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NOTE

***United States v. Maynard* and Enforcement of United States Drug Trafficking Laws on the High Seas: How Far Does United States Jurisdiction Really Reach?**

INTRODUCTION

The flow of illegal drugs from foreign countries into the United States has increased substantially. Seventy-five percent of the marijuana supply available in the United States is from foreign sources, primarily from Colombia and Mexico, and almost one-hundred percent of the cocaine supply is from foreign sources.¹ The United States through its drug trafficking laws has sought to combat the shipment of illegal drugs on the high seas.²

The high seas is one avenue for illicit drug trafficking.³ In 1986, in furtherance of United States policy to curb drug trafficking,⁴ Congress revised and recodified 21 U.S.C. section 955a,

¹ NATIONAL NARCOTICS INTELLIGENCE CONSUMERS COMMITTEE REPORT 1988, 5, 19-28 (1989) [hereinafter NNICC Report].

² See *infra* notes 35-72 and accompanying text.

³ The high seas include all waters beyond the territorial seas of the United States and beyond the territorial seas of any foreign nation. See *infra* note 21.

Marijuana is still transported via the high seas, even though there is evidence of changing marijuana trafficking patterns indicating that land transport through Latin American countries has become the more predominant route. This has been inferred by the decline in maritime marijuana seizures off the coast of the southeastern United States, the Bahamas and the Caribbean from 1986 to 1988. NNICC Report, *supra* note 1, at 14. The decline in seizures in these areas is not a direct indication of decrease in the use of the high seas as a trafficking route. Although there is evidence that drug traffickers now prefer to use smaller fishing and private vessels to hinder previously effective interdiction by avoiding detection that skews the statistics, the NNICC still contends that Colombian marijuana most commonly is transported by noncommercial vessels along the traditional trafficking routes. *Id.* at 14, 21, 46. Colombian cocaine trafficking to the United States is primarily on the high seas. *Id.* at 46.

⁴ In 1980 the Reagan Administration declared a "war on drugs." From 1982 to 1988,

the Marijuana on the High Seas Act.⁵ By this Act, Congress hoped to create a more substantial basis of subject matter jurisdiction over acts of drug trafficking committed aboard United States,⁶ stateless⁷ and foreign vessels⁸ on the high seas pursuant to 46 U.S.C. sections 1901 *et seq.*, the Maritime Drug Law Enforcement Act.⁹

Congress created this broader jurisdictional basis¹⁰ in order to apply United States criminal laws to persons trafficking drugs in international waters.¹¹ Yet, the United States was unable to establish a proper jurisdictional basis to subject three defendants in *United States v. Maynard*¹² to United States law. These defendants were British nationals sailing on a British registered vessel that was boarded by the United States Coast Guard on the high seas, approximately twenty miles south of Puerto Rico. The Coast Guard searched the vessel and found 660 kilograms of marijuana on board.¹³ The Coast Guard then seized the vessel after obtaining clearance from the United States Coast Guard Commandant in Washington, D.C. This clearance was based upon the Coast Guard's assessment that the vessel was stateless, and therefore the United States had jurisdiction over it. The defendants were convicted of marijuana possession with intent to

the annual federal budget to enforce marijuana laws rose from \$526 million to \$968 million. N.Y. Times, Aug. 23, 1989, at A17, col. 2.

⁵ 21 U.S.C. § 955a (1982). See *infra* notes 39-43.

⁶ 46 U.S.C. § 1903(b) (Supp. V 1987). According to section 1903(b) United States vessels include: a vessel documented under chapter 121 of Title 46; or a vessel numbered as provided in chapter 123 of Title 46 and a vessel owned in whole or part by the U.S., a citizen or national of the U.S., or a corporation created under the laws of the U.S. or any State. *Id.*

⁷ See *infra* notes 43, 68-72 and accompanying text.

⁸ A foreign vessel is a vessel owned by residents of a foreign nation or one sailing under a foreign flag. Article 5 of the Convention on the High Seas states that each nation "shall fix the conditions for the grant of its nationality to ships." Article 5 also requires the existence of a "genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control." Convention on the High Seas, April 29, 1958, art. 5, 13 U.S.T. 2312, 2315 T.I.A.S. No. 5200, 450 U.N.T.S. 82 (*entered into force* for the United States Sept. 30, 1962).

⁹ Maritime Drug Enforcement Act, 46 U.S.C. §§ 1901 *et seq.* (Supp. V 1987). See *infra* notes 44-72 and accompanying text.

¹⁰ See *infra* text accompanying notes 43-72.

¹¹ See *infra* note 21.

¹² 888 F.2d 918 (1st Cir. 1989).

¹³ See *infra* notes 76-77 and accompanying text.

distribute marijuana, in violation of section 1903(a), (c), and (f) of the Act.¹⁴ On appeal to the United States Court of Appeals for the First Circuit the defendants argued their vessel was not subject to United States jurisdiction when the Coast Guard boarded and searched. The First Circuit reversed the jury conviction, holding there was insufficient evidence to prove the United States had subject matter jurisdiction over the defendants.¹⁵

Subject matter jurisdiction over vessels on the high seas has been applied broadly by the judiciary, thus enabling the United States to board, search and seize vessels subject to United States jurisdiction anywhere in the world.¹⁶ The First Circuit in this decision interpreted the Maritime Drug Law Enforcement Act under its plain meaning to effectively narrow the far-reaching United States jurisdiction and restated the narrow circumstances when the United States lacks jurisdiction on the high seas.¹⁷

This note examines the application of United States jurisdiction when United States criminal laws are applied extraterritorially to foreign crew members aboard foreign registered vessels. Part I of the note examines the history of United States jurisdiction over vessels on navigable seas, including the present-day Maritime Drug Law Enforcement Act. Part II specifically examines the *United States v. Maynard* decision and the United States' jurisdiction over foreign flagged vessels on the high seas. Part III examines the weaknesses in the United States' jurisdictional analysis and alternative arguments that could have supported a finding of jurisdiction over the defend-

¹⁴ See *infra* notes 79-81, 83 for text of these sections.

¹⁵ See *infra* notes 88-102 and accompanying text.

¹⁶ See, e.g., *United States v. Robinson*, 843 F.2d 1, 2 (1st Cir.) , *cert. denied*, 109 S.Ct. 93 (1988)(Panamanian registered vessel boarded by the United States Coast Guard 500 nautical miles off United States coast); *United States v. Marsh*, 747 F.2d 7, 9 (1st Cir. 1984) (Danish registered vessel boarded by United States Coast Guard 270 miles off northeastern coast of United States); *United States v. Loalza-Vasquez*, 735 F.2d 153, 155 (5th Cir. 1984) (Panamanian registered vessel boarded 250 miles off the coast of United States in the Gulf of Mexico); *United States v. Greyshock*, 719 F. Supp. 927, 929 (D. Haw. 1989) (United States Coast Guard arrested crew 600 miles northeast of Oahu Hawaii); *United States v. Aikens*, 685 F. Supp 732, 735 (D. Haw. 1988) (vessel boarded by the Coast Guard 600 to 800 miles southeast of Hawaiian Islands).

¹⁷ See *infra* notes 88-102 and accompanying text.

ants in *United States v. Maynard*.

PART I: HISTORY OF UNITED STATES JURISDICTION

According to accepted principles of international law, the navigable sea is divided into three zones:¹⁸ the inland waters,¹⁹ the territorial waters²⁰ and the high seas.²¹ The United States claims a three nautical mile territorial sea zone.²² The area past this three nautical miles of territorial sea is considered the high seas, but generally it is accepted that a coastal nation may exercise limited control for customs purposes over a declared area that is designated "customs waters."²³ The United States exer-

¹⁸ *United States v. Louisiana*, 394 U.S. 11, 22 (1969), *reh'g denied*, 394 U.S. 994 (1969).

¹⁹ *Id.* at 22. Inland waters include internal waters such as rivers, lakes and canals. Nations have absolute sovereignty in inland waters, as if the waters were an extension of their land. Therefore, nations have authority to exclude foreign vessels altogether. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (*entered into force* for the United States Sept. 10, 1964) [hereinafter Convention on the Territorial Sea].

²⁰ Territorial waters is the area of the sea over which a nation claims and exercises substantial control. However "ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea." Convention on the Territorial Sea, *supra* note 19, at art. 14. Presently, the extent of nations' territorial waters varies because the international community was unable to agree upon uniform distances at the April 29, 1958 Geneva Conference. *Louisiana*, 394 U.S. 11, 22 n.24 (1969). A United Nations convention on the law of the sea was opened for signature on December 10, 1982. Third United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982)[hereinafter UNCLOS III]. If UNCLOS III is ratified eventually, this convention would establish a 12 nautical mile limit for the territorial sea. *Id.* at art. 3, 21 I.L.M. at 1272. In addition, it would permit a nation to exercise within 24 nautical miles of its coast the control necessary to enforce its laws within its territory and territorial sea. *Id.* at art. 33, 21 I.L.M. at 1276.

