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Stopping Drug Traffic on the High Seas: Jurisdiction over Stateless Vessels under 21 U.S.C. 955a

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DEVELOPMENTS

Stopping Drug Traffic On The High Seas: Jurisdiction Over Stateless Vessels Under 21 U.S.C. § 955a

I. INTRODUCTION

In an effort to curb drug traffic, the United States has demonstrated a growing judicial willingness to exercise jurisdiction over stateless vessels on the high seas. This article will focus on three issues raised by recent statutory interpretations of section 955a of the Marihuana on the High Seas Act[1] (hereinafter referred to as section 955a).

The first issue relates to the use of section 955a by courts to obtain jurisdiction over stateless vessels suspected of transporting illegal drugs. The second issue involves an analysis of general definitions of stateless vessels as applied to section 955a and how this has affected the exercise of jurisdiction. A third issue explores the consequences of denying Fourth Amendment rights to persons aboard stateless vessels on the high seas. The article concludes with a few observations by the writer concerning probable trends and solutions to the constitutional and jurisdictional problems raised by section 955a.

II. THE USE OF SECTION 955A AS A MEANS OF OBTAINING JURISDICTION

There are a number of principles by which jurisdiction over a vessel on the high seas can be obtained.[2] Those cases involving stateless vessels most often use the protective or objective territorial principles.[3] These

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1. Marihuana on the High Seas Act, 21 U.S.C. § 955a-d (Supp. V 1981). Section 955a of this Act embodies the enforcement provision; sections 955b-955d relate to definitions used throughout the Act, offenses and punishments, and the seizure and forfeiture of property, respectively.

2. These theories of jurisdiction are part of international customary law. For example, the "law of the flag" theory recognizes that a vessel on the high seas is subject to the jurisdiction of the state of the flag it flies. The universality principle recognizes that some crimes, such as piracy, are of such a universal character that any nation may participate in their suppression. For a thorough treatment of these and other bases of jurisdiction, see N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 891-44 (2d ed. 1980).

3. *See, e.g.*, United States v. Hayes, 653 F.2d 8 (1st Cir. 1981); United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968); Rivard v. United States, 375 F.2d 882 (5th Cir. 1967) (applying objective territoriality principle); *and* United States v. James-Robinson, 515 F.

principles require proof of a potential or actual effect in the nation asserting jurisdiction. A nexus, or connection with the country, must be demonstrated in order to maintain jurisdiction over the vessel.[4]

In stateless vessel cases, a nexus with the United States has been established by showing an intent to distribute narcotics in the United States. In the past, the prosecution's assertion of this intent was easily rebutted by the defense that the drugs were not headed for American shores.[5] In addition, the inadvertent repeal of a prior law had left prosecutors without a statutory basis for their argument.[6] Section 955a strengthens the prosecution's case by abrogating these traditional principles of jurisdiction and providing a long-awaited legal weapon against smuggling.[7]

The scope of the statute was intended by Congress to reach acts of possession, manufacture or distribution committed outside the territorial jurisdiction of the United States.[8] Furthermore, "[t]he intent element

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Supp. 1340 (S.D.Fla. 1981) (applying the protective principle). *See also* The S.S. Lotus, 1927 P.C.I.J., ser. A, No. 10 (Judgment of Sept. 7).

4. Note 3 *supra*.

5. H.R. REP. No. 323, 96th Cong., 1st Sess. 7 (1979) [hereinafter HOUSE REPORT]. *See also* United States v. Hayes, 653 F.2d 8 (1st. Cir. 1981).

6. HOUSE REPORT, *supra* note 4, at 4. The 1st Session of the 77th Congress passed a bill making it a crime to use narcotics on United States vessels on the high seas. The subsequent passage of the Comprehensive Drug Abuse Prevention and Control Act inadvertently repealed that bill; thus, what was a crime on United States territory was not a crime on a United States vessel on the high seas. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (pertinent sections codified in 21 U.S.C. §§ 801-966). *See also* 1980 U.S. CODE CONG. & AD. NEWS 1275.

7. *See* HOUSE REPORT, *supra* note 4, at 4, which states that:

> "[A]dequate material support and sufficient minimal sanctions are necessary to neutralize smugglers and provide a credible deterrent to smuggling through uniformly high conviction rates in the criminal justice system. There is presently no potent legal weapon in our anti-smuggling arsenal with which to combat drug offenses on the high seas."

