20-11188

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

ROBERT DEXTER WEIR, DAVID RODERICK WILLIAMS,

AND LUTHER FIAN PATTERSON,

Petitioners-Appellants,

- v. -

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-CV-23420-UU

OPENING BRIEF OF PETITIONERS-APPELLANTS

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STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Petitioners-Appellants do not have a parent corporation and are not publicly held corporations.

Interested parties are as follows:

American Civil Liberties Union, Inc.

American Civil Liberties Union of Florida, Inc.

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc.

Cohen, Eric Martin

Cronin, Sean Paul

Fajardo Orshan, Ariana

Ferguson, Patrick W.

Garber, Hon. Barry L.

Goodman, Hon. Jonathan

Greenberg, Benjamin G.

Hafetz, Jonathan

Loewy, Ira N.

Malone, Todd Omar

Mendez , Jr., Joaquin

O'Sullivan, Hon. John J.

Patterson, Luther Fian

Petrocelli, Patrick N.

Quencer, Kevin

Simonton, Hon. Andrea M.

Smachetti, Emily M.

Tarre, Michael S.

Thompson, George Garee

Tilley, Daniel B.

Torres, Hon. Edwin G.

Ungaro, Hon. Ursula

United States of America

Watt, Steven M.

Weir, Robert Dexter

White, Hon. Patrick A.

Williams, David Roderick

STATEMENT REGARDING ORAL ARGUMENT

Petitioners-Appellants request oral argument. Oral argument is warranted in this case because it raises important constitutional issues regarding Congress's authority to criminalize the acts of foreign nationals outside the United States, specifically, whether Congress can criminalize acts that are *not* crimes in all reasonably developed legal systems and whether Congress can criminalize extraterritorial conduct without any limitation merely because a foreign state consents to the enforcement of United States law in its territory.

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PRELIMINARY STATEMENT

Petitioners Robert Dexter Weir, David Roderick Williams, and Luther Fian Patterson ("Petitioners") are Jamaican nationals and fishermen. On September 13, 2017, they left their homes in Jamaica on board a thirty-two foot, Jamaican-registered boat, the *Jossette* WH 478, for a two-day fishing trip with two other Jamaican fishermen, Patrick Ferguson and George Garee Thompson. The next day, after being blown off-course during an unexpected storm, the United States Coast Guard ("Coast Guard") stopped and boarded the *Jossette* in international waters in the East Caribbean Sea, just outside the territorial waters of Haiti. (*See* Doc. 4-1 [A-36]; Doc. 4-4 [A-61-62].)

During the boarding process, Coast Guard officers asked the crew where they were heading, and one or more of the men responded that they were lost and trying to find their way back to Jamaica. (*See* Doc. 4-1 [A-36-37].) Once onboard, Coast Guard officers searched the *Jossette* and crewmembers for illicit substances. Although none were found onboard the *Jossette* or on any of the crewmembers, the officers forcibly removed Petitioners and the other two crewmembers from the *Jossette*, detained them onboard a Coast Guard ship, and destroyed the *Jossette*. (*See id.*; *see also* Doc. 4-11 at 23:23-24:4 [A-124-125].)

The Coast Guard detained Petitioners and their fellow crewmembers on board various Coast Guard vessels for the next thirty-two days, until October 16,

2017, when the Coast Guard delivered Petitioners to Miami, and to the custody of the Drug Enforcement Administration. The United States initially charged Petitioners with conspiracy to possess with intent to distribute marijuana. (Doc. 4-1 [A-36].) Later, the United States admitted that it "would have required a miracle" to prove the drug charges initially made against Petitioners; a miracle that it "could not have pulled off." (Doc. 4-11 at 24:4-7 [A-125].) Instead, on January 3 and 5, 2018, Petitioners pled guilty to one count of knowingly providing a materially false statement to a federal law enforcement officer, during a boarding, while on board a vessel subject to the jurisdiction of the United States, in violation of 18 U.S.C. § 2237(a)(2)(B). (Doc. 4-8 [A-81]; Doc. 4-9 [A-88]; Doc. 4-10 [A-95].)

Having been kept from their homes and their families for more than three months, Petitioners' guilty pleas presented them with the fastest possible path back to Jamaica. But Congress lacks the constitutional authority to criminalize the making of false statements by foreign nationals while they are aboard a foreign-flagged vessel located in international waters. The District Court also lacked jurisdiction to accept Petitioners' guilty pleas and, accordingly, should have granted their petition to vacate their convictions.

First, Petitioners' convictions violate the U.S. Constitution's Due Process Clause. This Court has confirmed multiple times that, for the extraterritorial application of federal law to comply with the Due Process Clause, the statute at

issue must provide foreign nationals with notice that the criminalized conduct is contrary to the laws of all reasonably developed legal systems. Section 2237(a)(2)(B) did not provide the constitutionally required notice to Petitioners. Petitioners are aware of no other nation that criminalizes the making of unsworn false statements to a government official during a boarding of a vessel. Neither the United States nor the District Court identified any instance where another nation criminalized the same or comparable conduct. The District Court erred by refusing to apply this Court's precedents and instead adopting and misapplying out-of-circuit cases from the First and Third Circuits.

Second, the High Seas Clause of the U.S. Constitution prohibits the extraterritorial application of United States law where, as here, the charging documents and other information before the Court shows that criminal defendants have no connection to, and their conduct has no effect in, the United States. Under its existing precedent interpreting the High Seas Clause, this Court has refused to incorporate a nexus requirement limiting Congress's authority under that Clause to only those cases where the charged conduct has a demonstrable link to, or actual effect in, the United States. Even so, the Court has consistently held that, for the United States to enforce its criminal statutes extraterritorially, as it did with Petitioners, the United States is constrained by principles of extraterritorial jurisdiction recognized by customary international law. None of the principles

recognized by this Court apply here. Accordingly, Congress lacked the authority to extend section 2237(a)(2)(B)'s reach extraterritorially, and the United States lacked the constitutional authority to prosecute Petitioners for making a false statement to a Coast Guard officer while Petitioners were aboard a foreign-flagged vessel located on the High Seas, even assuming, as this Court has previously held, that the High Seas Clause does not require a demonstrable nexus between the charged conduct and the United States.

Finally, this Court's existing interpretation of the High Seas Clause, particularly the Court's refusal to incorporate into that Clause a demonstrable nexus requirement between the charged conduct and the United States, is contrary to the original understanding of the High Seas Clause. The High Seas Clause is part of the Define and Punish Clause, which grants Congress authority to "define and punish" three separate and distinct types of crimes: (i) piracy (ii) felonies committed on the high seas; and (iii) offences against the law of nations. U.S. Const., Art. I, § 8, cl. 10. In conferring on Congress the authority to define and punish these types of crimes, the Framers intended to draw a distinction between Congress's authority to define and punish "piracy" and its authority to define and punish "Felonies committed on the high seas" by granting Congress authority to define and punish piracy without regard to the charged crime's nexus to the United States and to define and punish felonies committed on the high seas only where a

demonstrable nexus exists. This Court's prior interpretation of the High Seas Clause rejecting this distinction is incorrect and should be overruled. Petitioners advance this argument, which provides a separate basis for vacating their convictions, to preserve it for further appellate review.

JURISDICTIONAL STATEMENT

Petitioners were convicted of one count each of making a materially false statement to a federal law enforcement officer about their destination during a boarding of a vessel subject to the jurisdiction of the United States, in violation of 18 U.S.C. § 2237(a)(2)(B). The District Court had jurisdiction to issue writs of error coram nobis vacating Petitioners' convictions under the All Writs Act, 28 U.S.C. § 1651(a). *See United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000); *see also United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002).

Petitioners appeal from the Order denying their petition. (*See* Doc. 17 [A-174].[1]) This Court has jurisdiction over the appeal under 28 U.S.C. § 1291. The District Court entered its Order denying the petition on January 30, 2020. Petitioners filed a notice of appeal on March 26, 2020. (Doc. 18 [A-195].) The

[1] Citations to the record are made using the following format: (Doc. __ [A-__]). The "Doc." citation refers to the document entry number from the electronic docket of 19-cv-23420-UU in the Southern District of Florida. The "A-__" citation refers to the single-volume Appendix of Petitioners-Appellants, filed herewith.

appeal is timely under Rule 4(a)(1)(B) and (C) of the Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Whether Petitioners' convictions violate the Due Process Clause under this Court's existing precedent because they are foreign nationals convicted of violating federal law outside of the United States and their crime of conviction is not contrary to the laws of all reasonably developed legal systems.

2. Whether Petitioners' convictions violate the High Seas Clause because the extraterritorial application of 18 U.S.C. § 2237(a)(2)(B) is not supported by a principle of extraterritorial jurisdiction recognized by customary international law.