²¹ The high seas, also known as international waters, is the area beyond the territorial sea. Convention on the High Seas, *supra* note 8, art. 1, 13 U.S.T. at 2314; 21 U.S.C. § 955b(b) (1982); Comprehensive Drug Abuse Prevention and Control Act of 1970, 23 U.S.C. § 802 (Supp. V 1987). *United States v. Romero-Galue*, 757 F.2d 1147, 1149 n.1 (11th Cir. 1985); *United States v. Warren*, 578 F.2d 1058, 1064-65 n.4 (5th Cir. 1978), *cert. denied*, 446 U.S. 956 (1980); *United States v. Williams*, 617 F.2d 1063, 1073 n.6 (5th Cir. 1980). Article 2 of the Convention on the High Seas states, "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." Convention on the High Seas, *supra* note 8, art. 2, 13 U.S.T. at 2314.

²² 43 U.S.C. § 1301(a)(2) (1982). See *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923); see generally P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION*, 56-60, 75-112 (1927).

²³ Within the "customs waters" nations have limited jurisdiction to assure compliance with fiscal, customs and sanitation laws. Convention on the Territorial Sea, *supra*

cises limited control for customs purposes over waters that extend to twelve nautical miles from the coast.²⁴ For the purpose of criminal jurisdiction, the United States recognizes the area beyond the three mile territorial sea zone as the high seas.²⁵

The United States has exercised jurisdiction over activities

note 19, art. 24, 15 U.S.T. at 1612. This area is also referred to as the contiguous zone. Under the Convention on the Territorial Sea and the Contiguous Zone, the United States is granted limited jurisdiction over a contiguous zone (customs waters) outside the territorial sea but not exceeding twelve miles from the United States' coast. *Williams*, 617 F.2d at 1073.

²⁴ The Tariff Act of 1930 defines "customs waters" in an uncommon way:

The term 'customs waters' means, in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States.

Tariff Act of 1930, 19 U.S.C. § 1401(j) (1988).

The customs waters definition in 19 U.S.C. § 1401(j) also is defined in Anti-Smuggling Act of 1935, 19 U.S.C. § 1709(c) (1988). Customs waters can be extended beyond the normal limit of one hour's sailing time provided an arrangement exists between the United States and the foreign nation. *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987); *Romero-Galue*, 757 F.2d at 1153; *United States v. Gonzalez*, 776 F.2d 931, 935 (11th Cir. 1985). "The 'arrangement' necessary to create customs waters around a specific vessel may be informal, as long as there is a clear indication of consent by the foreign government." *United States v. Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987), *cert. denied*, 484 U.S. 1013 (1988) (*citing Gonzalez*, 776 F.2d at 933). Consent by a foreign nation can be a sufficient arrangement to create customs waters, even if that consent is obtained after a foreign vessel has been boarded and searched. *Alomia-Riascos*, 825 F.2d at 771. *United States v. Molinares Charris*, 822 F.2d 1213, 1216-17 (1st Cir. 1987) (validity of ad hoc arrangement assumed), *cert. denied*, 110 S.Ct. 233 (1989). *Robinson*, 843 F.2d 1, 2 (1988) (the court upheld conviction of foreign nationals under this construction of section 1401(j) under the former 21 U.S.C. section 955a(c)). *Peterson*, 812 F.2d at 492-93 (the court held that the consent of a foreign government brought the boarding of a ship within the customs waters of the United States under the former section 955a(c)). *See also United States v. Bent-Santana*, 774 F.2d 1545, 1549-50 (11th Cir. 1985); *United States v. Loalza-Vasquez*, 735 F.2d 153, 157 (5th Cir. 1984); *United States v. Vouloup*, 625 F. Supp. 1266, 1267-68 (D.P.R. 1985).

Under section 1903(c)(1)(D), if a vessel is considered within the customs waters of the United States, then the United States has jurisdiction under the same analysis of customs waters used in the former statute section 955a(c). *United States v. Biermann*, 678 F. Supp. 1437, 1443 (N.D. Cal. 1988) (the court held there was an arrangement with the United Kingdom enabling United States authorities to board, search and seize the vessel). *See infra* text accompanying notes 64-66, 111-13.

²⁵ *See supra* note 21. *United States v. Baker*, 609 F.2d 134, 136 (5th Cir.), *reh'g denied*, 613 F.2d 314 (5th Cir. 1980).

on the high seas by applying its laws extraterritorially.²⁶ Most courts have held that in order for the United States to exercise jurisdiction over a vessel on the high seas, whether the vessel is stateless or not, the jurisdictional basis must be founded on one of the five principles of jurisdiction²⁷ accepted under international law: (1) the territorial principle;²⁸ (2) the nationality prin-

²⁶ *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936 (1968); *United States v. Cadena*, 585 F.2d 1252, 1259 (5th Cir. 1978) (the court stated that because the United States has extraterritorial jurisdiction over offenses on the high seas, 14 U.S.C. § 89(a) authorizes the United States Coast Guard to stop and board vessels on the high seas to enforce these extraterritorial offenses); *Williams*, 617 F.2d 1063 (overruling *Cadena*). *United States v. Angola*, 514 F. Supp. 933, 936 (S.D. Fla. 1981) (the court held that 21 U.S.C. § 955a is a "legitimate and appropriate assertion of extra-territorial jurisdiction"); *Williams*, 617 F.2d at 1076-77 (the court held the United States has extraterritorial jurisdiction over offenses committed outside the United States that have an effect within its sovereign territory); *Loalza-Vasquez*, 735 F.2d at 156.

²⁷ There are conflicting numbers of principles of international jurisdiction ranging from four to six. Some legal scholars recognize these jurisdictional principles by different names. Five principles of jurisdiction were first discussed in Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) [hereinafter Harvard Research]. The Harvard Research designation incorporated the "law of the flag" principle as a corollary to the "territorial" principle. Most cases, treatises and commentators have adopted the Harvard Research designations. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1110 (1982); *United States v. Marino-Garcia*, 679 F.2d 1373, 1380-82 (11th Cir. 1982), cert. denied, 459 U.S. 1114 (1983); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 10-36 (1965) [hereinafter RESTATEMENT (SECOND)].

²⁸ Under the territorial principle, a State having a criminal law against proscribed acts has exclusive jurisdiction over such acts occurring within its territory regardless of the offender's nationality. Harvard Research, *supra* note 27, at 445, 480; RESTATEMENT (SECOND), *supra* note 27, at § 17; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 comment c (1989) [hereinafter RESTATEMENT (THIRD)]; *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804); *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812). The territorial principle has been accepted by all nations. *Pizzarusso*, 388 F.2d at 10; *Rivard v. United States*, 375 F.2d 882, 885-86 (5th Cir.), cert. denied, 389 U.S. 884 (1967); *United States v. Egan*, 501 F. Supp 1252, 1257 (S.D.N.Y. 1980).

The territorial principle incorporates a corollary, the "law of the flag" theory or the "floating territorial" principle, which gives a State exclusive jurisdiction over any offense committed by a vessel registered to that particular State. *Lauritzen v. Larsen*, 345 U.S. 571, 584-85 (1953); *United States v. Flores*, 289 U.S. 137, 155 (1933); *United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981); 9 DIGEST INT'L L. 22-23 (M. Whiteman ed. 1968) [hereinafter Whiteman]; Anderson, *Jurisdiction Over Stateless Vessels on the High Seas: an Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323, 338 (1982) [hereinafter Anderson]. To summarize, the territorial principle treats the vessel as a mobile part of that State. Such jurisdiction is necessary otherwise every time a vessel moved to different territories the law governing the conduct of that vessel would

ciple;²⁹ (3) the protective principle;³⁰ (4) the passive personality principle;³¹ and (5) the universality theory.³² The United States expressed its intention to adhere to these jurisdictional principles of international law in *The Paquete Habana*.³³ Under the

change, which would create chaos.

²⁹ The nationality principle recognizes the authority to confer subject matter jurisdiction upon a State for violations of that State's law regardless of where the violations occur, even when such violations are extraterritorial. Harvard Research, *supra* note 27, at 445; Whiteman, *supra* note 28, at 51; RESTATEMENT (SECOND), *supra* note 27, at § 34; RESTATEMENT (THIRD), *supra* note 28, at § 402; L. Oppenheim, 1 INTERNATIONAL LAW § 145, at 330 (H. Lauterpacht ed. 8th ed. 1955). See also Blackmer v. United States, 284 U.S. 421, 436-37 (1932); United States v. Perez-Herrera, 610 F.2d 289 (5th Cir.), *reh'g denied*, 613 F.2d 315 (5th Cir. 1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979); United States v. Layton, 509 F. Supp. 212, 216 (N.D. Cal. 1981), *appeal dismissed*, 645 F.2d 681 (9th Cir. 1981), *cert. denied*, 452 U.S. 972, (1981); Egan, 501 F. Supp. at 1258.

