jones Act. The 84 ships that are not Jones Act consist of 60 ships enrolled in the Maritime Security Program, or operating under contract to the Military Sealift Command, or filling a unique role in the commercial sector. In comparison, the largest flagged fleet in the world, that of Panama, consists of over 6,000 ships. The world total in 2016 was 41,674 commercial vessels. The CATO Institute would have you believe that this decline is a direct result of the Jones Act, but in truth, the history is much more complicated.

Without the Jones Act, the United States could have found itself in an identical same situation in World War Two. Instead, the Jones Act, reinforced by the Merchant Marine Act of 1936 ensured that not only was there a domestic shipbuilding industry, but it could be ramped up to support the building of over 5,000 merchant ships under the U.S. Maritime Commission and the Two-Ocean Navy. Without these ships, the goods manufactured by the Arsenal of Democracy would have been stuck in the United States and what merchant ships were available would have lacked the escorts to transport them across contested seas.

The issue at stake not adequately addressed by CATO is the rise of open registries and flags of conveniences during the post-World War Two era. Today, it is Panama, Liberia, and the Marshall Islands that dominate the registry nations; no longer do nation-states possess large merchant fleets, with the exception of China.

CATO contends that the Jones Act is a burden that American can no longer bear. Specifically, they cite the higher cost to build ships in America as opposed to overseas. The largest builders of commercial ships in the world today are the Republic of Korea, the People's Republic of China, and Japan; nine out of every ten ships afloat are built in East Asia. The question that needs to be raised is why? It is the exact reason that the CATO Institute rails about with the United States – government subsidies. The South Korean government announced the injection of over $700 million dollars into Hyundai Merchant Marine to stabilize the largest Korean shipping line. It was announced that the South Korean government would be infusing over $1 trillion into shipbuilding, in violation of the World Trade Organization.

The United States faces a decidedly uneven playing field when it comes to shipping, particularly when you compare it to nations that heavily subsidize those industries, or the standard of living is lower, making any cost in the United States appreciably higher.

Their second session aims to address the economic costs of the Jones Act and specifically, cabotage. A recent report, Impact of the U.S. Jones Act on Puerto Rico, found that retail prices

for goods in Puerto Rico are essentially the same as on the mainland. Another report indicates that cabotage laws currently exist in 91 nations. The CATO Institute argues that opening trade in Puerto Rico, Guam, Hawaii, Alaska, or even the mainland United States will result in substantially less cost due to the lower freight rates. This is a valid argument, but it does raise several key issues.

Currently, US ports are open to foreign-flag ships and most of trade in these ports comes from overseas. However, the domestic trade must be carried on Jones Act compliant ships – although numerous waivers are granted, particularly to cruise ships of foreign flagged, foreign built, and largely foreign crewed ships headquartered in the United States but incorporated overseas.

During the recent hurricanes, foreign aid was not excluded from Puerto Rico, but aid purchased in the United States had to be transported on American ships. The argument that insufficient ships were available has been disproven by American companies that service Puerto Rico and the real issue was the breakdown in land services on the island, from the port to the roads.

The next issue deals with National Security and this is the one that should be the most concerning. Can the United States live without a domestic merchant marine? If the nation wants to remain a global superpower with the ability to project forces, the answer is a resounding NO! While there is no denying the military capabilities of the United States, in any conflict, from the Korean War to recent operations in Afghanistan, it is American merchant ships that transport the needed supplies for those forces to fight.

In their video, the CATO Institute highlights the fact that during Operation Desert Shield/Desert Storm (1990-91), foreign flagged shipping carried 26.6% of US military equipment and supplies. They cite that only 12.7% were carried in US-flagged commercial ships. The remainder were transported in "U.S. government vessels." What they fail to mention is that those remaining 60.7 included American merchant ships under long-term and short-term charter to the government. Additionally, the ships owned by the government were all crewed and operated by commercial merchant mariners and shipping companies. The 1990-91 conflict highlighted a shortfall in American sealift capacity and by the time of the 2003 Iraq War, all the cargo shipped to that conflict went on ships crewed by American merchant mariners. Not to mention the fact that one out of every five vessels in the current Navy's battle force – specifically those providing underway replenishment and fleet support – are crewed by merchant mariners.

However, today there is a critical shortfall in the number of mariners, as cited by both the Maritime Administration, Mark Buzby, and the commander of the Navy's Military Sealift Command, Rear Admiral Dee Mewbourne. A series of articles by David Larter in the *Defense News* further highlights the crippling shortfalls in the current sealift fleet, with the aging of ships in the reserve fleet and the declining number of merchant mariners.

When CATO meets on December 6, there will be calls to repeal the Jones Act, remove the restrictions of cabotage and open American ports and waterways to foreign-flagged, foreign-crewed, and foreign-owned ships. Americans could see a reduction in their freight rates and the opening of new water routes between American ports. One can envision Panamian, Liberian, Marshall Islands, and even Chinese ships sailing up rivers, along the coast and upon our lakes. What is left of the U.S. merchant marine will disappear and the nation will find itself in a position worse than it did at the start of the First World War.

What happens when there is an incident involving a Chinese-crewed tug and barge on the Mississippi, or if someone is assaulted on a foreign cruise ship sailing between American ports? Can we expect the Chinese Navy to sail up the Mississippi as American gunboats did up the Yangtze to protect their interests (after all, the United States is not a signatory to the United Nations Convention on the Law of the Sea) or for Americans to be tried in foreign courts?

What happens when the United States needs to send military forces overseas as part of its foreign policy or in response to an attack, but commercial companies refuse to release their ships. Do we send America's most secret military hardware on ships that we have no control over? Ask the Canadian Army how that felt when half of their equipment was detained aboard MV *Katie*, a St. Vincent and the Grenadines-flagged vessel. The ship was arrested for a $100,000 fine and this meant that half of the material for the Canadian Army, valued at $150 million was hostage and unavailable to them. What if that happens to the United States?

Does the Jones Act need reform? Yes, what 98-year-old law does not need updating. Does it need to be repealed? Not if you want the United States to remain a legitimate maritime power! Reform and not repeal should be the mantra if the nation wants to remain the preeminent thalassocracy in the world today.