3. Whether this Court's prior holdings that the High Seas Clause does not contain a nexus requirement conflicts with the original understanding of the limits placed on Congress in enacting extraterritorial criminal statutes under the authority conferred on it by the High Seas Clause.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant provisions from the U.S. Constitution and the United States Code are reproduced in the Statutory Addendum to this brief.

STATEMENT OF THE CASE

I. Factual Background

On October 18, 2017, Petitioners were charged in a Criminal Complaint with one count of conspiracy to possess with intent to distribute a controlled substance, namely a mixture and substance containing 100 kilograms or more of marijuana, in violation of 46 U.S.C. §§ 70503(a)(1) and 70506(b). (Doc. 4-1 [A-34].) Those sections of the United States Code are part of the Maritime Drug Law Enforcement Act ("MDLEA"). The affidavit submitted in support of the Criminal Complaint states that the Coast Guard stopped the *Jossette* "in international waters approximately 13 nautical miles off the coast of the Navassa island." (Doc. 4-1 ¶ 5 [A-36].) According to the affiant, while in pursuit of the *Jossette*, "Coast Guard personnel observed the crew . . . jettison approximately 20-25 bales of suspected contraband that had been on deck," and Coast Guard personnel subsequently retrieved "several jettisoned bales in the surrounding waters that matched the appearance and size of the bales seen thrown from the [*Jossette*], which tested positive for marijuana." (Doc. 4-1 ¶¶ 5, 8 [A-36-37].) As the United States acknowledged at sentencing, however, the Coast Guard also performed an ion scan to "test[] for illicit substances onboard the vessel," which tested negative for marijuana. (Doc. 4-11 at 23:23-24:4 [A-124-125].)

On December 13, 2017, the United States filed an Information, which charged each of the Petitioners with "knowingly and intentionally provid[ing] materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination," in violation of 18 U.S.C. § 2237(a)(2)(B). (Doc. 4-2 [A-40].) According to the Information, "while on board a vessel subject to the jurisdiction of the United States, . . . the defendants represented to a Coast Guard officer that the vessel's destination was the waters near Jamaica, when in truth and in fact, and as the defendants then and there well knew, the vessel's destination was Haiti." (*Id.*) Unlike the charges initially filed against Petitioners in the Criminal Complaint, section 2237(a)(2)(B) is not part of the MDLEA, and it was not enacted with the expressed purpose of criminalizing conduct that relates to or facilitates drug trafficking.

Petitioners entered into substantively similar plea agreements with the United States in which they agreed to plead guilty to the sole count of the Information. (Doc. 4-3 [A-54-59]; Doc. 4-5 [A-64-69]; Doc. 4-7 [A-74-79].) Additionally, before they entered their guilty pleas, each of the Petitioners and the United States signed substantively similar factual proffers setting forth the factual bases for their pleas. (Doc. 4-4 [A-61-62]; Doc. 4-6 [A-71-72].) According to the proffers, Petitioners and the United States agreed that "[i]f this matter proceeded to

trial the Government would have proved beyond a reasonable doubt" certain facts, including the following:

- On September 14, 2017, the Coast Guard spotted "a vessel [the *Jossette*] speeding towards Haiti[] from the direction of Jamaica";
- The Coast Guard stopped the vessel "in international waters near Haiti";
- During the boarding process, one unnamed individual "claimed that the vessel was Jamaican and that the vessel was registered in Jamaica";
- "Jamaica was contacted," and "Jamaica confirmed the registration of the vessel, but authorized the United States to board and search the vessel";
- "Jamaica also later waived jurisdiction over the vessel," making "the vessel . . . subject to the jurisdiction of the United States"; and
- "When asked about the destination of the vessel, each of the members of the crew, including the defendant, told the United States Coast Guard boarding officers that the vessel's destination was the waters near the coast of Jamaica, where they intended to fish. This was not true. As the crew members, including the defendant, then and there well knew, the vessel's true destination was Haiti."

(Doc. 4-4 [A-61-62] (Factual Proffer for Robert Weir); Doc. 4-6 [A-71-72] (Factual Proffer for David Williams).)

On January 3, 2018, Petitioners Weir and Williams pled guilty pursuant to their plea agreements. (Doc. 4-11 at 20:9-21:4 [A-121-122].) During their plea allocutions, the District Court confirmed that Petitioners signed their proffers, had a full opportunity to review the proffers with their attorneys, and agreed with the facts contained in the proffers. (Doc. 4-11 at 19:4-20:8 [A-120-121].) During the

hearing, the United States admitted that the Coast Guard found no drugs onboard the *Jossette* and that ion scans confirmed the absence of any indication that marijuana had ever been onboard the vessel or on its crew members. (Doc. 4-11 at 23:8-24:7 [A-124-125].) The United States also admitted that, although marijuana was found one mile from the *Jossette*, "it would have required a miracle" to prove that the marijuana recovered had been onboard the *Jossette*, one which the United States admitted it "could not have pulled off." (Doc. 4-11 at 24:4-7 [A-125].[2])

Petitioners were each sentenced to ten months' imprisonment and one-year of supervised release. (Doc. 4-8, 4-9, 4-10 [A-81-100].) They were released from custody on July 13, 2018, and subsequently removed from the United States to Jamaica on August 30, 2018. Under the terms of their respective judgments, Petitioners are not permitted to "reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security." (Doc. 4-8 [A-84]; Doc. 4-9 [A-91]; Doc. 4-10 [A-98].) Additionally, under their orders of removal, Petitioners are prohibited from entering the United States "[a]t any time"

[2] The docket does not contain a Factual Proffer signed by Petitioner Patterson or a transcript for Mr. Patterson's sentencing, but Mr. Patterson recalls signing a document that is substantively similar to the proffers on the docket and attending a hearing in which he entered a plea of guilty to one count of 18 U.S.C. § 2237(a)(2)(B).

because they "have been convicted of a crime designated as an aggravated felony." (*See* Doc. 16-2 [A-173].[3])

II. Procedural History

On August 15, 2019, Petitioners filed a Petition for Issuance of Writs of Error Coram Nobis Vacating Convictions and Incorporated Memorandum of Facts and Law in Support. (*See* Doc. 1 [A-5-28].) In the petition, Petitioners raised three grounds for relief. They argued that their convictions violated the Due Process Clause because their crime of conviction—making a false statement about their destination during a boarding—is not contrary to the laws of all reasonably developed legal systems. (*Id.* [A-26].) They also raised two independent challenges under the High Seas Clause. First, Petitioners argued that, under existing precedent, their convictions violated the High Seas Clause because Congress lacks the authority to criminalize the extraterritorial making of false statements about a vessel's destination and, therefore, the United States lacked jurisdiction to prosecute Petitioners. (*Id.* [A-15-21].) Second, although foreclosed by existing precedent, Petitioners also argued that their convictions separately violated the High Seas Clause because, under the original understanding of the Clause, their

[3] Although the "Notice to Alien Ordered Removed/Departure Verification" in the record relates to co-defendant George Thompson, not Petitioners, Petitioners were all convicted of the same offense as Mr. Thompson and are subject to the same ban.

conduct must have a nexus to the United States, which is lacking here. They also demonstrated that their arguments are jurisdictional and, therefore, not waivable or subject to procedural default and that they are suffering from ongoing, collateral consequences from their convictions such that coram nobis relief is available to them. (*Id.* [A-21-26].)

The United States opposed on procedural and substantive grounds. (*See* Doc. 15 [A-137-155].) In support of its substantive argument, the United States annexed to its opposition a declaration from the Coast Guard, dated November 3, 2017, that was not part of the criminal record when Petitioners pled guilty and that had not previously been provided to Petitioners. (*See* Doc. 15-1 [A-156-158].) According to the declaration, "[o]n September 14, 2017, the Government of Jamaica confirmed the vessel's registration and authorized United States law enforcement to board and search the vessel." (Doc. 15-1 ¶ 4(c) [A-156].) Then, "[o]n October 9, 2017, the Government of Jamaica consented to the exercise of jurisdiction by the United States," which led the United States to conclude that the *Jossette* was "subject to the jurisdiction of the United States." (Doc. 15-1 ¶ 4(e)-(f) [A-158].)