³⁰ The protective principle allows a State to exercise jurisdiction over acts committed outside the State threatening its security or operation of its governmental functions. Harvard Research, *supra* note 27, at 445, 543; RESTATEMENT (SECOND), *supra* note 27, at § 33; RESTATEMENT (THIRD), *supra* note 28, at § 402 comment f, 402(3); Pizzarusso, 388 F.2d at 10-11; Egan, 501 F. Supp. at 1257-58.

³¹ The passive personality principle confers jurisdiction upon a State when one of its nationals is a victim of an offense. Harvard Research, *supra* note 27, at 445; RESTATEMENT (SECOND), *supra* note 27, at § 38; RESTATEMENT (THIRD), *supra* note 28, at § 402 comment g; Rivard, 375 F.2d at 885; Layton, 509 F. Supp. at 216. This principle generally is not acknowledged by the United States. *Marino-Garcia*, 679 F.2d at 1381 n.15; RESTATEMENT (SECOND), *supra* note 27, at § 30(2).

³² The universality principle recognizes all States have subject matter jurisdiction in any forum having custody over any perpetrator of offenses universally recognized as heinous or harmful to mankind and condoned by all nations as violations of the Law of Nations. Presently, this principle applies to piracy and slave trading. Harvard Research, *supra* note 27, at 445, 563-564; RESTATEMENT (SECOND), *supra* note 27, at § 34; Convention on the High Seas, *supra* note 8, art. 13-19, 13 U.S.T. at 2316-17; United States v. Klintonck, 18 U.S. (5 Wheat.) 144, 152 (1820); United States v. Holmes, 18 U.S. (5 Wheat.) 412, 417 (1820). Narcotics trafficking has not achieved the universality status of piracy and slave trading. Yet some authorities argue the universality principle should apply. The RESTATEMENT (THIRD) section 522 comment d states "[t]here is a movement to extend these rules to illicit traffic in narcotic drugs." RESTATEMENT (THIRD), *supra* note 28, at § 522 comment d. An attempt by the international community to make drug trafficking a universally condemned crime was initiated in the 1961 Single Convention on Narcotic Drugs, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204 (entered into force Dec. 13, 1964, for the United States June 24, 1967) [hereinafter Single Convention] which recognizes that drug trafficking is a serious threat to mankind. The United States is a signatory of this Convention and also a signatory of the Protocol amending the 1961 Single Convention on Narcotic Drugs. Protocol amending the 1961 Single Convention on Narcotic Drugs, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3 (entered into force Aug. 8, 1975).

³³ 175 U.S. 677 (1900). The court held that United States seizure of a Spanish flagged fishing vessel captured off the coast of Cuba violated international law. *Id.* at 714.

protective principle,³⁴ the United States has applied its laws to obtain jurisdiction over many vessels on the high seas in its campaign to combat drug smuggling.

The United States Congress in 1970 enacted the Comprehensive Drug Abuse Prevention and Control Act,³⁵ which inadvertently contained a section repealing the criminal provision under which drug smugglers apprehended on the high seas were prosecuted, without creating a new provision to replace it.³⁶ From 1970 to 1980 the United States Coast Guard boarded and seized vessels on the high seas to no avail. Many drug traffickers were unable to be convicted of possession with intent to dis-

The court stated, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 714. Since *The Paquete Habana* decision, courts consistently have upheld intentions to follow principles of international law. *United States v. Alvarez-Mena*, 765 F.2d 1259, 1264 (5th Cir. 1985); *United States v. Conroy*, 589 F.2d 1258, 1267 (5th Cir. 1979), *cert. denied*, 444 U.S. 831 (1979); *United States v. Biermann*, 678 F. Supp. 1437, 1444 (N.D. Cal 1988); *United States v. James-Robinson*, 515 F. Supp. 1340, 1342 (S.D. Fla. 1981).

³⁴ The protective principle recognizes that a nation may assert jurisdiction over foreign vessels on the high seas that threaten its security or governmental functions. The nation need not demonstrate an actual effect on the nation itself. *U.S. v. Robinson*, 843 F.2d 1, 3 (1st Cir. 1988) (*citing Pizzarusso*, 388 F.2d at 10-11 which held drug trafficking may be prevented under the protective principle); *United States v. Peterson*, 812 F.2d 486, 493-94 (9th Cir. 1987) (the protective principle applies); *Biermann*, 678 F. Supp. at 1444 (the court held the protective principle supports the extraterritorial reach of section 1903). *See also United States v. Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987); *United States v. Romero-Galue*, 757 F.2d 1147, 1154 n.20 (11th Cir. 1985) (*citing Rivard*, 375 F.2d at 885); *James-Robinson*, 515 F. Supp. at 1344. *Loalza-Vasquez*, 735 F.2d at 156 (court rejected appellants' argument that the protective principle should not apply). Commentators have argued the universality principle should apply to support the extraterritorial reach of section 1903. *See supra* note 32.

³⁵ Comprehensive Drug Abuse Prevention and Control Act, *supra* note 21.

³⁶ 21 U.S.C. section 184(a) (repealed October 26, 1970), prohibited the use of narcotics on board United States vessels on the high seas. The Comprehensive Drug Abuse Prevention and Control Act did not include a similar provision and only allowed for prohibition against possession of narcotics in the territorial United States, in turn legalizing possession on the high seas. *Id.*; *United States v. Winter*, 509 F.2d 975 (5th Cir.) (landmark case that brought to light the loophole left by the repeal of section 184(a)), *cert. denied*, 423 U.S. 825 (1975). S. REP. No. 855, 96th Cong., 2d Sess. 1-2, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2785 [hereinafter *Senate Report*] (discusses the difficulty to prosecute drug traffickers before the enactment of 21 U.S.C. section 955a). *See United States v. Howard-Arias*, 679 F.2d 363, 369 n.6 (4th Cir. 1982) (court held the legislation was enacted to reach drug traffickers outside the territorial limits of United States and to fill statutory void from "inadvertent" repeal by the Comprehensive Drug Abuse Prevention and Control Act), *cert. denied*, 459 U.S. 874 (1982).

tribute because of the loophole left by the Comprehensive Drug Abuse Prevention and Control Act.³⁷ The only way to convict persons apprehended on the high seas was on a charge of conspiracy because although the Comprehensive Drug Abuse Prevention and Control Act prohibited possession of narcotics within United States waters, it did not forbid possession on the high seas unless there was evidence of conspiracy or attempt to import or distribute the narcotics into the United States.³⁸ Thus, the legislative loophole in the Comprehensive Drug Abuse Prevention and Control Act, rather than a lack of jurisdiction to prosecute, prevented the government from securing convictions.³⁹

In 1980, Congress enacted the Marijuana on the High Seas Act, 21 U.S.C. section 955a, as a response to substantial deficien-

³⁷ *Howard-Arias*, 679 F.2d at 369-70; *United States v. Hayes*, 653 F.2d 8, 16 (1st Cir. 1981).

See generally *United States v. Hensel*, 699 F.2d 18, 26-30 (1st Cir. 1983) (the court discusses the United States Coast Guard's statutory authority to search foreign ships in international waters under 14 U.S.C. section 89(a) as well as under international legal principles).

³⁸ 21 U.S.C. § 846 (1982). This statute provided for criminal penalties for attempts or conspiracy to violate 21 U.S.C. § 841(a)(1) (1982). Section 846 provided: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (1982). Section 846 was amended November 18, 1988 but the effect of the statute is still the same. 21 U.S.C. § 846 (1988). Section 963 prohibits attempts or conspiracies to violate, *inter alia*, sections 952(a) and 959, to import controlled substances and to manufacture or distribute controlled substances with the intent or knowledge that the drugs will be imported unlawfully. 21 U.S.C. § 963 (1988). Sections 841, 846, 952, 959 and 963 are the penal provisions that the United States adopted to effectuate its treaty obligations under the 1961 Single Convention on Narcotic Drugs. Under Article 4 of the Single Convention on Narcotic Drugs the "[p]arties shall take such legislative and administrative measures as may be necessary: (a) To give effect and carry out the provisions of this Convention within their own territories; (b) To cooperate with other states in the execution of the provisions of this Convention." Single Convention, *supra* note 32, at art. 4, 18 U.S.T. at 1413. *See United States v. Marsh*, 747 F.2d 7 (1st Cir. 1984).

