

MARITIME & ADMIRALTY PRACTICE

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# Jones Act and U.S. Flag 101

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# Agenda

- A Bit of History
- Current Requirements
- Current Issues
- Questions

“

You may vote for the foreign ship; I will vote for the American ship, and I have no fears of the verdict of the American people on such a proposition.  
Rep. Wesley L. Jones, June 16, 1902

”

# A Bit of History – In General

U.S. has preferred by law U.S. built/U.S. owned vessels since 1789

Preference converted to a reservation in the domestic trade in 1817

U.S. has gyrated over time on crew citizenship requirements

U.S. developed over time a complicated system of citizen qualification

U.S. has toyed with subsidies since the Civil War but did not go all in until the Merchant Marine Act, 1936

Starting in 1904, U.S. Government cargoes have been reserved at least in part to qualified U.S.-flag vessels

# A Bit of History – The “Jones Act”



- “Merchandise” coastwise reservation has evolved since 1817
  - Expanded geographically to Louisiana, Alaska, Puerto Rico, and Hawaii
  - Expanded functionally to dredging, towing, salvage, and passengers
  - Tightened to prevent evasions in 1866, 1893, 1898, and 1920
  - Restricted in 1898 to U.S.-flag (vs. U.S.-owned) vessels
  - Limited to specific defined “U.S. citizens” in World War I
  - “Provisos,” exceptions, and loophole plugs have been enacted over time since 1920

# Current Requirements – Overview

## Domestic – A National Registry

- Coastwise citizen owned
- U.S. citizen crew
- Closed market
- Vessel U.S. built
- Owner/crew pay U.S. federal income tax

## Foreign – A Quasi-Open Registry

- Registry/documentation citizen owned
- U.S. citizen crew
- Potential access to U.S. Government support programs
- Vessel built anywhere (except civilian cargo preference)
- Owner option to pay tonnage tax

# Current Requirements – Citizenship

- **Registry Citizen**

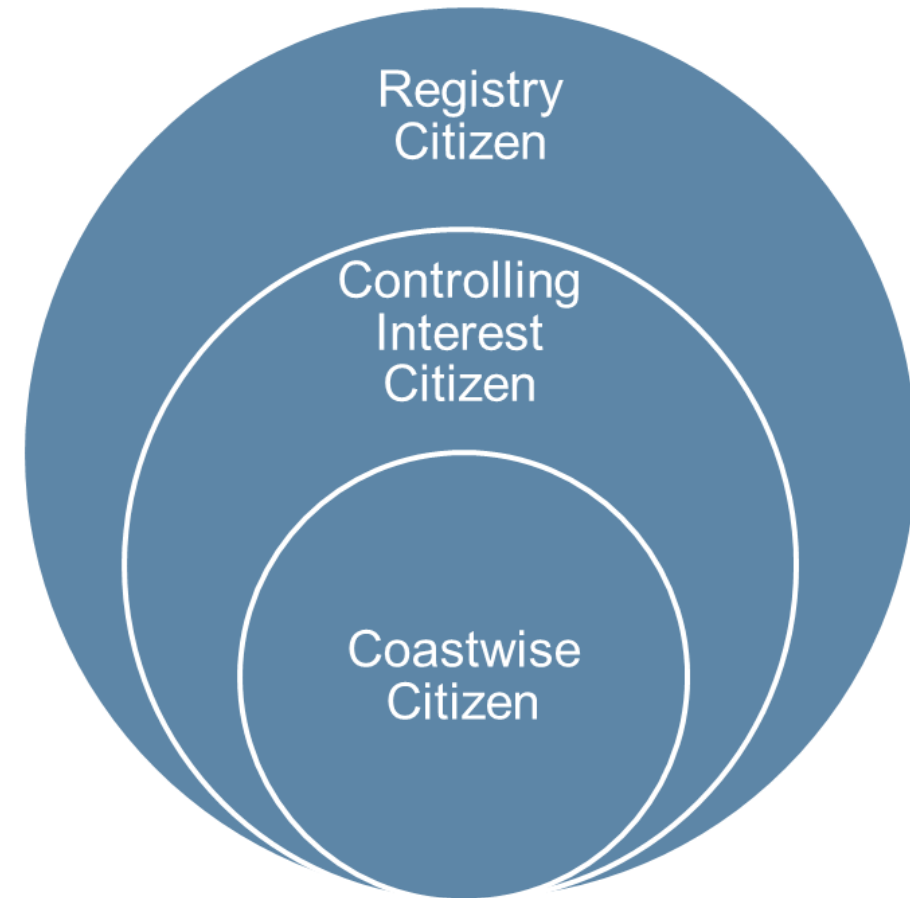
- Entity U.S. organized/mainly U.S. management
- Entity can be 100% owned by non-citizens
- Eligible to document a vessel

- **Controlling Interest Citizen**

- Registry citizen + 51% U.S. citizen beneficial ownership
- Eligible for certain government support programs

- **Coastwise Citizen**

- Registry citizen + 75% U.S. citizen beneficial ownership
- Eligible for “Jones Act” trades