On January 30, 2020, the District Court entered an Order denying the petition. (*See* Doc. 17 [A-174-194].) On the procedural grounds raised in the United States' opposition, the District Court ruled in Petitioners' favor, holding that "[t]he Petition is timely and the claims are cognizable." (Doc. 17 at 6 [A-

179].) The District Court refused to "read [a one-year] statute of limitations into Petitioners' claim for coram nobis relief," and reached the merits of Petitioners' claims notwithstanding their failure to challenge their convictions on similar grounds as part of a direct appeal because "Petitioners' constitutional challenges to § 2237(a)(2)(B) are jurisdictional and not waivable." (*Id.*; *see also* Doc. 17 at 7 [A-180] ("Here, Petitioners challenge the constitutionality of the federal statute 18 U.S.C. § 2237(a)(2)(B) that served as the basis for their convictions. Thus, Petitioners' claim is jurisdictional and they need not 'show cause' to justify their failure to raise these claims in their trial proceedings or on direct appeal.").) The District Court also held that Petitioners showed they were suffering from the type of present harms necessary to obtain coram nobis relief because "[t]he immigration effects of [their] convictions are more than incidental" and are "serious collateral consequences of pleading guilty." (Doc. 17 at 9 [A-182].)

On the merits, however, the District Court ruled against Petitioners. Although the District Court did not identify any other nation that criminalizes the making of false statements about a vessel's destination during a boarding, it nevertheless rejected Petitioners' Due Process Clause claim because it determined that their convictions were fundamentally fair. (Doc. 17 at 19-21 [A-192-194].) The District Court also denied Petitioners' first High Seas Clause claim, holding that it had jurisdiction over Petitioners' prosecution under the territorial, protective,

and universal principles of jurisdiction. The District Court did not address Petitioners' second High Seas Clause claim because, as Petitioners acknowledged, it is foreclosed by binding precedent. (Doc. 17 at 10-19 [A183-192].) On March 26, 2020, Petitioners timely filed a notice of appeal. (*See* Doc. 18 [A-195].)

SUMMARY OF THE ARGUMENT

I. In *United States v. Gonzalez*, 776 F.2d 931, 940-41 (11th Cir. 1985), this Court held that a drug statute could be applied extraterritorially to a foreign national consistent with the Due Process Clause because the statute criminalized "conduct which is contrary to laws of all reasonably developed legal systems." The Court reiterated this holding three times since deciding *Gonzalez* in 1985. Here, there is no dispute that, unlike the drug statutes at issue in *Gonzalez* and its progeny, the statute under which Petitioners were convicted, 18 U.S.C. § 2237(a)(2)(B), is *not* a drug statute and Petitioners' crime of conviction—making a false statement about a vessel's destination during a boarding—is *not* contrary to the laws of all reasonably developed legal systems. Nevertheless, the District Court refused to apply *Gonzalez* and its progeny to Petitioners' claim, reasoning that those cases are "inapposite." The District Court's refusal was reversible error. *Gonzalez* and its progeny are directly on point and compel the conclusion that Petitioners' convictions violate the Due Process Clause.

The District Court further erred by adopting decisions from the First and Third Circuits as persuasive and ruling that Jamaica's alleged consent giving the United States permission to board the *Jossette* and to search and seize any illicit substances that officers found on board, cured any due process violation. This Court rejected the District Court's consent rationale in *Gonzalez*. Resort to out-of-circuit authority was unnecessary and improper. In any event, the District Court misinterpreted the cases it cited from the First and Third Circuits. Those cases both held that consent from a foreign nation supported a finding that drug prosecutions under the MDLEA did not violate the Due Process Clause. But, in both cases, the nature of the crime—specifically, the fact that many other nations criminalized the same conduct—served as the courts' main rationale. Because Petitioners' crime of conviction is not universally condemned by reasonably developed nations, Jamaica's consent, standing alone, cannot satisfy the limitations imposed by the Due Process Clause.

II.A. The United States also lacked jurisdiction to prosecute Petitioners for engaging in extraterritorial conduct under this Court's existing precedent interpreting the High Seas Clause. That precedent requires that the United States can only criminalize extraterritorial conduct where it would be consistent with a principle of extraterritorial jurisdiction recognized by customary international law, which is lacking here. The District Court erred by holding that Petitioners'

prosecution was justified by the so-called territorial, protective, and universal principles of extraterritorial jurisdiction. Under the District Court's application of the territorial principle, the United States obtained the constitutional authority to prosecute Petitioners because Jamaica allegedly consented to the United States exercising jurisdiction over the *Jossette* and its crew members. When previously ruling on the constitutionality of a U.S. law that purportedly sought to criminalize conduct that occurred within the territorial waters of Panama, this Court rejected Panama's consent to the United States' prosecution of its nationals to justify that exercise of U.S criminal jurisdiction. The same rationale applies here, to the United States' purported exercise of jurisdiction to criminalize and prosecute Petitioners' conduct occurring on a Jamaican-flagged vessel in international waters based on Jamaica's consent. The District Court erred by holding that Jamaica's consent, standing alone, gave the United States jurisdiction to prosecute Petitioners.

The District Court also erred by relying on the protective and universal principles to justify the United States' prosecution of Petitioners. Although this Court has previously upheld the constitutionality of drug-trafficking crimes criminalized under the MDLEA and similar statutes, Petitioners were not convicted of any MDLEA- or drug-offense. Indeed their crime of conviction has no connection whatsoever to drug trafficking or laws criminalizing drug trafficking. Unlike the case the Court relied on, which upheld the constitutionality of a

different statute because, when enacting that statute, Congress expressly found that the criminalized conduct facilitated drug trafficking, there has been no congressional finding that Petitioners' crime of conviction similarly facilitates drug trafficking.

II.B. Although foreclosed by this Court's precedent, Petitioners' convictions separately violate the High Seas Clause. Contrary to the Court's prior holdings, Congress is limited in its ability to define and punish felonies on the high seas to situations where the criminal conduct proscribed has a demonstrable nexus to the United States. But this Court's prior precedent is contrary to the original understanding of the Define and Punish Clause's three distinct grants of power and should be overruled. Without the nexus requirement originally understood to constrain Congress's powers under the High Seas Clause, the separate and distinct Piracies Clause is rendered redundant. Congress has no need to define and punish the act of piracy—which does *not* require a nexus to the United States—because it can simply act under the more expansive High Seas Clause. The High Seas Clause's nexus requirement gives both clauses separate and independent meaning, consistent with founding era practice.

STANDARD OF REVIEW

This Court reviews "[a] district court's denial of coram nobis relief . . . for abuse of discretion." *Peter*, 310 F.3d at 711. "[A]n error of law is an abuse of discretion per se." *Id.*

ARGUMENT

I. Petitioners' Convictions Violate the Due Process Clause

Petitioners' due process claim is based on binding precedent. As this Court has consistently held, for a statute to be extended extraterritorially to a foreign national consistent with the Due Process Clause, it must criminalize "conduct which is contrary to laws of all reasonably developed legal systems." *Gonzalez*, 776 F.2d at 940-41; *see also United States v. Cabezas-Montano*, 949 F.3d 567, 587 (11th Cir. 2020) (statute criminalizing drug trafficking on the high seas did *not* violate the Due Process Clause because the statute "provides clear notice that *all nations* prohibit and condemn drug trafficking aboard stateless vessels on the high seas") (emphasis added); *United States v. Campbell*, 743 F.3d 802, 812 (11th Cir. 2014); *United States v. Rendon*, 354 F.3d 1320, 1326 (11th Cir. 2003). It is undisputed that Petitioners were convicted of a crime that is *not* contrary to the laws of all reasonably developed legal systems. Petitioners are aware of no other nation that criminalizes the making of a false statement about a vessel's destination during a boarding, and neither the United States nor the District Court identified

any such nation. Under *Gonzalez*, *Cabezas-Montano*, *Campbell*, and *Rendon*, this renders Petitioners' convictions unconstitutional.

In denying Petitioners' due process claim, the District Court narrowly construed the claim as "based on a lack of notice" and held that *Campbell* and *Gonzalez* were "inapposite" because those cases only applied to claims based "on a nexus requirement or vagueness." (Doc. 17 at 19-20 [A-192-193].[4]) Accordingly, the District Court refused to apply *Gonzalez*, *Cabezas-Montano*, *Campbell*, and *Rendon*. Instead, the court held, "due process requires only that an exercise of extraterritorial jurisdiction not be arbitrary or fundamentally unfair." (Doc. 17 at 20 [A-193] (quoting *United States v. Baston*, 818 F.3d 651, 669 (11th Cir. 2016)).) According to the District Court, this standard was satisfied because of "[c]ompliance with international law," which, the District Court determined, "puts a defendant on notice that he could be subjected to the jurisdiction of the United States." (*Id.*) Additionally, the District Court found decisions from the First and Third Circuits "persuasive," and held that, under its interpretation of those decisions, "there is no due process violation" because "Jamaica expressly consented to the boarding and searching of the *Jossette* and waived jurisdiction." (Doc. 17 at 21 [A-194].)

[4] The District Court did not discuss *Rendon*. *Cabezas-Montano* was decided the same day the court issued its order denying the petition.