See also Coast Guard Drug Law Enforcement: Hearings before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 16 (1979). At these hearings, Morris Bushby, counsel for the U.S. Department of State said that "[w]hile ordinarily the United States does not favor a unilateral extension of jurisdiction by the United States over activities of non-U.S. citizens on board stateless vessels without proof of some connection to the United States, the serious nature of this problem [dictates otherwise]."

8. 21 U.S.C. § 955a[h] (Supp. V 1981). At least one court has implied that the statute may exceed the bounds of international law by extending jurisdiction beyond territorial limits. In United States v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982), defendants' ship became disabled 60 miles off the coast of Virginia where they boarded an Italian vessel. The Coast Guard searched the disabled vessel and found a large quantity of marihuana. The defense argued proof of a nexus was required; otherwise, the exercise of jurisdiction via section 955a would violate international law. The court recognized the potential conflict between section 955a and international law. Instead of justifying its decision in light of international law as the court in United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982) had done, the court in *Howard-Arias* concluded that while international law is a part of United States law, it must give way when in conflict with a federal statute. *See also* The Pacquette Habana,

may be inferred by proof of a presence of a large quantity of the narcotic, giving rise to an inference of trafficking."[9] The statute passed as recommended, and section 955a now reads:

> It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.[10]

Subsequent interpretations of section 955a effectuated the intent of Congress. Courts upheld convictions absent proof of an intent to cause any effect in the United States.[11] At first, these interpretations were limited to United States registered vessels, [12] but *United States v. Marino-Garcia*[13] was a natural extension of this interpretation to stateless vessels.

In *Marino-Garcia*, the vessel FOUR ROSES was apprehended by the Coast Guard DEPENDABLE on the high seas, 300 miles south of Florida and 65 miles west of Cuba. When the DEPENDABLE approached the FOUR ROSES and requested identification, the Coast Guard was told that the ship's home port was Miami, Florida. The words "Miami, Florida" were also stenciled on the bow. A subsequent document check revealed that the vessel was not registered in the United States but in Honduras. All nine crewmen aboard the FOUR ROSES were foreign nationals. Upon discovery of 57,000 pounds of marihuana in the hold, the crew was indicted and subsequently convicted under section 955a.[14]

The *Marino-Garcia* court rebutted the defendants' assertion that section 955a required a showing of a nexus to the United States. Section 955a prohibits any person aboard "a vessel subject to the jurisdiction of the United States" from possessing a controlled substance with intent to distribute or manufacture. As the statutory definition of "vessel subject to the jurisdiction of the United States" includes stateless vessels,[15] the court concluded that "the statute does not require that there be a nexus

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175 U.S. 677 (1900), which held that international law is binding on the United States, *and* Zenith Radio Corp. v. Matsushita Electric Industrial Co., 494 F. Supp. 1161 (E.D. Pa. 1980) for the rule that United States law takes precedence over international law.

9. HOUSE REPORT, *supra* note 4, at 16.

10. 21 U.S.C. § 955a (Supp. V 1981).

11. The Fourth Circuit followed suit in United States v. Alonzo, 689 F.2d 1202 (4th Cir. 1982). *See also* United States v. Riker, 670 F.2d 987 (11th Cir. 1982); United States v. Liles, 670 F.2d 989 (11th Cir. 1982); United States v. Quesada-Rosadal, 685 F.2d 1281 (11th Cir. 1982); *and* United States v. Stuart-Caballero, 686 F.2d 890 (11th Cir. 1982).

12. United States v. Julio-Diaz, 678 F.2d 1031 (11th Cir. 1982).

13. United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982), *cert. denied* 103 S.Ct. 948 (1983).

14. *Id.* at 1377.

15. 21 U.S.C. § 955b(d) provides that a " 'vessel subject to the jurisdiction of the United States includes a vessel without nationality or a vessel assimilated to a vessel without a nationality, in accordance with paragraph (2) of article 6 of the [United Nations] Convention on the High Seas, 1958."

between stateless vessels and the U.S. but instead extends this country's jurisdiction to all such cases."[16] Thus, "[j]urisdiction exists solely as a consequence of the vessel's status as stateless."[17] By dispensing with the traditional requirement of proving a nexus, prosecution becomes easier not only for the United States, but for all nations. A vessel's stateless status "makes [it] subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those persons aboard to prosecution for violating the proscriptions."[18]

III. DEFINITIONS OF STATELESS VESSELS AS APPLIED TO SECTION 955A

Once the *Marino-Garcia* court held that a vessel becomes subject to the jurisdiction of the United States if it is stateless, the next issue then became how "stateless" was to be defined.