³⁹ H.R. REP. NO. 323, 96th Cong., 1st Sess. 4-5 (1979) [hereinafter House Report]; Senate Report, *supra* note 36, at 2785-86; *see also Cadena*, 585 F.2d 1252 (5th Cir. 1978).

For further discussions on the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see Anderson*, *supra* note 28, at 324-26; Lewis, *The Marijuana on the High Seas Act: Extending U.S. Jurisdiction Beyond International Limits*, 8 YALE J. WORLD PUB. ORD. 369-72 (1982); Note, *High Seas Narcotics Smuggling and Section 955a of Title 21: Overextension of the Protective Principle of International Jurisdiction*, 50 FORDHAM L. REV. 688, 700-03 (1982).

cies in the Comprehensive Drug Abuse Prevention and Control Act and to broaden the scope of federal narcotics law.⁴⁰ In the statutory language of section 955a as well as its legislative history, Congress expressed a clear intent to authorize extraterritorial jurisdiction within the bounds of international law.⁴¹ Section 955a(a) of the Act specifically prohibits any person on board a United States vessel or a vessel subject to the United States' jurisdiction on the high seas from knowingly or intentionally possessing a controlled substance with intent to manufacture or distribute.⁴²

Stateless vessels were intended to be included under section 955a. Under section 955b(d) a "vessel subject to the jurisdiction of the United States' includes a vessel without a nationality or a vessel assimilated to a vessel without a nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958."⁴³ Therefore, section 955a expressly extends subject matter jurisdiction over drug traffickers aboard stateless vessels on the high seas without requiring a nexus between the alleged crime and the United States.

As an amendment to the Marijuana on the High Seas Act, the Maritime Drug Law Enforcement Act of 1986⁴⁴ was to create an even broader basis of subject matter jurisdiction over crimes committed on the high seas.⁴⁵ The Senate report pertaining to this amendment stated that prior to the amendment some defendants successfully escaped prosecution by "relying heavily on international jurisdictional questions and legal technicalities."⁴⁶ The amendment therefore included a provision to prohibit individual defendants from relying as a defense on the government's non-compliance with international law.⁴⁷

⁴⁰ See *supra* note 39.

⁴¹ See *supra* note 39. *United States v. Romero-Galue*, 757 F.2d 1147, 1152 (11th Cir. 1985); *United States v. Howard-Arias*, 679 F.2d 363 (4th Cir. 1982); *United States v. James-Robinson*, 515 F. Supp. 1340 (S.D. Fla. 1981);

⁴² 21 U.S.C. § 955a(a) (1982).

⁴³ 21 U.S.C. § 955b(d) (1981).

⁴⁴ 46 U.S.C. § 1901 *et seq.* (Supp. V 1987). This Act is the amended and recodified version effective November 10, 1986.

⁴⁵ See *infra* notes 51-53 and accompanying text.

⁴⁶ S. REP. NO. 530, 99th Cong., 2d Sess. 15-16, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5986, 6000 [hereinafter Senate Report 2].

⁴⁷ 42 U.S.C. § 1903(d) (Supp. V 1987). This section states in pertinent part: "A

In the Maritime Drug Law Enforcement Act,⁴⁸ Congress declared: “[T]hat trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned. Moreover, such trafficking presents a specific threat to security and societal well-being of the United States.”⁴⁹ Congress stated under section 1903(h) of the new Act, “[t]his section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.”⁵⁰

In section 1903(a), Congress consolidated the offenses under sections 955a(a), (b) and (c) making them one offense and also deleted section 955a(d).⁵¹ The offenses were consolidated because each of the previously enumerated offenses had slightly different jurisdictional requirements that had to be satisfied,⁵²

claim of failure to comply with international law in the enforcement of this chapter may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter.” 46 U.S.C. § 1903(d) (Supp. V 1987). Section 1903(d) indicates defendants have no standing to object to alleged deficiencies in United States compliance to jurisdictional requirements. The legislative history clearly demonstrates that Congress intended to foreclose this argument to defendants. The Senate Report stated: “In the view of the Committee, only the flag nation of a vessel should have a right to question whether the Coast Guard has boarded that vessel with the required consent. The international law of jurisdiction is an issue between sovereign nations. Drug smuggling is universally recognized criminal behavior, and defendants should not be allowed to inject these collateral issues into their trials.” Senate Report 2, *supra* note 46, at 6001. The court in *United States v. Biermann* held defendant did not have standing to object to any alleged deficiencies under section 1903(d). *United States v. Biermann*, 678 F. Supp. 1437, 1443 (N.D. Cal. 1988). *United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987).

⁴⁸ 46 U.S.C. §§ 1901 *et seq.* (Supp. V 1987).

⁴⁹ 46 U.S.C. § 1902 (Supp. V 1987). This section was formerly classified to section 955b of Title 21, Food and Drugs.

⁵⁰ 46 U.S.C. § 1903(h) (Supp. V 1987).

⁵¹ Former 21 U.S.C. section 955a(d) provided a separate offense for possession with intent to import. Essentially, section 955a(d) required some nexus with the United States for conviction. This section was not included in the new statute, thus eliminating the necessity to show some injury directly to the United States to be convicted.

⁵² Senate Report 2, *supra* note 46, at 6001, (four separate offenses stated in the previous law are now consolidated into a single offense.) *United States v. Potes*, 880 F.2d 1475 (1st Cir. 1989). See also House Report, *supra* note 39, at 9-10. In *United States v. Molinares Charris*, 822 F.2d 1213, 1216 (1st Cir. 1987) the court held “[e]ach of the four offenses in section 955a[(a)-(d)] focuses on a different jurisdictional basis: the vessel’s nationality, the citizenship of those on board, the waters in which the vessel sails, or that it is the United States to which the illegal cargo is intended to be imported.” See, e.g. *United States v. Doe*, 878 F.2d 1546, 1549 (1st Cir. 1989).

thus hindering prosecution.⁵³

The new Act, section 1903(a), uses the same wording as section 955b(d), a "[v]essel subject to the jurisdiction of the United States."⁵⁴ Although the language is old, Congress has construed the words as having a meaning that includes a "vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law[s]."⁵⁵ The former statute, section 955a(c), had been interpreted by the courts to contain the same type of jurisdiction over foreign vessels on the high seas as defined under section 1903(c)(1)(C).⁵⁶ Prosecuting under former section 955a(c) required "a complicated cross reference to an unusual definition of the words 'customs waters' " in 19 U.S.C. section 1401(j).⁵⁷ Upon establishing the existence of customs waters, it was criminal to possess drugs aboard a foreign vessel on the high seas when the foreign flag nation permitted the United States to prosecute.⁵⁸ Such consent to prosecute could be achieved by treaty or other arrangement.⁵⁹

Section 1903(c)(1)(C)⁶⁰ expressly provides for United States jurisdiction over foreign flagged vessels on the high seas without the complicated cross reference to 19 U.S.C. section 1401(j). In order for the United States to obtain jurisdiction under section 1903(c)(1)(C) and still adhere to Congress' and the courts' long-standing intent to promulgate and interpret United States laws within the principles of jurisdiction under international law, it is

⁵³ *Doe*, 878 F.2d at 1549; *United States v. Christensen*, 732 F.2d 20, 21 (1st Cir. 1984).

⁵⁴ This phrase, a vessel subject to the jurisdiction of the United States, as defined in 21 U.S.C. § 955b(d) (1982), refers only to stateless vessels and the equivalent in accordance with Article 6, para. 2 of the Convention on the High Seas. 21 U.S.C. § 955b(d) (1981).

⁵⁵ 46 U.S.C. § 1903(c)(1)(C) (Supp. V 1987); *infra* note 80. *Doe*, 878 F.2d at 1549.

⁵⁶ *United States v. Biermann*, 678 F. Supp. 1437, 1442 (N.D. Cal. 1988).

⁵⁷ See 19 U.S.C. § 1401(j), *supra* note 24. *Doe*, 878 F.2d at 1549 (*quoting* *United States v. Robinson*, 843 F.2d 1, 2 (1st Cir. 1988) which states "if a foreign government 'by treaty or other arrangement' permits the United States 'to enforce [its laws] upon . . . [a] vessel upon the high seas' the waters around the vessel become 'customs waters,' and 21 U.S.C. § 955a(c) then forbids drug possession"). *Id.*

⁵⁸ See *supra* note 57. *United States v. Romero-Galue*, 757 F.2d 1147, 1154 (11th Cir. 1985). See *United States v. Gonzales*, 776 F.2d 931 (11th Cir. 1985); *United States v. Layne*, 599 F. Supp. 689 (S.D. Fla. 1984).

⁵⁹ See *supra* note 57. See also *Romero-Galue*, 757 F.2d at 1152; *United States v. Marsh*, 747 F.2d 7, 9 (1st Cir. 1984); *Biermann*, 678 F. Supp. at 1442.