# Current Requirements – Foreign Trade Support Programs

## Direct Payments

- Maritime Security Program – 60 vessels mainly container and ro/ro
- Cable Security Program – 2 cable layers
- Tanker Security Program – 10 product tank vessels not yet funded

## Cargo Support

- Cargo Preference Act of 1904 – 100% of DoD cargoes
- Cargo Preference Act of 1954 – 50% of civilian agency cargoes
- Public Resolution 17 – Ex-Im Bank financed cargoes

## DoD Charters

- Long term time charters -- Gitmo, Antarctic supply etc.
- Episodic time/voyage charters – product, vehicles

# Current Requirements – Financial Support

- **Title XI** – government financing of U.S. built vessels for foreign/non-contiguous U.S. trade
- **Capital Construction/Reserve Funds** – 401(K) for vessel owners
- **Tonnage Tax** – nominal tax payable by vessel owner in lieu of federal income tax



# Current Issues – Third Proviso

- CBP alleged in summer 2021 that movements of frozen fish from Alaska to lower 48 via Canada in part by foreign vessel did not fit within proviso
- \$350 million in fines assessed
- Suit commenced in Alaska federal court
- Court permitted operation to continue pending the litigation outcome
- Case fully briefed for a decision which could come any time
- Case has the potential to create a substantial Jones Act loophole

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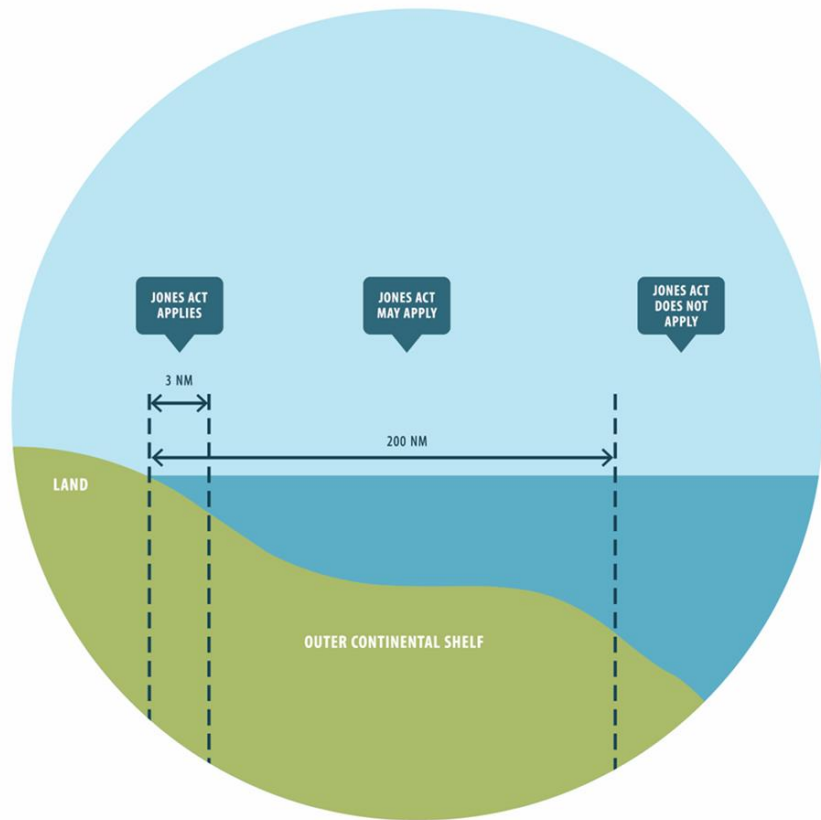
**Jones Act “does not apply to the transportation of merchandise between points in the continental United States, including Alaska, over through routes in part over Canadian rail lines and connecting water facilities if the routes are recognized by the Surface Transportation Board and rate tariffs for the routes have been filed with the Board.”**

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# Current Issues – Suit Against CBP

- Jones Act applies to “merchandise” and “transportation”
  - “Vessel equipment” excluded
  - Even very short movements covered
- CBP’s interpretation –
  - “Vessel equipment” includes items necessary for the vessel’s function, not just the vessel’s navigation/safety
- OMSA/SCA sued CBP in Nov. 2017
- Latest CBP guidance issued Dec. 2019
  - Exempted short move lifting operations
- Case has long been fully briefed on gov’t motion to dismiss
- Case has potential for significant oil/gas and offshore wind impacts

# Current Issues – Offshore Wind



- From 2005 to 2021, there was a jurisdictional issue whether Jones Act applied
- Resolved Jan. 1, 2021 with new statute
- The unresolved jurisdiction issue made CBP hesitate to issue rulings
- Only a handful have been issued since Jan. 1 for federal waters projects
- Numerous issues remain, for example –
  - WTIV vessel equipment
  - WTIV personnel
  - Certain cable operations
  - Cable burial

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THE LEGAL 500 US 2021 – TRANSPORT: SHIPPING –  
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# QUESTIONS?

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