In America, stateless vessels have often been defined as "international pariahs [without] any recognized right to navigate freely on the high seas."[19] They are considered modern-day pirates—men and vessels without a country.[20]

The United Nations Convention on the High Seas[21] provides that "[a] ship which sails under the flags of two or more states, using them according to convenience . . . may be assimilated to a ship without nationality."[22] Furthermore, an English court has held that "[n]o question . . . of any breach of international law can arise if there is no state under whose flag the vessel sails."[23] Based on this decision and on the fact that commentators discussing the issue have unanimously agreed that all nations have the right to assert jurisdiction over stateless vessels on the high seas,[24] the *Marino-Garcia* court concluded that the exercise of jurisdiction did not transgress recognized principles of international law.[25]

The expanding jurisdictional base provided by section 955a and the generalized definition of "stateless vessel" are indications that the crime of transporting illegal drugs by ship is being treated as a *universal* crime because "any nation" can prosecute.[26] This "universal crime implication"

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16. United States v. Marino-Garcia, 679 F.2d 1373, 1379 (11th Cir. 1982).

17. *Id.* at 1383.

18. *Id.*

19. *See* United States v. Cortes, 588 F.2d 106 (5th Cir. 1979) *and* United States v. May-May, 470 F. Supp. 384 (S.D.Tex. 1979).

20. HOUSE REPORT, *supra* note 4, at 3.

21. United Nations Convention on the High Seas, art. 6, para. 2, *opened for signature* Apr. 29, 1958, *entered into force* Sept. 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

22. *Id.* at art. 6, para. 2. "Flags of convenience" is a term of art denoting the use of more than one flag as a means of evading the law of any given state.

23. Molvan v. Attorney-General for Palestine, 1948 A.C. 351

24. 679 F.2d at 1383. The court cites, inter alia, 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 21 (1968) and 1 L. OPPENHEIM, INTERNATIONAL LAW 546 (7th ed. 1948).

25. 679 F.2d at 1382.

26. *Id.* at 1383.

is also supported by the recent case of *United States v. Martinez*.[27] In that case, the vessel was stateless not because of proof that it was using flags according to convenience, but because it was not validly registered under Honduran law, as the defendants claimed.[28] The emphasis on invalid registration was justified under paragraph 2 of article 6 of the Convention on the High Seas.[29] However, this provision addresses only vessels that use flags of convenience, without mentioning registration. This extension of the "stateless" definition clearly aids prosecution, although its justification remains unclear.[30]

United States v. Knight[31] further supports the pro-prosecution stance adopted by the *Marino-Garcia* court. In *Knight*, the vessel KRIS was apprehended on the high seas in an exclusive Mexican fishing zone. The home port, "Brownsville, Texas", was stenciled on the stern, although the captain had claimed that the vessel and crew were Colombian.[32] When the defense introduced evidence that the ship was of Panamanian registry, the vessel was considered stateless because it had adopted various nationalities according to convenience. The court clearly required that the proof of a nexus, long a thorn in the side of the prosecution, was a burden to be borne by the defense. Thus, the defense had to show a "sufficient nexus between the KRIS and another country in order to preclude [United States] jurisdiction."[33]

Cases such as *Martinez* and *Knight* illustrate the judicial willingness to aid prosecution. In addition, the Eleventh Circuit has also indicated that stateless vessels may not be entitled to constitutional protection.

IV. THE CONSTITUTIONAL LIMITS ON SEARCHES AND SEIZURES OF STATELESS VESSELS ON THE HIGH SEAS

The United States constitutional provision most often invoked to dismiss high seas narcotics confiscation cases is the Fourth Amendment proscription against unreasonable search and seizures.[34] It requires that every search and seizure on land be based on probable cause.[35] The Ninth and Second Circuits have drawn a parallel between the search and seizure of vessels, concluding that in both instances an "articulate and reasonable

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27. 700 F.2d 1358 (11th Cir. 1983).