⁶⁰ See *infra* note 80.

necessary to obtain consent or waived objection by the foreign flagged vessel's nation to the enforcement of United States laws by United States authorities.⁶¹ The necessary consent still can be satisfied by treaty or other arrangement, as was permitted under former section 955a(c).⁶² Therefore, if a foreign nation consents to the United States enforcing its laws over the nation's flagged vessel, the United States has unbounding jurisdiction over that vessel on the high seas without a nexus requirement to prove intent to import illicit drugs to the United States. The Act only requires that the offenders knowingly or intentionally manufacture or distribute a controlled substance.⁶³

Section 1903(c)(1)(D)⁶⁴ permits the United States to board, examine, search, seize or otherwise enforce United States laws upon foreign flagged vessels on the high seas in conjunction with 19 U.S.C. section 1401(j) as was allowed under former section 955a(c).⁶⁵ The United States can obtain this jurisdiction over foreign vessels as long as there is a treaty or other arrangement to bring the vessels within the customs waters of the United States.⁶⁶ Therefore, under this construction of the Act the United States can obtain jurisdiction over a foreign flagged vessel under either section 1903(c)(1)(C) or (D).

All nations that are signatories to the Convention of the High Seas,⁶⁷ including the United States, have expressed jurisdiction over stateless vessels on the high seas.⁶⁸ Section 1903(c)(1)(B)⁶⁹ expressly provides for United States jurisdiction over stateless vessels. The determination that a vessel is stateless only requires: (1) the flag nation to deny the claimed nationality of the vessel;⁷⁰ (2) the master of the vessel to fail to make a

⁶¹ See *supra* note 33.

⁶² *United States v. Mena*, 863 F.2d 1522 (11th Cir. 1989); *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987); *Bent-Santana*, 774 F.2d 1545, 1549 (11th Cir. 1985); *United States v. Loalza-Vasquez*, 735 F.2d 153, 157 (5th Cir. 1984).

⁶³ 46 U.S.C. § 1903(a) (Supp. V 1987).

⁶⁴ See *infra* note 80.

⁶⁵ *United States v. Robinson*, 843 F.2d 1, 2 (1st Cir. 1988); *United States v. Biermann*, 678 F. Supp. 1437, 1441 (N.D. Cal. 1988).

⁶⁶ See *supra* note 24.

⁶⁷ Convention on the High Seas, *supra* note 8.

⁶⁸ *Id.*, at art. 6, para. (2), 13 U.S.T. at 2315.

⁶⁹ See *infra* note 80.

⁷⁰ 46 U.S.C. § 1903(c)(2)(A) (Supp. V 1987), *infra* note 80.

claim of nationality of the vessel upon request of proper United States authorities;⁷¹ (3) the vessel to sail under two or more nations' flags, according to convenience.⁷²

In *United States v. Maynard*⁷³ the United States attempted to establish jurisdiction over a drug-laden vessel, the *Carpe Diem*, on the high seas by virtue of the vessel being stateless under the second or third requirements of the rules deeming a vessel stateless.

PART II: *United States v. Maynard* - UNITED STATES JURISDICTION

A. *Facts*

On February 16, 1988, the United States Coast Guard Cutter, the *Vashon* was conducting a routine patrol in international waters⁷⁴ along the southern coast of Puerto Rico when it sighted a thirty-foot sailing vessel, the *Carpe Diem*. The *Carpe Diem* was deemed to be approximately twenty nautical miles south of Ponce, Puerto Rico. In accordance with the internationally recognized "Right of Approach,"⁷⁵ the *Vashon* maneuvered alongside the sailing vessel to indicate to the *Carpe Diem* crew members that the commanding officer of the *Vashon*, Captain William L. Ross, wanted to speak with them on the VHF marine radio. During the radio conversation, the master of the *Carpe Diem*, defendant Errol Maynard, stated the crew was sailing

⁷¹ 46 U.S.C. § 1903(c)(2)(B) (Supp. V 1987), *infra* note 80.

⁷² Convention on the High Seas, *supra* note 8, at art. 6, para. (2), 13 U.S.T. at 2315; 46 U.S.C. § 1903(c)(1)(B) (Supp. V 1987), *infra* note 80.

⁷³ 888 F.2d 918 (1st Cir. 1989).

⁷⁴ See *supra* note 21.

⁷⁵ The "Right of Approach" is a doctrine of international maritime law that allows a nation's warships to hail and board an unidentified vessel for the limited purpose of ascertaining its nationality. *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 42-44 (1825); *United States v. Romero-Galue*, 757 F.2d 1147, 1149 n.3 (11th Cir. 1985); *United States v. Monroy*, 614 F.2d 61, 64 (5th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980); *United States v. Postal*, 589 F.2d 862, 870-71 (5th Cir. 1979); *United States v. Petrulla*, 457 F. Supp. 1367, 1372 n.1 (1978). The "Right of Approach" is codified in Article 22 of the Convention on the High Seas. Convention on the High Seas, *supra* note 8, 13 U.S.T. at 2318. The U.S. Coast Guard also has statutory authority to board vessels on the high seas to verify registry. 14 U.S.C. § 89 (1982), *supra* note 24, for further discussion. See also *United States v. Marino-Garcia*, 679 F.2d 1373, 1378 (11th Cir. 1982); *Williams*, 617 F.2d 1063 (5th Cir. 1980); *United States v. Cadena*, 585 F.2d 1252, 1256-57 (5th Cir. 1978).

from Venezuela to Barbuda. Maynard complied with a request by Ross to board the vessel.

A four-man armed boarding party, commanded by Lieutenant Michael Emerson, then was dispatched from the *Vashon*. The boarding party circled the *Carpe Diem*, and Maynard verbally confirmed permission to board. The boarding party noted there were two other people aboard the *Carpe Diem*, defendants Glen Petersen and Austin Caines. Once aboard, Emerson and his men smelled marijuana and responded by conducting a full security sweep⁷⁶ search of the entire vessel including all interior compartments. The search turned up 660 kilograms of marijuana. Other items found included: several nations' flags other than the British Virgin Islands' courtesy flag flying; two radio licenses with United States Virgin Islands' registration numbers; a British passport for Maynard that indicated he was from the British Virgin Islands; a driver's license belonging to Petersen indicating he also was a citizen of the British Virgin Islands.

Influenced by the presence of the marijuana, Emerson radioed back to Ross. He recommended that the *Carpe Diem* be considered a stateless vessel because no evidence of registration or documentation of the vessel's nationality was found and that the *Carpe Diem* should be seized.

Ross requested and received a statement of "no objection"⁷⁷ to seizing the *Carpe Diem* as a stateless vessel. The statement of "no objection" was the end product of a series of contacts made between Ross, his operational commander in Puerto Rico and the Commandant of the United States Coast Guard in Washington, D.C.⁷⁸ After the "no objection" clearance, Emerson arrested

⁷⁶ *Maynard*, 888 F.2d at 920. A security sweep in which the interior compartments are examined has been held within the statutory authority of the United States Coast Guard if the boarding of a vessel is lawful.

⁷⁷ See *infra* note 90.

⁷⁸ This was the proper chain of authority within the United States Coast Guard for seeking clearance to seize the vessel. However, the Commandant of the United States Coast Guard in Washington D.C. should have sought express consent of the United Kingdom to seize or a denial by the United Kingdom that the vessel was in fact a United Kingdom registered vessel under 46 U.S.C section 1903(c). *Maynard*, 888 F.2d at 925. See *infra* notes 80, 90.

The Coast Guard also has relied previously on the agreement between the United Kingdom and United States that gives the United States consent to board and seize United Kingdom registered vessels in the Caribbean Sea and to consider the vessels within the "customs waters" of the United States. See *supra* note 24 and accompanying

the three defendants and seized the *Carpe Diem*.

B. District Court's Finding of Jurisdictional Basis

On February 24, 1988, the three defendants, citizens of the United Kingdom, British Virgin Islands, were indicted on a one count charge for possession of marijuana with intent to distribute, in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. section 1903(a),⁷⁹ (c),⁸⁰ (f),⁸¹ and 18 U.S.C. section 2.⁸²

text; *infra* notes 103-14 and accompanying text. The Commandant in this situation had several options to seek authority to give Ross clearance to seize the *Carpe Diem*. But declaring the *Carpe Diem* a stateless vessel without further inquiry was improper and a violation of United States law under 46 U.S.C. section 1903(c). *Maynard*, 888 F.2d at 924-25.

⁷⁹ 46 U.S.C. section 1903(a) provides in pertinent part:

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 . . . to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

46 U.S.C. § 1903(a) (Supp. V 1987).

⁸⁰ 46 U.S.C. section 1903(c)(1) provides:

"vessel subject to the jurisdiction of the United States" includes- (A) a vessel without a nationality; (B) a vessel assimilated to a vessel without a nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention on the High Seas; (C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States; (D) a vessel located within the customs waters of the United States; and (E) a vessel located in the territorial water of another nation, where the nation consents to the enforcement of United States law by the United States.

Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under subparagraph (C) and (E) of this paragraph may be obtained by radio, telephone, or similar oral means, and may be proved by certification of the Secretary of State or the Secretary's designee.

46 U.S.C. § 1903(c)(1) (Supp. V 1987). U.S.C. section 1903(c)(2) provides:

"vessel without a nationality" includes- (A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed; and (B) a vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel.

46 U.S.C. § 1903(c)(2) (Supp. V. 1987). 46 U.S.C. section 1903(c)(3) provides that a claim of nationality or registry only includes:

(A) possession on board the vessel and production of documents evidencing the vessel's nationality in accordance with article 5 of the 1958 Convention on the High Seas; (B) flying its flag nation's ensign or flag; or (C) a verbal claim of nationality or registry by the master or person in charge of the vessel.

46 U.S.C. § 1903(c)(3) (Supp. V 1987).

⁸¹ 46 U.S.C. section 1903(f) provides for jurisdiction and venue, *infra* note 83. 46

The defendants entered a not guilty plea. On March 15, 1988, they filed a motion to suppress the marijuana evidence, claiming the United States lacked jurisdiction to board and search the vessel. The motion was denied.

On April 20, 1988, a two-day jury trial commenced in the United States District Court for the District of Puerto Rico.⁸³ The defendants renewed their motion to suppress the evidence. The defendants also submitted a motion for a judgment of acquittal,⁸⁴ pursuant to Rule 29, claiming the United States Coast Guard did not have jurisdiction when it boarded the *Carpe Diem*. These motions were denied at the close of the government's case and again at the close of all the evidence.

The defendants maintained, during the trial, that even if the United States had jurisdiction, they did not intentionally possess or distribute illegal drugs, which is an element of the crime that must be shown to convict the defendants. The defendants argued the marijuana was forced upon them by the people who had hired them to deliver the *Carpe Diem* from Venezuela to Barbuda. They testified that at the time they agreed to transport the sailboat they had no intention of possessing or distributing drugs. The defendants stated that a few hours after they left shore, the people who had hired them to deliver their sailboat intercepted them in a speedboat and forced them at gunpoint to take the marijuana. They also testified they intended to notify the authorities upon docking.

The government argued the three-man crew intentionally possessed marijuana with intent to distribute in violation of the Maritime Drug Law Enforcement Act sections 1903 (a) and (c). The Act was revised to expand United States jurisdiction on the high seas in furtherance of American efforts to curb drug traf-

U.S.C. § 1903(f) (Supp. V 1987).

⁸² 18 U.S.C. § 2 (1988). This statute provides that any person who commits an offense against the United States is punishable as a principle.

⁸³ The District Court was the proper court under section 1903(f) which provides in pertinent part: "Any person who violates this section shall be tried in the United States district court at the point of entry where that person enters the United States, or in the United States District Court of the District of Columbia." 46 U.S.C. § 1903(f) (Supp. V 1987).

⁸⁴ A Rule 29 motion for a judgment of acquittal is used in the place of motions for directed verdict which are abolished. FED. R. CRIM. P. 29(a).

ficking.⁸⁵ The United States cited two reasons for claiming jurisdiction over the *Carpe Diem* under the Act's provisions. First, under section 1903(c)(3)(A), the *Carpe Diem* did not have registration or documentation papers on board to prove the nationality of the vessel.⁸⁶ Second, under section 1903(c)(3)(B), Emerson's search uncovered flags of several nations, thus indicating the *Carpe Diem* was stateless because at any moment a new flag could be raised.⁸⁷

The jury was not convinced by the defendants' argument that there was a lack of intent to possess and distribute a controlled substance; such an intention is a required element of the crime. The jury accepted the government's claim of jurisdiction, finding the United States had jurisdiction over the *Carpe Diem* because it was a vessel without a nationality. The jury rendered a guilty verdict, finding the defendants guilty of possession of marijuana with intent to distribute, in violation of 46 U.S.C. section 1903(a), (c) and (f).

⁸⁵ See *supra* text accompanying notes 44-66.

⁸⁶ This is a meritless argument because neither the Convention on the High Seas nor section 1903(c)(3) require that all vessels must possess on board documents evidencing their nationality. Article 5 of the Convention on the High Seas only requires "[e]ach State shall issue to ships to which it has granted the right to fly its flag documents to that effect." Convention on the High Seas, *supra* note 8, at art. 5, para. (2), 13 U.S.T. at 2315. It does not specifically require that each vessel shall carry and produce those documents on request. *Id.* However as a practical matter it is extremely difficult to gain legal entry into another state without documentation of the vessel. United States law under section 1903(c)(3) does not require that a claim of nationality only can be satisfied by possession or production of documents evidencing the vessel's nationality. However, possession and production of documents is only one means to satisfy a claim of nationality. 46 U.S.C. § 1903(c)(3) (Supp. V 1987).

⁸⁷ This second argument by the government is also meritless because it is common practice for ships to carry courtesy flags of many nations. This common practice is necessitated by the fact that in most territorial waters and ports of a state, foreign vessels are required to fly the courtesy flag of that state while present. Therefore a transient vessel generally carries many courtesy flags in order to comply with the requirements of other states. The fact that the *Carpe Diem* had other flags aboard is not dispositive to show that it was a stateless vessel and might at any moment change its declared nationality by raising another nation's flag. If the *Carpe Diem* had in fact raised another flag it would have been deemed a stateless vessel under Article 6, paragraph 2 of the Convention on the High Seas. Convention on the High Seas, *supra* note 8, at art. 6, para. (2), 13 U.S.T. at 2315. *United States v. Cadena*, 585 F.2d 1252, 1260 n.15 (5th Cir. 1978) (Coast Guard officer testified that it is customary for a vessel to fly the flag of a nation as it enters that nation's port and therefore evidence that other flags were found aboard is not conclusive that the vessel is stateless). See also *United States v. Pinto-Mejia*, 720 F.2d 248, 256 (2d Cir. 1983).

C. First Circuit Denies Jurisdiction

Defendants appealed the conviction on the ground, *inter alia*, that their vessel was not subject to United States jurisdiction when the Coast Guard boarded and searched it. The United States Court of Appeals for the First Circuit reversed the jury conviction. The court ruled there was insufficient evidence to justify a finding that the *Carpe Diem* was subject to United States jurisdiction by virtue of being a vessel without a nationality.⁸⁸ A procedural error by the Coast Guard was the main reason behind the court's finding of no jurisdiction. According to the court, the Commandant of the United States Coast Guard violated section 1903 (c)(1)(C).⁸⁹

The violation of section 1903(c)(1)(C) occurred when the Commandant determined on his own accord that the *Carpe Diem* was stateless, and the Commandant failed to seek confirmation from the United Kingdom that the vessel was indeed stateless. Interpreting section 1903 (c)(2)(A), the court held the proper procedure the Coast Guard must follow prior to declaring a vessel stateless is to seek verification from the vessel's alleged flag nation that the vessel is not in fact registered in that nation. In the alternative, the court stated that if a vessel is indeed registered under the nation whose flag is raised, then the vessel's claim of nationality is satisfied under section 1903 (c)(3)(B), thus eliminating the possibility of United States jurisdiction over the vessel without the flag nation's consent.⁹⁰

⁸⁸ On appeal, the defendants raised two other issues: (1) "whether the district court erred in its jury instructions," and (2) "whether there was sufficient evidence for a finding that the necessary criminal intent for the offense existed." *United States v. Maynard*, 888 F.2d 918, 927 n.5. (1st Cir. 1989). The court held it was not necessary to address these issues based on its holding that the *Carpe Diem* was not subject to the jurisdiction of the United States. *Id.*

⁸⁹ See *supra* note 80.

⁹⁰ United States under its laws requires consent or a statement of "no objection" from the flag nation under section 1903(c)(1)(C). 46 U.S.C. § 1903(c)(1)(C) (Supp. V 1987). The United States also has an agreement with the United Kingdom that has been in force since 1981. The agreement specifies procedures to facilitate the interdiction by the United States of vessels of the United Kingdom suspected of drug trafficking. The United States must follow these procedures before seizing a British registered vessel. The United Kingdom agreed to consent to the United States searching a vessel if the United States has reasonable belief that the vessel has on board a cargo of drugs for importation into the United States in violation of United States laws, and the United Kingdom will not object to the vessel being seized and taken to a United States port.