The District Court erred in its narrow interpretation of the rule established in *Gonzalez* and reiterated three times since in *Cabezas-Montano*, *Campbell*, and *Rendon*. Contrary to the District Court's holding, this Court has never limited application of *Gonzalez* and its progeny to arguments based on a nexus requirement or vagueness. Quite the opposite. In those cases, this Court *rejected* due process arguments based on a nexus requirement (*Campbell*) and vagueness (*Gonzalez*) because those standards do *not* apply in this context. Instead, the proper question to ask to resolve challenges under the Due Process Clause brought by foreign nationals charged with engaging in extraterritorial activity is whether the statute criminalizes conduct that "all nations prohibit and condemn," not whether a statute has a nexus requirement or is vague (as the defendants argued in *Campbell* and *Gonzalez*). *Campbell*, 743 F.3d at 812.

An actual examination of *Campbell* and *Gonzalez* reveals the error in the District Court's analysis because, contrary to the District Court's rationale, both decisions resolved due process claims by relying on the notice provided to foreign nationals through other nations criminalizing similar conduct. In *Campbell*, for example, this Court found that the statute at issue did not violate the Due Process Clause because it "provide[d] *clear notice* that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas." 743 F.3d at 812 (emphasis added). The reverse is also true. A statute that does *not* provide the same

clear notice violates the Due Process Clause. *See Id.*; *see also Cabezas-Montano*, 949 F.3d at 587 ("[T]his Court has held that the Fifth Amendment's Due Process Clause does not prohibit the trial and conviction of aliens captured on the high seas while drug trafficking because the MDLEA provides *clear notice* that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas.") (emphasis added); *see also Gonzalez*, 776 F.3d at 940-41 (no due process violation where statute "provided *clear notice* of what conduct is forbidden," and that "conduct . . . is contrary to laws of all reasonably developed legal systems") (emphasis added); *Rendon*, 354 F.3d at 1326 ("[T]here was no due process violation when predecessor statute provided *clear notice* that drug trafficking aboard vessels was prohibited and conduct prohibited was condemned by all nations.") (emphasis added). Unlike in those cases, Petitioners' conduct—making a false statement about their destination during a boarding—is not prohibited and condemned by all nations. Petitioners did not receive the clear notice mandated by this Court, and their convictions violate the Due Process Clause.

The District Court compounded its error by rejecting Petitioners' due process claim, in part, based on its determination that they actually *had* received "notice that [they] could be subjected to the jurisdiction of the United States" because their convictions "[c]ompli[ed] with international law." (Doc. 17 at 20 [A-193].) *Gonzalez*, *Cabezas-Montano*, *Campbell*, and *Rendon* directly speak to how

foreign nationals receive constitutionally mandated notice that extraterritorial conduct might violate federal law. They receive that notice because all reasonably developed nations criminalize the same conduct, which alerts foreign nationals to the fact that they might be subject to prosecution in the United States even when engaging in such conduct outside of the United States. When all reasonably developed nations do *not* criminalize the same conduct, foreign nationals have no reason to know that they "could be subjected to the jurisdiction of the United States" when engaging in that conduct outside the United States. (*Id.*) Indeed, the District Court did not elaborate on which international law Petitioners' conviction allegedly complied with, and it is difficult to understand which law that might be because, so far as Petitioners are aware, no other nation criminalizes making a false statement about a vessel's destination during a boarding. Petitioners had no reason to know they were subjecting themselves to jurisdiction in the United States when they made statements to the Coast Guard while on board a Jamaican-flagged vessel stopped in international waters off the coast of Haiti. It is fundamentally unfair to convict them of violating United States law for making a false statement under these circumstances.

The District Court's due process analysis cannot be saved by relying on Jamaica's consent and the application of nonbinding cases from the First and Third Circuits. (*See* Doc. 17 at 20-21 [A-193-194] (citing *United States v. Cardales*, 168

F.3d 548, 554 (1st Cir. 1999); *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002)).) The fact that the First and Third Circuits have supposedly relied on "consent" from "the flag nation" alone to reject due process arguments (*Id.*) should not result in the denial of Petitioners' due process claim because, even assuming that is the law in those circuits, it is not the law in this Circuit. *See United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011) ("We are bound by prior panel decisions unless or until we overrule them while sitting *en banc*, or they are overruled by the Supreme Court."). This Court confronted the issue of a flag-nation's consent in *Gonzalez*. There, Honduran nationals were convicted of trafficking marijuana, and they challenged their convictions under the Due Process Clause because they were caught while on the high seas. This Court denied the defendants' due process claims because "[b]oth the offense and the intent of the United States are clear." 776 F.2d at 941. According to the Court, "[t]hose embarking on voyages with holds laden with illicit narcotics, conduct which is contrary to laws of all reasonably developed legal systems, do so with the awareness of the risk that their government may consent to enforcement of the United States' laws against the vessel." *Id.* And, the Court held, "[d]ue process does not require that a person who violates the law of all reasonable nations be excused on the basis that his own nation might have requested that he not be prosecuted by a foreign sovereign." *Id.* (emphasis omitted). In *Gonzalez*, it was the

nature of the crime—that it was "contrary to laws of all reasonably developed legal systems"—not Honduras' consent, that rendered the convictions constitutional. Thus, Jamaica's consent on its own is not enough to sustain Petitioners' convictions. The conduct at issue must also be contrary to laws of all reasonably developed legal systems. Petitioners' conduct does not satisfy that standard.

In any event, the District Court erred in interpreting *Perez-Oviedo* and *Cardales* because, even under those cases, the flag-nation's consent, on its own, did not render the challenged convictions constitutional. In *Perez-Oviedo*, the Third Circuit relied on Panama's consent, not as its main holding, but only to further support its conclusion that there was no due process violation. *See* 281 F.3d at 403 ("Perez-Oviedo's state of facts presents an even stronger case for concluding that no due process violation occurred [because t]he Panamanian government expressly consented to the application of the MDLEA."). For its main holding, the court relied on its prior determination that, "[s]ince drug trafficking is condemned universally by law-abiding nations, . . . there was no reason for us to conclude that it is fundamentally unfair for Congress to provide for the punishment of a person apprehended with narcotics on the high seas." *Id.* (internal quotation marks omitted).[5] Similarly, in *Cardales*, the First Circuit relied on Venezuela's

[5] The district court's conclusion that Petitioners' convictions are fundamentally fair even absent universal condemnation of the crime of conviction conflicts with *Perez-Oviedo*. *Compare* (Doc. No. 17 at 21) *with Perez-Oviedo*, 281 F.3d at 403.

consent *and* on its conclusion that "Congress has determined that all drug trafficking aboard vessels threatens our nation's security." 168 F.3d at 553. Thus, the court held, "*when individuals engage in drug trafficking aboard a vessel*, due process is satisfied when the foreign nation in which the vessel is registered authorizes the application of United States law to the persons on board the vessel." *Id.* (emphasis added). Petitioners were not engaged in drug trafficking nor were they engaged in any other offense that is condemned by all reasonably developed legal systems. Neither *Perez-Oviedo* nor *Cardales* supports a determination that, Jamaica's consent to allow the Coast Guard to board and search the *Jossette*, on its own, cured any potential due process violation arising from Petitioners' convictions of a crime penalized, as far as Petitioners are aware and as the United States has never refuted, in the United States and the United States alone.

Finally, the District Court erred in its determination that Petitioners did *not* raise a lack of nexus to the United States as part of their due process claim. Petitioners expressly argued that their convictions violate the Due Process Clause because they "had no notice that they would be putting themselves in jeopardy in the United States when they told the Coast Guard the *Jossette*'s 'destination was the waters near the coast of Jamaica' after the Coast Guard intercepted the *Jossette* in international waters while it was traveling towards Haiti." (Doc. 1 at 21 [A-26].) This argument is premised on Petitioners' lack of connection to the United States

and the resulting lack of notice they had as to the potential criminal ramifications of responding to the Coast Guard's questions. In opposition, the United States did not argue that *Gonzalez* and its progeny did *not* apply to Petitioners' claim; it did not address those cases at all. (*See* Doc. 15 at 17-18 [A-153-154].) And, in replying to the United States' opposition, Petitioners reiterated their lack of connection to the United States, arguing that they "lack[ed] any connection with the United States whatsoever apart from the fact that Coast Guard officers intercepted them on the high seas while they were traveling from Jamaica towards Haiti." (Doc. 16 at 7 [A-166].) If Petitioners were required to raise an argument based on a lack of nexus to the United States to obtain the benefit of *Gonzalez*, *Cabezas-Montano*, *Campbell*, and *Rendon*, they satisfied that burden.

