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SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF
INTERNATIONAL LAW AND
COMMERCIAL REGULATION

Volume 5 | Number 3

Article 9

Summer 1980

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Recommended Citation

Rex C. Morgan, *A Judicial Response to Hovering Narcotics Smugglers: United States v. May May*, 5 N.C. J. INT'L L. & COM. REG. 481 (2016).

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A Judicial Response to Hovering Narcotics Smugglers: *United States v. May May*

Escalating narcotics smuggling along the coast of the southeastern United States has prompted a judicial expansion of jurisdiction beyond the traditional territorial limits. This expansion has mandated a liberal interpretation of the Coast Guard's statutory power to effect arrests on the high seas, a narrow interpretation of international maritime law and a somewhat diminished standard of probable cause to make searches, seizures and arrests on the high seas.

*United States v. May May*¹ illustrates this trend towards liberalization of search and seizure powers of U.S. law enforcement agencies upon the high seas. In *May May*, the defendants who were apprehended on the high seas and prosecuted for conspiracy to import marijuana, contested the district court's jurisdiction in addition to asserting the constitutional invalidity of the search, seizure and arrest. Finding that statutory authority as well as probable cause existed, the court disallowed the constitutional claims. Moreover, though the defendants had never been within the territorial limits of the United States, jurisdiction was allowed to attach because the "intended impact" of the defendant's acts was within this country. Thus the defendants, who had never been within the United States or even within its territorial waters, were subjected to the substantive criminal laws of the United States.

On August 15, 1978, a Coast Guard cutter, the DURABLE, while on routine patrol in the Gulf of Mexico, made contact with a flagless merchant vessel heading toward the Texas coast. Various irregularities sighted aboard the merchant vessel aroused the suspicion of the DURABLE's commander;² in his experienced opinion the vessel fit the pattern of the classic mothership³ used extensively in the importation of mari-

¹ 470 F. Supp. 384 (S.D. Tex. 1979).

² *Id.* at 390-91. These factors were the hand-lettered, non-permanent name-board on the vessel, the failure to have a home port noted on the stern, the presence of extra fuel drums on the deck and the unusually large number of crewmen aboard the vessel. Additionally, an officer of the DURABLE had received an informer's tip two weeks earlier about a large shipment of marijuana which was to arrive off the coast of Texas during the month of August. This tip, however, was given no weight by the court. *Id.* at 389 n.3.

³ *Id.* at 391. A mothership is usually a 70 to 90 foot, non-U.S. flag vessel found hovering off the coast of the United States outside of territorial waters and carrying large quantities of marijuana. The cargo is often loaded into smaller vessels which transport the contraband from ship to shore.

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The merchant vessel was approached⁴ and in response to an inquiry by the Coast Guard, a spokesman for the SUPERFLY II stated that the ship was Panamanian and enroute to Tampico, Mexico. At this point, however, the SUPERFLY II was north of its stated destination and heading away from that city in a northerly direction. While awaiting orders,⁵ the Coast Guard followed the merchant vessel, which, at times, took evasive maneuvers.⁶ The commander later received word that the SUPERFLY II was not a registered vessel of Panama and permission was given to board in order to identify the vessel.⁷

Boarding took place about 135 miles off the Texas coast, at which time the boarding party was authorized only to determine the ship's true nationality. When the crew members expressed ignorance as to the location of the ship's documents, the boarding party entered the cargo hold to determine the main beam number of the vessel.⁸ Upon entering, they found the hold full of marijuana. The SUPERFLY II was then seized and its crew members taken into custody. Afterwards, a general search of the vessel produced charts which indicated the ship was to deliver its cargo to smaller coastal vessels while hovering off the Texas coast.⁹

The crew members of the SUPERFLY II were charged with conspiracy to import marijuana and to possess marijuana with intent to distribute, pursuant to 21 U.S.C. §§ 846 and 963.¹⁰ The defendants moved

⁴ When a Coast Guard vessel is on patrol and encounters another vessel, it is standard operating procedure for the patrol vessel to attempt to determine the nationality of the encountered ship. *Id.* at 388. Termed the right of approach or right of flag verification, this is accepted practice in international law. See C. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 271-72 (4th ed. 1959); G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 124 (4th ed. 1960); H. SMITH, *THE LAW AND CUSTOM OF THE SEA* 64-65 (3d ed. 1959). See also *The Convention on the High Seas*, art. 22, 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200 (1958).

⁵ The commander had radioed the information he had on the SUPERFLY II to his superiors and had asked for confirmation of its nationality and for permission to board. 470 F. Supp. at 390.

⁶ *Id.* at 391.

⁷ After determining that the SUPERFLY II was not a registered vessel of Panama, Coast Guard officials consulted with the State Department and the Department of Justice before granting permission to board the SUPERFLY II. *Id.* at 391-92.

⁸ The nationality of a vessel can be determined by an examination of the main beam number. It is permanently affixed through welding or carving to the main beam of the ship. The main beam is similar to a spike running from the front to the back of the vessel below the deck and above the holds. To ascertain the main beam number, one must go into the hold of the ship. *Id.* at 392 n.11.

⁹ *Id.* at 393-94.

¹⁰ 21 U.S.C. § 846 (1976) provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter (Subchapter I—Control and Enforcement) is punishable by imprisonment or fine or both"

21 U.S.C. § 963 (1976) provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter (Subchapter I—Import and Export) is punishable by imprisonment or fine or both"

These are the usual charges filed in extraterritorial drug smuggling cases. The principal reason is that, unlike the general federal conspiracy act embodied in 18 U.S.C. § 371 (1976), neither of these statutes explicitly requires the allegation of an overt act within the United States for a conviction. See Ficken, *The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smug-*

to dismiss the charges or, alternatively, to exclude the evidence. In their motion to dismiss, the defendants, whose actual nationality was Colombian, claimed that the court lacked jurisdiction because they had never made contact with the United States or its territorial waters.¹¹ The motion to suppress was premised on an assertion that the Coast Guard lacked statutory and constitutional power for any boarding, search and seizure which occurs in international waters. The Southern District Court of Texas denied both motions.