The court held it was necessary for the Commandant to seek the United Kingdom's consent to the application of United States laws because the *Carpe Diem* satisfied at least one, if not two, of the three alternative section 1903(c)(3) requirements under which a claim of nationality can be established.⁹¹ Although two government witnesses offered conflicting testimony about what flag the *Carpe Diem* was flying,⁹² the court held that regardless of which version of the facts was to be believed, the *Carpe Diem* could not be deemed a stateless vessel because there was in fact a flag flying. Even if the Coast Guard could not identify what nation the flag belonged to, the court held section 1903(c)(3)(B) does not authorize the Coast Guard to declare a

Agreement to Facilitate the Interdiction by the United States of Vessels of the United Kingdom Suspected of Trafficking in Drugs, Nov. 13, 1981, United Kingdom-United States, T.I.A.S. No. 10296 [hereinafter Anti-Drug Trafficking Agreement]. In *United States v. Biermann*, the court held a British flagged vessel and defendants thereon were subject to United States jurisdiction pursuant to the Act and the Coast Guard had authority to board the vessel without reasonable suspicion or probable cause because of the agreement between the United States and the United Kingdom enabling United States authorities to board, examine, search, seize and otherwise enforce upon the high seas United States laws upon express consent or waived objection by the United Kingdom so that a vessel flying the flag of the United Kingdom in international waters is considered to be located within the customs waters of the United States under the Act. *United States v. Biermann*, 678 F. Supp. 1437, 1442 (N.D. Cal. 1988). See also *supra* notes 24, 37.

⁹¹ A claim of nationality can be asserted in three alternative ways under section 1903(c)(3) that include:

(A) possession on board the vessel and production of documents evidencing the vessel's nationality in accordance with article 5 of the 1958 Convention on the High Seas; (B) flying its flag nation's ensign or flag; or (C) a verbal claim of nationality or registry by the master or person in charge of the vessel.

46 U.S.C. § 1903(c) (Supp. V 1987). See *Maynard*, 888 F.2d at 922; *United States v. Potes*, 880 F.2d 1475, 1479 (1st Cir. 1989).

⁹² The disputed facts of the trial proceeding arose from conflicting testimony about what flag the *Carpe Diem* was flying. Captain Ross testified that prior to boarding the sailboat, a courtesy flag was observed flying, but that it could not be identified as a British Virgin Islands' flag until after the *Carpe Diem* was boarded. Conflicting testimony by another government witness, Emerson, the officer leading the boarding party, stated the flag that was flying on the *Carpe Diem* was identified as a British Virgin Islands' courtesy flag by the U.S. Coast Guard crew before it boarded the vessel. *Maynard*, 888 F.2d at 921-22. Captain Ross also testified that the name of the boat, the *Carpe Diem*, was painted on the stern, but it did not have a home port or registration number. Emerson concurred with this testimony. *Id.* Under international practice it is customary or required by some countries to have a designated home port and registration number on a properly registered vessel. Convention on the High Seas, *supra* note 8, art. 5, 13 U.S.T. at 2315.

vessel stateless. The court concluded that flying a flag is a valid claim of nationality that cannot be thwarted due to factors such as the Coast Guard's inability to identify the flag "whether because of visibility problems, weather, darkness, size, or unfamiliarity."⁹³

The court also determined that the *Carpe Diem* could have satisfied its claim of nationality by providing "a verbal claim of nationality or registry by the master" in accordance with section 1903 (c)(3)(C).⁹⁴ The Coast Guard's Law Enforcement Checklist⁹⁵ documented that during the initial radio contact with Maynard, master of the *Carpe Diem*,⁹⁶ stated to Captain Ross: (1) that he was a citizen of the British Virgin Islands; (2) that the *Carpe Diem* was registered under the British flag; (3) that a British Virgin Islands' flag was on board. Emerson's testimony corroborated the 7th Coast Guard District Law Enforcement Checklist.⁹⁷

Because the *Carpe Diem* definitely satisfied its burden of claiming a nationality via flying a flag and/or possibly via claiming a nationality by verbal declaration, only one means remained by which the vessel could be found stateless. That means was a declaration by the nation whose flag was flown that the vessel was not registered under that nation.⁹⁸ It is undisputed that Great Britain was never asked to verify or deny Maynard's claim

⁹³ *Maynard*, 888 F.2d at 924.

⁹⁴ 46 U.S.C. § 1903(c)(3)(C) (Supp. V 1987), *supra* note 80.

⁹⁵ A Law Enforcement Checklist is a document that is routinely prepared by the Coast Guard for future use in criminal trials and is prefaced with instructions for accuracy. It is a record of the events of the Coast Guard's interception of vessels. *Maynard*, 888 F.2d at 921-22.

⁹⁶ A master or person in charge of a vessel is authorized to make a verbal claim of nationality. 46 U.S.C. § 1903(c)(3)(C) (Supp. V 1987).

⁹⁷ This is another disputed fact that arose at the trial proceeding in Emerson's testimony. He was present with Captain Ross during the initial radio conversation prior to boarding and he prepared the checklist after the interception of the *Carpe Diem*. Emerson testified that Maynard stated he was a British citizen and the vessel was of British registry. *Maynard*, 888 F.2d at 921-22. The checklist corroborated Emerson's testimony because it specifically stated: the British Virgin Islands' flag was observed five minutes after the *Carpe Diem* was first sighted by the *Vashon* crew; during the initial radio contact, before the boarding, Maynard stated to Ross that his nationality was British; the vessel was registered under the British flag; and a British Virgins Islands' flag was on board. Captain Ross testified that no identification of the vessel's nor the crew members' nationality was made during the initial radio communication. *Id.*

⁹⁸ 46 U.S.C. § 1903(c)(2)(A) (Supp. V 1987), *supra* note 80.

that the *Carpe Diem* was a British Virgin Islands' vessel.⁹⁹ Hence, jurisdiction also could not be found upon this final alternative.¹⁰⁰

The government was forced to argue that the vessel was stateless because of the Commandant's failure to follow proper procedure under United States laws in his determination of the status of the *Carpe Diem*. The government was unsuccessful and lost the case on appeal because although this statute has been amended and judicially interpreted to create a broad jurisdictional basis, the United States,¹⁰¹ cannot enforce its laws over foreign vessels on the high seas unless it can be successfully argued that the United States had consent of the flagged nation to seize the vessel by treaty or other arrangement; or that the vessel was in the "customs waters" of the United States; or the vessel was located in territorial waters of another nation, where the nation consents to enforcement of United States law.¹⁰²

PART III: JURISDICTIONAL ANALYSIS BY THE UNITED STATES

A. *Jurisdiction Under an International Anti-Drug Trafficking Agreement*

In choosing to argue that the Coast Guard had authority to seize the *Carpe Diem* as a stateless vessel, the District Attorney overlooked an alternative argument under which jurisdiction might have been established. Under the Agreement to Facilitate

⁹⁹ "Both Ross and Emerson testified at trial that to their knowledge, at no time was Great Britain or the British Virgin Islands asked for a statement of 'no objection' to board the *Carpe Diem*, nor was there any evidence that anybody made such a request." *Maynard*, 888 F.2d at 920. The court in *Maynard* quoted *United States v. Potes*, 880 F.2d 1475, 1479 (1st Cir. 1989), which held "that when a claim of Honduran nationality was verbally made by the vessel's master, but no Honduran flag was flying and the master could not produce the Honduran registration numbers, there was not sufficient proof . . . that the claim of Honduran nationality was ever denied by Honduras, and, therefore, the convictions had to be reversed." *Maynard*, 888 F.2d at 925. See text of 46 U.S.C. § 1903(c)(2)(A) (Supp. V 1987), *supra* note 80.

¹⁰⁰ The government did not argue as to the *Carpe Diem's* statelessness under the alternative prong of the statute, section 1903(c)(2)(B), in which a vessel is deemed to be stateless if the master "fails to make a claim of nationality or registry" if requested by an officer of the United States because there was no evidence that *Maynard* failed to claim a nationality upon request. *Maynard*, 888 F.2d at 925. See 46 U.S.C. § 1903(c)(2)(B) (Supp. V 1987), *supra* note 80.

¹⁰¹ See *supra* text accompanying notes 44-66.

¹⁰² 46 U.S.C. § 1903(c) (Supp. V 1987), *supra* note 80.

the Interdiction by the United States of Vessels of the United Kingdom Suspected of Trafficking Drugs,¹⁰³ it is plausible that Great Britain's immediate consent was not necessary in order to seize the *Carpe Diem*.¹⁰⁴ Thus, the District Attorney did not have to take the position that the *Carpe Diem* was a stateless vessel in order to establish United States jurisdiction. Rather, the Anti-Drug Trafficking Agreement could have provided an automatic jurisdictional basis for prosecution of the *Carpe Diem* crew.