II. Petitioners' Convictions Violate the High Seas Clause

Petitioners' convictions also separately violate the High Seas Clause for two distinct reasons. First, although existing Eleventh Circuit precedent rejects the argument that the High Seas Clause imposes on the United States an obligation to demonstrate a nexus between the charged conduct and the United States, this Court has consistently recognized that extraterritorial application of United States law must be supported by a principle of extraterritorial jurisdiction recognized by customary international law. The District Court erred by holding that the so-called

territorial, protective, and universal principles authorized Congress to criminalize Petitioners' conduct and to prosecute and convict them for it.

Second, although Congress did not specify the constitutional power it was invoking when it enacted section 2237(a)(2)(B), presumably it was relying on the High Seas Clause of the Define and Punish Clause. The Define and Punish Clause grants Congress authority to criminalize three separate and distinct categories of conduct: (i) piracy; (ii) felonies committed on the high seas; and (iii) offenses against the law of nations. U.S. Const., Art. I, § 8, cl. 10. Each of the three categories incorporates limitations on Congress's authority to define and punish these crimes, and, although foreclosed by existing precedent, the original understanding of the High Seas Clause shows that the Framers intended to limit Congress's authority to define and punish felonies committed on the high seas by requiring that Congress only exercise that authority when the defined "felonies" have a nexus to the United States. Because Petitioners' conduct had no such nexus, their convictions are unconstitutional.

A. Petitioners' Convictions are Unconstitutional Under Existing Precedent Interpreting the Extraterritorial Reach of United States Law

The "Define and Punish" Clause gives Congress authority "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. Const., Art. I, § 8, cl. 10. Although the Eleventh Circuit has

rejected arguments that Congress's authority to define and punish felonies committed on the high seas is limited to those instances where the conduct being punished has a nexus to the United States, it has consistently held that the extraterritorial application of United States law still must be supported by a principle of extraterritorial jurisdiction recognized by customary international law. *See Campbell*, 743 F.3d at 809-12; *United States v. Saac*, 632 F.3d 1203, 1210 (11th Cir. 2011); *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006). Thus, the Eleventh Circuit has held that "international law generally prohibits any country from asserting jurisdiction over foreign vessels on the high seas" unless that country can demonstrate the existence of an internationally recognized basis for the exercise of extraterritorial jurisdiction. *See United States v. Marino-Garcia*, 679 F.2d 1373, 1380-82 (11th Cir. 1982); *see also Campbell*, 743 F.3d at 809-10. The District Court held that the territorial, protective, and universal principles supported Petitioners' convictions, but none of those bases for the exercise of jurisdiction apply to Petitioners. Because the United States lacked jurisdiction to criminalize Petitioners' conduct and prosecute them for it, the District Court should have set aside or vacated their convictions.

1. The Territorial Principle Does Not Apply to Petitioners

Under the so-called territorial principle, the United States "has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent

provided by international agreement with the other state." *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1379 n.6 (11th Cir. 2011). This Court has never held that the limits placed on Congress by the Define and Punish Clause can be overcome merely by relying on the consent of a foreign nation. It held the exact opposite the one time it was presented with this question. In *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012), the Court held that Congress could not criminalize drug trafficking in the territorial waters of Panama because the Define and Punish Clause (specifically, the Offences Clause) did not authorize Congress to criminalize that conduct in foreign territories. According to a majority of the Court, it made no difference that Panama had consented to the prosecution because "Congress exceeded its power, under the Offences Clause, when it proscribed the defendants' conduct in the territorial waters of Panama." *Id.* at 1258.

The District Court refused to apply *Bellaizac-Hurtado*, holding that the case was "inapposite" because it involved the Offences Clause, not the High Seas Clause. (Doc. 17 at 15 [A-188].) But that distinction would not have altered this Court's decision in *Bellaizac-Hurtado* and, if left undisturbed, the District Court's analysis would render that decision a nullity. If, as the District Court held, consent alone justifies extraterritorial application of United States law under the territorial principle, then this Court never would have reached the question of whether drug trafficking could be criminalized under the Offences Clause because Panama's

consent would have ended the inquiry and resort to the authority conferred by the Offences Clause would have been unnecessary. In the District Court's view, regardless of whether a federal crime (such as the drug trafficking at issue in *Bellaizac-Hurtado*) occurred in the territorial waters of Panama, in the mountains of Bolivia, or on a foreign-flagged vessel off the coast of Haiti, once the foreign nation consents, the United States has jurisdiction to prosecute *any* federal crime covered by the consent. *Bellaizac-Hurtado* rejected that outcome, holding that the limits imposed on Congress in the Offences Clause could not be overcome by the consent of a foreign sovereign alone. This Court should apply the same rule to the High Seas Clause.[6]

In short, the Government's proposed rule would eviscerate any limits imposed on Congress by the Define and Punish Clause. As Judge Barkett made clear in her special concurrence in *Bellaizac-Hurtado*, "[t]he government's argument that . . . authority [to proscribe conduct under Article I, Section 8, Clause 10 of the Constitution] can be supplied by another nation's consent to United States jurisdiction is without merit." *Id.* at 1262 (Barkett, J., concurring); *see also*

[6] The fact that the Court noted in *Bellaizac-Hurtado* that it has "always upheld extraterritorial convictions *under our drug trafficking laws* as an exercise of power under the [High Seas] Clause," 700 F.3d at 1257 (emphasis added), says nothing about the issue presented here—whether the false statement crime of conviction is a valid exercise of power under the High Seas Clause. Petitioners' crime of conviction has nothing to do with drug trafficking.

United States v. Cardales-Luna, 632 F.3d 731, 741 (1st Cir. 2011) (Torruella, J., dissenting) (rejecting argument that Congress could prosecute "the conduct of Colombian nationals in Bolivia traveling over its mountain roads carrying a load of coca leaves destined for Peru . . . with the consent of Bolivia" because "Bolivia cannot grant Congress powers beyond those allotted to it by the Constitution"). Petitioners respectfully submit that the views expressed by Judge Barkett and Judge Torruella are consistent with *Bellaizac-Hurtado*'s interpretation of the Offences Clause and should apply equally to the High Seas Clause.

Regardless of whether a foreign nation's consent on its own can generally satisfy the limits imposed on Congress by the High Seas Clause, the record before the District Court when it accepted Petitioners' guilty plea is still not supported by the territorial principle of jurisdiction because there is no properly considered evidence to support a finding that Jamaica consented to Petitioners' prosecution. Thus, even if Jamaica's consent *could* establish jurisdiction, the United States never obtained jurisdiction over Petitioners on that basis. Instead of relying on the record before the District Court when it accepted Petitioners' guilty plea, the United States relied on an extrajudicial declaration setting forth new facts not previously disclosed to the court or Petitioners. (*See* Doc. 15-1 [A-156-158].) The declaration states that, "[o]n October 9, 2017, the Government of Jamaica consented to the exercise of jurisdiction by the United States." (Doc. 15-1 ¶ 4(e)

[A-158].) This is contrary to the record before the court at the time Petitioners' pled guilty. The Information only charges that Petitioners were "on board a vessel subject to the jurisdiction of the United States" (Doc. 4-2 [A-40]), and in their Factual Proffers, Petitioners and the Government agreed that "Jamaica . . . waived jurisdiction over the vessel" (Doc. 4-4 [A-61]; Doc. 4-6 [A-71]). The United States did *not* charge and Petitioners did *not* admit that Jamaica consented to application of United States law. The District Court erred by allowing the Government's post-conviction alteration of its charging document and the agreed upon factual basis for Petitioners' guilty pleas. *See Peter*, 310 F.3d at 715 (granting petition for issuance of writ of coram nobis where "the Government affirmatively alleged a specific course of conduct that is outside the reach of the [charged] statute").

Even if it were proper for the District Court to consider the United States extrajudicial declaration, the declaration itself contradicts the determination that Petitioners were subject to the jurisdiction of the United States when they made their statements to the Coast Guard on September 14, 2017, as required by the statute. *See* 18 U.S.C. § 2237(a)(2)(B). According to the United States' new argument, Petitioners were subject to *Jamaica's* jurisdiction until October 9, 2017, when Jamaica consented to the United States exercising jurisdiction over Petitioners. (Doc. 15-1 ¶ 4(e) [A-158].) Given this admission, the District Court clearly erred by finding that the United States had jurisdiction to prosecute

Petitioners for the making of an allegedly false statement on September 14, 2017 based on consent the United States would not receive for another 25 days.[7]

2. The Protective and Universal Principles Do Not Apply to Petitioners

The District Court also erred in holding that the protective and universal principles of jurisdiction apply to Petitioners. Under the protective principle of jurisdiction, states may "assert jurisdiction over foreign vessels on the high seas that threaten their security or governmental functions." *Marino-Garcia*, 679 F.2d at 1381. Universal jurisdiction authorizes a state to criminalize only a limited subset of universally proscribed conduct "such as the slave trade or piracy." *Id.* at 1381-82. Petitioners' crime of conviction does not threaten the United States' security or governmental functions nor is it universally condemned. Accordingly, neither the protective nor universal principles of jurisdiction apply.