28. *Id.* at 1362. The defendants had produced an Honduran certificate upon boarding, which was later refuted by the Honduran government.

29. United Nations Convention on the High Seas, note 21 *supra*.

30. A recent law review article perceives this extension as implied under international law. *See* Case Comment, *United States v. Marino-Garcia*, 52 CIN. L. REV. 292 (1983). *See also United States v. Marino-Garcia: Criminal Jurisdiction Over Stateless Vessels on the High Seas*, 9 BROOKLYN J. INT'L L. 141 (1983).

31. 705 F.2d 432 (1983).

32. *Id.* at 433.

33. *Id.*

34. U.S. CONST. amend. IV.

35. Delaware v. Prouse, 440 U.S. 648 (1979). This case held that a valid search of an automobile required a "reasonable and articulable suspicion."

suspicion"[36] is required. The rationale is that the lesser expectation of privacy on board a ship justifies a lesser standard than probable cause. The Fifth Circuit rejected the applicability of landbased Fourth Amendment requirements, holding that because seizures on the high seas were fundamentally different from those on land due to limited enforcement personnel,[37] there was no need to show reasonable suspicion or probable cause.

The Eleventh Circuit adopted the Fifth Circuit's standard that the Coast Guard need not have a reasonable suspicion of an ongoing violation in order to implement a valid seizure.[38] Stateless vessels, as well as American vessels, are subject to this rule. The *Marino-Garcia* decision indicated in dicta that even if the Fourth Amendment applied, the seizure would still be valid because, under international law, the Coast Guard has the right to approach an unidentified vessel in order to ascertain the vessel's nationality.[39] This rule was extended by providing that the Coast Guard may subject the unidentified vessel to a seizure for the limited purpose of a document inspection. There must be a reasonable suspicion that the vessel is an American flagship or that the vessel is attempting to conceal its identity.[40] However, the potential for abuse is great, as random and subterfuge searches designed to seek evidence of a crime are covertly authorized under the guise of administrative searches.[41] In addition, the

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36. In United States v. Piner, 608 F.2d 358 (9th Cir. 1979), a divided panel concluded that a random inspection of an American vessel conducted at night without a reasonable suspicion of illegal activity transgressed the Fourth Amendment. *See also* United States v. Streifel, 665 F.2d 414 (2d Cir. 1981).

37. United States v. Shelnut, 625 F.2d 59 (5th Cir. 1980); United States v. Williams, 617 F.2d 1063 (5th Cir. 1980).

38. 679 F.2d at 1385.

39. The S.S. Lotus, 1927 P.C.I.J., ser. A., No. 10 (Judgment of Sept. 7); The Mariana Flora, 24 U.S. (11 Wheat) 1 (1826).

40. United States v. Williams, 617 F.2d 1063 (5th Cir. 1980); United States v. Rubies, 612 F.2d 397 (9th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). The Supreme Court has recently ruled that the search and seizure of a ship located in U.S. waters providing ready access to the open sea was valid even though there was no suspicion of wrongdoing at the time of boarding. United States v. Villamonte-Marquez *et al.*, ___U.S.___, 103 S.Ct. 2573 (1983). In *Villamonte-Marquez*, a ship was boarded by customs officers pursuant to 19 U.S.C. § 1581a, which authorizes them to board any vessel at any place for a document inspection. Marihuana was discovered in the hold, and the defendants were prosecuted under 21 U.S.C. § 963. The gist of the Supreme Court's holding (by Justice Rehnquist) was that, in boarding the vessel, customs officers need not suspect any wrongdoing by the crew because "the nature of the governmental interest in assuring compliance with documentation requirements, particularly in waters where the need to deter or apprehend smugglers is great, [and] the type of intrusion, while not minimal, is limited." 103 S.Ct. at 2582. The dissent argued, however, that "[t]oday's holding . . . r[a]n roughshod over the previously well-established principle that the police may not be issued a free commission to invade any private premises without a requirement of probable cause, reason, suspicion or some other limit on their discretion or abuse thereof." *Id.* at 2589.

41. *See* Nanda, *Enforcement of United States Laws at Sea—Selected Jurisdictional and Evidentiary Issues* in INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY, FOURTH SOKOL COLLOQUIUM (1981).