The Anti-Drug Trafficking Agreement states the United Kingdom consents to seizure of United Kingdom flagged vessels if authorities reasonably believe "that the vessel has on board a cargo of drugs for importation into the United States."¹⁰⁵ The bales of marijuana uncovered during the security sweep establish such a reasonable belief. Furthermore, even though the court made no finding as to whether the *Carpe Diem* was importing its illegal cargo to the United States, case law indicates courts are quick to find that the United States is the final destination.¹⁰⁶ Thus, the Anti-Drug Trafficking Agreement can be deemed to satisfy the necessary consent element required for jurisdiction under section 1903(c)(1)(C).¹⁰⁷

As further evidence that the United Kingdom intended to automatically consent to United States jurisdiction under the Anti-Drug Trafficking Agreement, it is worth noting that the agreement provides a means for the United Kingdom to revoke its implicit consent within the first fourteen days of a vessel's seizure.¹⁰⁸ The United Kingdom also retains the right to object to prosecution of a seized vessel's crew.¹⁰⁹ Such safeguards indi-

¹⁰³ Anti-Drug Trafficking Agreement, *supra* note 90.

¹⁰⁴ It is notable that the Anti-Drug Trafficking Agreement does not require advanced consent by the United Kingdom to any particular boarding. *United States v. Biermann*, 678 F. Supp. 1437, 1442 (N.D. Cal. 1988). *See also United States v. Hernandez*, 655 F. Supp. 1069, 1071 (D.P.R. 1989) (the court held the flagged nation's consent valid even though it was given after boarding the vessel, as long as the nation's ratification of the decision is before trial).

¹⁰⁵ Anti-Drug Trafficking Agreement, *supra* note 90, at para. 1.

¹⁰⁶ *See, e.g., United States v. Loalza-Vasquez*, 735 F.2d 153, 156 (5th Cir. 1984); *United States v. Angola*, 514 F. Supp. 933, 936 (S.D. Fla. 1981).

¹⁰⁷ *See supra* note 80.

¹⁰⁸ Anti-Drug Trafficking Agreement, *supra* note 90, at para. 4.

¹⁰⁹ *Id.* at para. 5.

cate the United Kingdom intended for the United States to have jurisdiction over its flagged vessels unless United Kingdom authorities state otherwise.¹¹⁰

B. Possible Jurisdiction Pursuant to Customs Waters Analysis

If the District Attorney could have proven that the United States in fact had consent from the United Kingdom based on the Anti-Drug Trafficking Agreement, then the government could have established jurisdiction over the *Carpe Diem* under section 1903 (c)(1)(D). In that section, Congress specifically defined a "vessel subject to the jurisdiction of the United States" as a "vessel located in the customs waters of the United States."¹¹¹

The *Carpe Diem* arguably could have been in the customs waters of the United States as defined 19 U.S.C. section 1401(j).¹¹² Courts have interpreted this definition of customs waters to permit the United States to board a foreign vessel on the high seas by such an arrangement as the Anti-Drug Trafficking Agreement or by more informal, properly authorized consent measures such as by radio, telephone, or similar oral or electronic means.¹¹³

C. Conclusion

Had the District Attorney in the trial proceeding conceded that the *Carpe Diem* was a foreign flagged vessel and relied in-

¹¹⁰ In the Anti-Drug Trafficking Agreement the British government stated it had "regard to the need for international co-operation in suppressing the illicit traffic in narcotic drugs, which is recognised in the Single Convention on Narcotic Drugs of 1961." Anti-Drug Trafficking Agreement, *supra* note 90, preamble. See also Single Convention, *supra* note 32.

¹¹¹ See *supra* note 80. United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987) (held that the consent of the flag nation brought the vessel within the customs waters of the United States).

¹¹² See *supra* note 24.

¹¹³ See *supra* note 80. United States v. Biermann, 678 F. Supp. 1437, 1441 (N.D. Cal. 1988.) The court concluded that under section 1903(c)(1)(D) the vessel was located within the customs waters of the United States, as defined by section 1401(j) because there was an "arrangement" with the United Kingdom enabling United States authorities to board, examine, search and seize the vessel that was actually thirty-five nautical miles south of Point Reyes, California. *Id.*

stead on the statutory provisions that Congress enacted to provide for jurisdiction, perhaps the convictions would not have been reversed. There was sufficient evidence that the *Carpe Diem* was laden with marijuana of a commercial quantity to convict the defendants of possession with intent to distribute.¹¹⁴

PART IV: CONCLUSION: UNITED STATES RETAINS UNBOUNDED JURISDICTION ON THE HIGH SEAS

Although the United States did not have jurisdiction over the *Carpe Diem*, this case cannot be construed as allowing drug traffickers to reign on the high seas. Frequent interpretations of the Maritime Drug Law Enforcement Act demonstrate that foreign flagged vessels anywhere on the high seas are within the jurisdictional reach of the United States and subject to prosecution under the Act.¹¹⁵ Had the United States followed proper procedures for obtaining Great Britain's jurisdictional consent, the Maritime Drug Law Enforcement Act readily would have provided a jurisdictional basis, and the defendants still would be serving their sentences today.¹¹⁶

True, the United States must adhere to established procedures for obtaining jurisdiction.¹¹⁷ But adherence is far from difficult. In this case, a mere telephone call to the proper British authority would have made the difference between jurisdiction and the defendants' acquittal. Furthermore, there is no doubt that if the United States had made that simple telephone call, the British would have granted automatic consent.¹¹⁸

Congress fully intended to reach foreign flagged vessels to the maximum extent permissible under international law when it enacted the Maritime Drug Law Enforcement Act.¹¹⁹ Even

¹¹⁴ United States v. Maynard, 888 F.2d 918, 920 (1st Cir. 1989).

¹¹⁵ See *supra* text accompanying notes 16, 60-72.

¹¹⁶ The three defendants were sentenced to ten-year prison terms. Sentence Proceedings at 7, United States v. Maynard, 888 F.2d 918 (1st Cir. 1989), (No. 88-96).

¹¹⁷ See *supra* text accompanying notes 28-34.

¹¹⁸ See *supra* note 80. See generally United States v. Quemener, 789 F.2d 145 (2d Cir. 1986); United States v. Layne, 599 F. Supp. 689 (S.D. Fla. 1984).

¹¹⁹ House Report, *supra* note 39, at 9.; Senate Report, *supra* note 36, at 2785; United States v. Robinson, 843 F.2d 1, 3 (1st Cir. 1988); United States v. Molinares Charris, 822 F.2d 1213, 1217 (1st Cir. 1987); United States v. Romero-Galue, 757 F.2d 931, 1154 (11th Cir. 1985).

more, it is evident that foreign nations desire such broad jurisdiction by the United States. This desire is demonstrated not only by the formal Anti-Drug Trafficking Agreement between the United States and United Kingdom, but also by informal agreements drawn frequently with other nations.¹²⁰ Hence, if nations freely continue to provide jurisdictional consent and the Maritime Drug Law Enforcement Act remains as written, *United States v. Maynard* will be an anomaly in the United States' effort to combat drug smuggling. The United States will continue to have unbounded authority to police the high seas in its effort to curtail the American drug crisis.

Frances S. Blakeslee

¹²⁰ Panama was not a signator of The Convention on the High Seas when it consented to the United States boarding of its registered vessels. See *United States v. Peterson*, 812 F.2d 486, 489 (9th Cir. 1987); *United States v. Pena-Jessie*, 763 F.2d 618, 620 (4th Cir. 1985); *United States v. Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985); *Romero-Galue*, 757 F.2d 1147, 1149; *United States v. Loalza-Vasquez*, 735 F.2d 153, 157-58 (5th Cir. 1984); *United States v. Streifel*, 665 F.2d 414, 425 (2d Cir. 1981). Honduras also has consented to the boarding, search, seizure, and prosecution of the crew members. *United States v. Gonzalez*, 776 F.2d 931, 934 (11th Cir. 1985). *United States v. Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987) (Barbados consented). *United States v. Dominguez*, 604 F.2d 304, 308 (4th Cir. 1979), *cert. denied*, 44 U.S. 1014 (1980) (Bahamian government permitted United States jurisdiction). Great Britain has consented to boarding even prior to the Anti-Drug Trafficking Agreement. *United States v. Green*, 671 F.2d 46, 51 (1st Cir. 1982), *cert. denied*, 457 U.S. 1135 (1982). *United States v. Marsh*, 747 F.2d 7, 9 (1st Cir. 1984) (the government of Denmark entered into an arrangement to consent to search and seize its registered vessels). *United States v. Michelena Orovio*, 702 F.2d 496, 498 (5th Cir. 1983) (Venezuelan authority consented to search of its flagged vessel). *United States v. Greyshock*, 719 F. Supp. 927, 929 (D. Haw. 1989) (Cook Islands, the flag nation, gave consent to board its registered vessel).