The District Court did not hold otherwise. It did not hold that the protective or universal principles of jurisdiction applied to false statement crimes. Instead, it upheld the exercise of jurisdiction over Petitioners because, according to the District Court, the protective and universal principles authorize "the

[7] The District Court's attempt to excuse its reliance on the extrajudicial facts because Petitioners stipulated "that the *Jossette* was 'subject to the jurisdiction of the United States,'" (Doc. No. 17 at 14 n.6 [A-187]), should be rejected. It is well settled that jurisdiction is not waivable and "cannot be created by the consent of the parties." *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1261 (11th Cir. 2000); *see also Peter*, 310 F.3d at 712.

criminalization of the means of *facilitating* [high seas narcotics] trafficking." (Doc. 17 at 17 [A-190].) In holding that this rationale applied to Petitioners, the District Court analogized section 2237(a)(2)(B) to the Drug Trafficking Vessel Interdiction Act of 2008, which this Court previously upheld under the universal and protective principles based on "*Congress's findings* show[ing] that the [Act] targets criminal conduct that *facilitates drug trafficking*." *Saac*, 632 F.3d at 1210-11 (emphasis added) (quoting congressional finding that the Act criminalized conduct that "facilitates transnational crime, including drug trafficking"). Congress made no similar finding when it enacted section 2237(a)(2)(B) and there otherwise is no indication that Congress determined that making a false statement about a vessel's destination facilitates drug trafficking. *See* H.R. Conf. Rep. 109-333, at *103 (Dec. 8, 2005) (stating that section 2237 was enacted because, although "the Coast Guard has authority to use whatever force is reasonably necessary to require a vessel to stop or be boarded, 'refusal to stop,' by itself, is not currently a crime"). The link to drug trafficking required by *Saac* cannot be supplied by the mere fact that "§ 2237 incorporates the MDLEA's definitions of 'vessel subject to the jurisdiction of the United States' and 'vessel of the United States.'" (Doc. 17 at 18 [A-191].) Neither of those definitions relate to drug trafficking, nor are they a substitute for a congressional finding that a particular crime actually facilitates drug trafficking.

B. Petitioners' Convictions Violate the Original Understanding of the Define and Punish Clause[8]

The Define and Punish Clause "contain[s] three distinct grants of power": (1) "the power to define and punish piracies" ("Piracies Clause"); (2) "the power to define and punish felonies committed on the high seas" ("High Seas Clause"); and (3) "the power to define and punish offenses against the law of nations" ("Offences Clause"). *Bellaizac-Hurtado*, 700 F.3d at 1248 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-59 (1820)). Because the Clauses are distinct, they should be interpreted in such a way as to give each of them an independent effect—*i.e.*, an effect that grants Congress a non-redundant power to define and punish specific conduct not covered by the others. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect."). Making a false statement to a federal officer is not an act of piracy, *see Bellaizac-Hurtado*, 700 F.3d at 1248 ("piracy is, by definition, robbery on the high seas"), nor is it an offense against the law of nations, *see id.* at 1251 ("the 'law of nations' . . . means customary international law"). To justify the constitutionality of Petitioners' convictions, the United States must, therefore, rely

[8] Petitioners acknowledge that components of this argument are contrary to binding precedent. *See Saac*, 632 F.3d at 1209; *Estupinan*, 453 F.3d at 1338-39. They make this argument to preserve the issue for further appellate review.

on the High Seas Clause. But the original understanding of that Clause does not support Petitioners' convictions.

Few courts have explored the limits placed on Congress's ability to legislate pursuant to the High Seas Clause. And it is now assumed—in this Circuit at least—that the High Seas Clause gives Congress the power to criminalize conduct occurring on the high seas even in cases where there is no nexus between the crime, its perpetrators and victims, and the United States. *See Saac*, 632 F.3d at 1209 ("While there is a dearth of authority interpreting the scope of Congress's power under the High Seas Clause, early Supreme Court opinions intimate that statutes passed under the High Seas Clause may properly criminalize conduct that lacks a connection to the United States."). For the reasons that follow, this interpretation of the High Seas Clause is incorrect and contrary to the original understanding of the Clause's limitations. The power conferred by the High Seas Clause can only be exercised when the proscribed conduct has a nexus to the United States. Because there was no such nexus here, Petitioners' convictions are unconstitutional.

To properly understand the limits of the High Seas Clause, the Court should first consider Congress's power pursuant to the Piracies Clause. At the time of the founding, "[p]iracy was the only [universal jurisdiction] offense" commonly recognized in international law, meaning it was the only offense "that a nation

[could] prosecute . . . even though it [had] no connection to the conduct or participants." Eugene Kontorovich, "Beyond the Article I Horizon, Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes" ("Beyond the Article I Horizon"), 93 Minn. L. Rev. 1191, 1192, 1209 (2009); *see also Smith*, 18 U.S. (5 Wheat.) at 162 (recognizing the "general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [the] offense [of piracy] against any persons whatsoever"); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-60 (1795) ("[A]ll piracies and trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation."). Accordingly, pursuant to its authority under the Piracies Clause, Congress could define and punish acts of piracy even in cases where the acts had no nexus to the United States. *See United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820) (recognizing that piracy "is considered as an offence within the criminal jurisdiction of all nations" because "[i]t is against all, and punished by all"); *see also United States v. Dire*, 680 F.3d 446, 455 (4th Cir. 2012) (recognizing that "general piracy" punishable under the Piracies Clause "is created by international consensus" and is therefore "restricted in substance to those offenses that the international community agrees constitute piracy").

Congress's power under the Piracies Clause is not, however, unlimited. Piracy has a specific and commonly recognized definition—"robbery on the high

seas." *Bellaizac-Hurtado*, 700 F.3d at 1248; *see also Furlong*, 18 U.S. (5 Wheat.) at 196-97. Congress cannot simply define any offense—such as making a false statement to the Coast Guard—as an act of piracy punishable without regard to its nexus (or lack thereof) to the United States. *See Dire*, 680 F.3d at 455 (favorably discussing distinction drawn by District Court between "general piracy" punishable as a universal-jurisdiction offense under the Piracies Clause and "municipal piracy" punishable under the High Seas Clause, the latter of which "is flexible enough to cover virtually any overt act Congress chooses to dub piracy," but "is necessarily restricted to those acts that have a jurisdictional nexus with the United States"). The Supreme Court made this limiting principle on Congress's power clear in *Furlong*. The Court held that the United States could not punish murder "committed by a foreigner upon a foreigner in a foreign ship." *Furlong*, 18 U.S. (5 Wheat.) at 197. In so holding, the Court relied on the "well-known distinctions between the crimes of piracy and murder, both as to constituents and incidents." *Id.* at 196-97. According to the Court, murder, unlike the crime of piracy, "is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within [the] universal jurisdiction" of all nations. *Id.* at 197. Thus, the Court determined, "punishing [murder] when committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation, has not been acknowledged as a right, much less an obligation." *Id.* In other words, the

"felony" of murder was not a universal-jurisdiction offense and could not be punished in this country absent a demonstrable nexus to the United States. *See Bellaizac-Hurtado*, 700 F.3d at 1249 (citing *Furlong* for the proposition "that Congress may not define murder as 'piracy' to punish it under the Piracies Clause").

The distinction relied on in *Furlong* between piracy and murder should control the Court's interpretation of the Piracies and High Seas Clauses. Congress has the authority to define and punish an act of piracy without regard to whether the act has a nexus to the United States, and it has the separate and distinct authority to define and punish additional, non-piracy felonies committed on the high seas to the extent those felonies have a nexus to the United States. *See* Kontorovich, Beyond the Article I Horizon, 93 Minn. L. Rev. at 1251 ("In general, the Constitution does not empower Congress to legislate over foreigners in international waters or abroad. If Congress could do so, its powers would be unlimited."); *see generally Cardales-Luna*, 632 F.3d at 739-47 (Torruella, J., dissenting). This interpretation gives both the Piracies Clause and the High Seas Clause independent, non-redundant meanings. The Piracies Clause applies to a limited subset of "felonies" but is expansive in its territorial reach. The High Seas Clause, conversely, covers the broad spectrum of felonies defined by Congress, but

is limited by the nexus requirement, a requirement that does not constrain Congress when acting pursuant to the Piracies Clause.