Marino-Garcia court's extension of the right to approach was allegedly authorized by article 22 of the Convention on the High Seas. In invoking this provision, however, the court misapplied it. Article 22 provides that:

> [a] warship which has encountered a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting . . . that, although flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.[42]

The United States Coast Guard is boarding vessels on the high seas because of a suspicion that they are stateless. The U.N. Convention requires that the suspicion must be based on the fact that the ship is of the same nationality as the state asserting jurisdiction; therefore, it does not provide a basis in international law for denying constitutional rights.

Domestic constitutional law provides no more justification for a denial of the constitutional rights of the crew of stateless vessels on the high seas than does international law. It is an accepted principle of United States law that the Fourth Amendment is not limited to domestic vessels or United States citizens. "[O]nce a foreign vessel is subjected to criminal prosecution, it is entitled to the equal protection of all laws; including the Fourth Amendment."[43] The Eleventh Circuit has interpreted this provision as encompassing foreign vessels but excluding stateless vessels, as follows:

> Without deciding the issue, we note that a number of considerations militate against the extension of the Amendment to stateless vessels. Stateless vessels have no right to travel freely on the high seas and are considered a threat to the order and stability of the oceans. Since the vessels have no rights under international law, we find it somewhat dubious to suggest that the Founding Fathers intended to provide these vessels with the prophylactic safeguards contained in the Fourth Amendment."[44]

Indeed, the court went further and indicated that even if the Fourth Amendment were applicable, a vessel's status as stateless might render *any* search and seizure reasonable.[45] The defect in this argument is that a vessel's status cannot be determined until boarding for a document inspection; yet, this prior boarding is sanctioned by a subsequent discovery.[46]

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42. United Nations Convention on the High Seas, *supra* note 21, at art. 22, para. 1(c).

43. United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1978).

44. 679 F.2d at 1384 n.21.

45. *Id.* at 1384.

46. A sounder approach was utilized in United States v. Barrio, 556 F. Supp. 395 (D.P.R. 1982). This case involved a stateless vessel boarded while on the high seas. The defendant crew members' motion to suppress evidence was denied as Fourth Amendment rights were "personal rights not to be vicariously asserted." This analysis was made in conformity with Alderman v. United States, 394 U.S. 165 (1969), which ruled that a person who is aggrieved by an illegal search and seizure as a result of a third person's premises or prop-

This circular reasoning should not be the basis for denying constitutional rights. The equal protection clause under the United States Constitution demands that foreign persons prosecuted under United States laws receive constitutional protection.[47]

V. CONCLUSION

In the wake of *Marino-Garcia* and its progeny, a clear trend can be identified which dramatically alters the prosecution of suspected drug smugglers on the high seas. The Eleventh Circuit has begun to treat drug smuggling as a universal crime by expanding the jurisdictional base of section 955a. It does so by including invalid registration within its definition of stateless vessel and also by placing the burden of showing a nexus upon the defense. Instead of focusing on the statelessness of the vessel, international dialogue would be encouraged by focusing on the vessel's activities vis-à-vis drug smuggling. This would preserve the constitutional rights afforded crews of stateless vessels under United States law, while allowing for effective prosecution of illegal drug traffic on the high seas.

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Directed-Energy Weapons On The "High Frontier"

I. INTRODUCTION

President Reagan recently announced the proposed development and deployment by the U.S. of a space-based ABM system utilizing directed-energy weapons (DEWs).[1] Although the proposal provoked a variety of intense reactions from the political and scientific communities in both the U.S. and U.S.S.R., it failed to arouse and sustain the public concern which might otherwise be forthcoming. The "Star Wars" quality of the plan perhaps renders it superfluous in the minds of most.

Although doubts exist as to whether the technology necessary to implement the President's proposal will ever be available, they do not warrant disregard of the impact which would be caused by the development

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erty has not suffered any loss of Fourth Amendment rights.

47. *See* NOWAK, ROTUNDA & YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 592 (1982). The Fourth Amendment is applied through the Fourteenth Amendment, which requires equal protection under the law for all persons. "Aliens are persons, so they receive the protection of . . . the Equal Protection Clause." *See also* United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1979).

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1. *Reagan Proposes New Weapons*, Denver Post, Mar. 24, 1983, at 1-A, col. 2.