Further, interpreting the High Seas Clause to incorporate a nexus requirement is consistent with founding-era practices implying such a limitation, which provides additional support for this interpretation. *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government . . . give meaning to the Constitution.") (internal quotation marks omitted); *see also NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014) (reiterating that "postfounding practice is entitled to 'great weight'" in interpreting the Constitution). Most notably, as detailed by Professor Eugene Kontorovich, "[i]n 1820 Congress went further than it or any other nation had ever gone before by declaring the slave trade a form of piracy punishable by death." Eugene Kontorovich, "The 'Define and Punish' Clause and the Limits of Universal Jurisdiction," 103 Nw. U. L. Rev. 149, 194 (2009). Although Congress "wanted to end the slave trade globally," it nevertheless cabined the reach of the statute to "only punish [the slave trade] to the extent that it had a demonstrable U.S. nexus." *Id.* Congress in 1820 recognized that its authority to criminalize conduct not traditionally understood to be piracy was limited. The fact that Congress did *not* extend its anti-slave trade statute to reach conduct regardless of its nexus to the United States is a strong indication that it perceived itself as lacking the authority under the Felonies Clause to do so. *See id.*

at 196 ("In short, only if the conduct were a universally cognizable offense in international law did the [House Committee on the Slave Trade] feel it could cast a universal net.").

Petitioners are foreign nationals. At the time the Coast Guard stopped them, they were lost on the high seas and the *Jossette* was heading towards Haiti.[9] The record is clear that Petitioners had no connection to the United States whatsoever. It is also clear that they were not engaged in an offense, like piracy or slave-trading, that can constitutionally be punished without such a nexus. Congress lacked the constitutional authority to criminalize Petitioners' statements to the Coast Guard, and this Court, therefore, lacked jurisdiction to prosecute and convict Petitioners of violating 18 U.S.C. § 2237(a)(2)(B).

[9] The fact that the *Jossette* was travelling towards Haiti at the time it was intercepted by the Coast Guard is demonstrably true. Although Petitioners pled guilty to making false statements, they did not know where the *Jossette* was heading at the time of their interaction because they had been blown off course in a storm and were lost. Regardless, Petitioners do not here challenge the factual basis for their pleas that they made materially false statements to the Coast Guard.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court vacate the District Court's Order denying their petition and remand with instructions to grant the petition.

Respectfully submitted,

May 5, 2020

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,679 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman.

/s/ Patrick N. Petrocelli
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CERTIFICATE OF SERVICE

I certify that on May 5, 2020, the foregoing Brief of Petitioners-Appellants was filed with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Patrick N. Petrocelli
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STATUTORY ADDENDUM

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United States Code Annotated
Constitution of the United States
Annotated
Article I. The Congress

U.S.C.A. Const. Art. I § 8, cl. 10

Section 8, Clause 10. Piracies and Felonies on the High Seas; Offenses Against the Law of Nations

Currentness

The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Notes of Decisions (30)

U.S.C.A. Const. Art. I § 8, cl. 10, USCA CONST Art. I § 8, cl. 10
Current through P.L. 116-138.

End of Document

SA-1

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V-Due Process

Amendment V. Due Process clause

Currentness

<Notes of Decisions for this clause are displayed in multiple documents. For text, historical notes, and references, see first document for Amendment V.>

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

Notes of Decisions (3162)

U.S.C.A. Const. Amend. V-Due Process, USCA CONST Amend. V-Due Process
Current through P.L. 116-138.

End of Document

SA-2

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 109. Searches and Seizures (Refs & Annos)

18 U.S.C.A. § 2237

§ 2237. Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information

Effective: October 15, 2010
Currentness

(a)(1) It shall be unlawful for the master, operator, or person in charge of a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to knowingly fail to obey an order by an authorized Federal law enforcement officer to heave to that vessel.

(2) It shall be unlawful for any person on board a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to--

(A) forcibly resist, oppose, prevent, impede, intimidate, or interfere with a boarding or other law enforcement action authorized by any Federal law or to resist a lawful arrest; or

(B) provide materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew.

(b)(1) Except as otherwise provided in this subsection, whoever knowingly violates subsection (a) shall be fined under this title or imprisoned for not more than 5 years, or both.

(2)(A) If the offense is one under paragraph (1) or (2)(A) of subsection (a) and has an aggravating factor set forth in subparagraph (B) of this paragraph, the offender shall be fined under this title or imprisoned for any term of years or life, or both.

(B) The aggravating factor referred to in subparagraph (A) is that the offense--

(i) results in death; or

(ii) involves--

(I) an attempt to kill;

(II) kidnapping or an attempt to kidnap; or

(III) an offense under section 2241.

(3) If the offense is one under paragraph (1) or (2)(A) of subsection (a) and results in serious bodily injury (as defined in section 1365), the offender shall be fined under this title or imprisoned for not more than 15 years, or both.

(4) If the offense is one under paragraph (1) or (2)(A) of subsection (a), involves knowing transportation under inhumane conditions, and is committed in the course of a violation of section 274 of the Immigration and Nationality Act, or chapter 77 or section 113 (other than under subsection (a)(4) or (a)(5) of such section) or 117 of this title, the offender shall be fined under this title or imprisoned for not more than 15 years, or both.

(c) This section does not limit the authority of a customs officer under section 581 of the Tariff Act of 1930 (19 U.S.C. 1581), or any other provision of law enforced or administered by the Secretary of the Treasury or the Secretary of Homeland Security, or the authority of any Federal law enforcement officer under any law of the United States, to order a vessel to stop or heave to.

(d) A foreign nation may consent or waive objection to the enforcement of United States law by the United States under this section by radio, telephone, or similar oral or electronic means. Consent or waiver may be proven by certification of the Secretary of State or the designee of the Secretary of State.

(e) In this section--

(1) the term "Federal law enforcement officer" has the meaning given the term in section 115(c);

(2) the term "heave to" means to cause a vessel to slow, come to a stop, or adjust its course or speed to account for the weather conditions and sea state to facilitate a law enforcement boarding;

(3) the term "vessel subject to the jurisdiction of the United States" has the meaning given the term in section 70502 of title 46;

(4) the term "vessel of the United States" has the meaning given the term in section 70502 of title 46; and

(5) the term "transportation under inhumane conditions" means--

(A) transportation--

(i) of one or more persons in an engine compartment, storage compartment, or other confined space;

(ii) at an excessive speed; or

(iii) of a number of persons in excess of the rated capacity of the vessel; or

(B) intentional grounding of a vessel in which persons are being transported.

CREDIT(S)

(Added Pub.L. 109-177, Title III, § 303(a), Mar. 9, 2006, 120 Stat. 233; amended Pub.L. 111-281, Title IX, § 917, Oct. 15, 2010, 124 Stat. 3021.)

Notes of Decisions (2)

18 U.S.C.A. § 2237, 18 USCA § 2237
Current through P.L. 116-138.

End of Document

United States Code Annotated
Title 46. Shipping (Refs & Annos)
Subtitle VII. Security and Drug Enforcement (Refs & Annos)
Chapter 705. Maritime Drug Law Enforcement

46 U.S.C.A. § 70502
Formerly cited as 46 App. USCA § 1903

§ 70502. Definitions

Effective: October 13, 2008
Currentness

(a) Application of other definitions.--The definitions in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) apply to this chapter.

(b) Vessel of the United States.--In this chapter, the term "vessel of the United States" means--

(1) a vessel documented under chapter 121 of this title or numbered as provided in chapter 123 of this title;

(2) a vessel owned in any part by an individual who is a citizen of the United States, the United States Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the United States or of a State, unless--

(A) the vessel has been granted the nationality of a foreign nation under article 5 of the 1958 Convention on the High Seas; and

(B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States who is authorized to enforce applicable provisions of United States law; and

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was sold to a person not a citizen of the United States, placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation.

(c) Vessel subject to the jurisdiction of the United States.--

(1) In general.--In this chapter, the term "vessel subject to the jurisdiction of the United States" includes--

(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel in the customs waters of the United States;

(E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and

(F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that--

(i) is entering the United States;

(ii) has departed the United States; or

(iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

(2) Consent or waiver of objection.--Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under paragraph (1)(C) or (E)--

(A) may be obtained by radio, telephone, or similar oral or electronic means; and

(B) is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(d) Vessel without nationality.--

(1) In general.--In this chapter, the term “vessel without nationality” includes--

(A) a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed;

(B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

(2) Response to claim of registry.--The response of a foreign nation to a claim of registry under paragraph (1)(A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(e) Claim of nationality or registry.--A claim of nationality or registry under this section includes only--

(1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas;

(2) flying its nation's ensign or flag; or

(3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.

(f) Semi-submersible vessel; submersible vessel.--In this chapter:

(1) Semi-submersible vessel.--The term "semi-submersible vessel" means any watercraft constructed or adapted to be capable of operating with most of its hull and bulk under the surface of the water, including both manned and unmanned watercraft.

(2) Submersible vessel.--The term "submersible vessel" means a vessel that is capable of operating completely below the surface of the water, including both manned and unmanned watercraft.

CREDIT(S)

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1685; Pub.L. 109-241, Title III, § 303, July 11, 2006, 120 Stat. 527; Pub.L. 110-181, Div. C, Title XXXV, § 3525(a)(6), (b), Jan. 28, 2008, 122 Stat. 601; Pub.L. 110-407, Title II, § 203, Oct. 13, 2008, 122 Stat. 4300.)

Notes of Decisions (85)

46 U.S.C.A. § 70502, 46 USCA § 70502
Current through P.L. 116-138.

46 U.S.C.A. § 70503
Formerly cited as 46 App. USCA § 1903

§ 70503. Prohibited acts

Effective: February 8, 2016
Currentness

(a) Prohibitions.--While on board a covered vessel, an individual may not knowingly or intentionally--

(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;

(2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or

(3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

(b) Extension beyond territorial jurisdiction.--Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.

(c) Nonapplication.--

(1) In general.--Subject to paragraph (2), subsection (a) does not apply to--

(A) a common or contract carrier or an employee of the carrier who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business; or

(B) a public vessel of the United States or an individual on board the vessel who possesses or distributes a controlled substance in the lawful course of the individual's duties.

(2) Entered in manifest.--Paragraph (1) applies only if the controlled substance is part of the cargo entered in the vessel's manifest and is intended to be imported lawfully into the country of destination for scientific, medical, or other lawful purposes.

(d) Burden of proof.--The United States Government is not required to negative a defense provided by subsection (c) in a complaint, information, indictment, or other pleading or in a trial or other proceeding. The burden of going forward with the evidence supporting the defense is on the person claiming its benefit.

(e) Covered vessel defined.--In this section the term "covered vessel" means--

(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States.

CREDIT(S)

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1687; Pub.L. 114-120, Title III, § 314(a), (b), (e)(1), Feb. 8, 2016, 130 Stat. 59.)

Notes of Decisions (189)

46 U.S.C.A. § 70503, 46 USCA § 70503
Current through P.L. 116-140.

End of Document

United States Code Annotated
Title 46. Shipping (Refs & Annos)
Subtitle VII. Security and Drug Enforcement (Refs & Annos)
Chapter 705. Maritime Drug Law Enforcement

46 U.S.C.A. § 70506
Formerly cited as 46 App. USCA § 1903

§ 70506. Penalties

Effective: February 8, 2016
Currentness

(a) Violations.--A person violating paragraph (1) of section 70503(a) of this title shall be punished as provided in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960). However, if the offense is a second or subsequent offense as provided in section 1012(b) of that Act (21 U.S.C. 962(b)), the person shall be punished as provided in section 1012 of that Act (21 U.S.C. 962).

(b) Attempts and conspiracies.--A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503.

(c) Simple possession.--

(1) In general.--Any individual on a vessel subject to the jurisdiction of the United States who is found by the Secretary, after notice and an opportunity for a hearing, to have knowingly or intentionally possessed a controlled substance within the meaning of the Controlled Substances Act (21 U.S.C. 812) shall be liable to the United States for a civil penalty of not to exceed $5,000 for each violation. The Secretary shall notify the individual in writing of the amount of the civil penalty.

(2) Determination of amount.--In determining the amount of the penalty, the Secretary shall consider the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters that justice requires.

(3) Treatment of civil penalty assessment.--Assessment of a civil penalty under this subsection shall not be considered a conviction for purposes of State or Federal law but may be considered proof of possession if such a determination is relevant.

(d) Penalty.--A person violating paragraph (2) or (3) of section 70503(a) shall be fined in accordance with section 3571 of title 18, imprisoned not more than 15 years, or both.

CREDIT(S)

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub.L. 111-281, Title III, § 302, Oct. 15, 2010, 124 Stat. 2923; Pub.L. 114-120, Title III, § 314(c), Feb. 8, 2016, 130 Stat. 59.)

Notes of Decisions (36)

46 U.S.C.A. § 70506, 46 USCA § 70506
Current through P.L. 116-140.

End of Document

H.R. CONF. REP. 109-333, H.R. Conf. Rep. No. 333, 109TH Cong.,
1ST Sess. 2005, 2005 WL 3350148, 2006 U.S.C.C.A.N. 184 (Leg.Hist.)
P.L. 109-177, *1 **184 USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005

DATES OF CONSIDERATION AND PASSAGE

House: July 21, November 9, 2005
Senate: July 29, December 14-16, 2005, March 1, 2006
Cong. Record Vol. 152 (2006)

House Conference Report
No. 109-333, December 8, 2005
[To accompany H.R. 3199]

HOUSE CONFERENCE REPORT NO. 109–333

December 8, 2005

Mr. Sensenbrenner, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 3199]

**0 The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3199), to extend and modify authorities needed to combat terrorism, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.–This Act may be cited as the "USA PATRIOT Improvement and Reauthorization Act of 2005".

(b) Table of Contents.–The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I–USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT

Sec. 101. References to, and modification of short title for, USA PATRIOT Act.

Sec. 102. USA PATRIOT Act sunset provisions.

inappropriate controls may result in the theft of cargo and, more dangerously, undetected admission of ***103** ****197** terrorists. In addition to establishing appropriate physical, procedural, and personnel security for seaports, it is important that U.S. criminal law adequately reflect the seriousness of the offense. This section clarifies that 18 U.S.C. S 1036 (fraudulent access to transport facilities) includes seaports and waterfronts within its scope, and increases the penalties for violating these provisions from a maximum of 5 years to 10 years.

Section 303. Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information

Section 303 of the conference report is substantively similar to section 303 of the House bill and the parallel section in S. 378. A core function of the United States Coast Guard is law enforcement at sea, especially in the aftermath of the tragic events of September 11, 2001. While the Coast Guard has authority to use whatever force is reasonably necessary to require a vessel to stop or be boarded, "refusal to stop," by itself, is not currently a crime. This section amends title 18 of the United States Code to make it a crime: (1) for a vessel operator knowingly to fail to slow or stop a ship once ordered to do so by a Federal law enforcement officer; (2) for any person on board a vessel to impede boarding or other law enforcement action authorized by Federal law; or (3) for any person on board a vessel to provide false information to a Federal law enforcement officer. Any violation of this section will be punishable by a fine and/or imprisonment for a maximum term of 5 years.

Section 304. Criminal sanctions for violence against maritime navigation, placement of destructive devices

Section 304 of the conference report is substantively similar to section 305 of the House bill, and excludes the malicious dumping provisions contained in S. 378. The Coast Guard maintains over 50,000 navigational aids on more than 25,000 miles of waterways. These aids, which are relied upon by all commercial, military, and recreational mariners, are essential for safe navigation and, therefore, are inviting targets for terrorists. To deter any such intentional interference, this section amends 18 U.S.C. S 2280(a) (violence against maritime navigation) to make it a crime to intentionally damage or tamper with any maritime navigational aid maintained by the Coast Guard or under its authority, if such act endangers the safe navigation of a ship. In addition, this section amends title 18 of the United States Code to make it a crime to knowingly place in waters any device that is likely to damage a vessel or its cargo, interfere with a vessel's safe navigation, or interfere with maritime commerce. Any violation of this provision will be punishable by a fine and/or a maximum term of imprisonment for life, and if death results, an offense could be punishable by a sentence of death.

Section 305. Transportation of dangerous materials and terrorists

Section 305 of the conference report is substantively similar to section 306 of the House bill and the parallel provision in S. 378, but adopts the intent requirements as specified in S. 378. The section makes it a crime to knowingly and intentionally transport aboard any vessel an explosive, biological agent, chemical weapon, ***104** or radioactive or nuclear materials, knowing that the item is intended to be used to commit a terrorist act. Any violation of this provision will be punishable by a fine and a maximum prison term of life and, if death results, the offense could be punished by a sentence of death.

****198** Section 306. Destruction of, or interference with, vessels or maritime facilities

Section 306 of the conference report is substantively similar to section 307 of the House bill and the parallel provision in S. 378. This section makes it a crime to: (1) damage or destroy a vessel or its parts, a maritime facility, or any apparatus used to store, load or unload cargo and passengers; (2) perform an act of violence against or incapacitate any individual on a vessel, or at or near a facility; or (3) knowingly communicate false information that endangers the safety of a vessel. Any violation of this section (including attempts and conspiracies) will be punished by a fine and/or imprisonment for a