The motion to dismiss was based solely upon lack of subject matter jurisdiction. Attacks on personal jurisdiction in extraterritorial drug smuggling cases have proved futile due to reliance by the courts upon the *Ker-Frisbie* doctrine. That doctrine states that any defendant in a federal criminal trial, whether a citizen or not, and whether arrested in this country or not, may not successfully challenge a district court's jurisdiction over his person on the grounds that his presence before the court was unlawfully obtained.¹²

In denying the defendants' motion to dismiss, the court found that the concept of extraterritorial application is implicitly contained within the conspiracy charges under sections 846 and 963.¹³ Furthermore, the court stated that allegation of an overt act is unnecessary under these statutes.¹⁴ Noting that the Fifth Circuit had sustained jurisdiction over conspiracies involving nonresident aliens who were arrested on the high seas and had never entered the United States,¹⁵ the court justified extra-

glers Beyond the Contiguous Zone: An Assessment Under International Law, 29 U. MIAMI L. REV. 700, 701 n.5 (1975).

¹¹ 470 F. Supp. at 394. Basically, there are three divisions of waters: internal waters, territorial seas and the high seas. The latter encompasses an area known as the contiguous zone. The territorial sea extends from the coast outward for three miles; within it the sovereign exercises complete jurisdiction. Seaward of this limit is the high seas. However, for implementation of some U.S. laws, such as customs, security and health laws, there is a contiguous zone which extends nine miles from the three mile limit, resulting in a boundary twelve miles from the coast. Carmichael, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51, 56 (1977).

On the high seas, a nation-state exercises exclusive jurisdiction over all ships entitled to fly its own flag. But generally, the high seas are not subject to the sovereignty of any state, and reasonable regard must be given to the rights of others to use the high seas. *See generally* Convention on the High Seas, *supra* note 4.

¹² The precedents for this doctrine are *Ker v. Illinois*, 119 U.S. 436 (1886) and *Frisbie v. Collins*, 342 U.S. 519 (1952). In the former, the Supreme Court held that a defendant who was convicted in a state court could not challenge the conviction on the ground that he was improperly brought within the court's jurisdiction in violation of his fourteenth amendment right to due process of law. In *Frisbie*, the Supreme Court reaffirmed *Ker*, even in a situation in which the defendant was forcibly abducted from another state, possibly in violation of federal kidnapping statutes. *See also* *United States v. Winter*, 509 F.2d 975, 986-89 (5th Cir. 1975).

¹³ 470 F. Supp. at 395. The court cited *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979) for this proposition. There the court reasoned that under the objective view of jurisdiction ascribed to by the United States, jurisdiction attaches to extraterritorial acts that are intended to have an effect within this country. Consequently, Congress intended for 21 U.S.C. §§ 846 and 963 to have extraterritorial effect since it did not limit the extent of their application. *Id.* at 885.

¹⁴ 470 F. Supp. at 395.

¹⁵ *Id.* (citing *United States v. Winter*, 509 F.2d 975, 986-89 (5th Cir. 1975); *United States*

territorial jurisdiction under the "intended impacts" doctrine. This doctrine represents a method used by the judiciary to assert jurisdiction over extraterritorial drug conspiracy crimes. If it can be demonstrated that the extraterritorial acts of defendants charged with conspiracy to import or possess a controlled substance were intended to have an effect within the United States, the court will allow jurisdiction to attach.¹⁶

The district court in *May May* realized that the "intended impacts" doctrine resulted in an expansive concept of jurisdiction but found that it comported with the decisions of the Fifth Circuit in cases involving drug conspiracies. Using the scope of the drug problem to justify this concept of jurisdiction, the court found that there was sufficient evidence in *May May* to conclude that the cargo aboard the SUPERFLY II was intended for the United States.¹⁷

The defendant's second claim, the motion to suppress, was based on the Coast Guard's lack of statutory and constitutional power to board, search and seize a stateless vessel and its crew in international waters. Addressing the questions of statutory power, the court cited 14 U.S.C. § 89(a),¹⁸ stating: "[T]he Coast Guard is empowered to make inquiries of, examine, search and seize any vessel on the high seas that is subject to the jurisdiction of or the operation of any law of the United States."¹⁹

The court explained that the boarding, search and seizure were justified under this statute for two independent reasons. First, because the conspiracy statutes conferred extraterritorial jurisdiction over crimes intended for the United States, the jurisdiction requirement of section 89(a) was satisfied. Thus, when probable cause existed to believe a foreign vessel on the high seas was violating section 846 or 963, the Coast Guard was authorized to investigate and take action under section 89(a). The court found that adequate probable cause existed to believe that the SUPERFLY II was engaged in illicit activities.²⁰ Second,²¹ because the ship was a stateless vessel (*i.e.*, no legitimate nationality could be discerned from the ship or its crew), the Coast Guard was justified in boarding to determine the vessel's actual registration and nationality.²² Once

v. Cadena, 585 F.2d 1252 (5th Cir. 1978), *aff'd per curiam*, 588 F.2d 100 (5th Cir. 1979) (amplifying and explaining its previous holding).

¹⁶ *Id.*

¹⁷ *Id.* at 396.

¹⁸ 14 U.S.C. § 89(a) (1976) provides in relevant part: "The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States."

¹⁹ 470 F. Supp. at 396-97.

²⁰ The factors the court considered controlling were "the physical conditions of the SUPERFLY II, its location when compared to its stated destination, its movements after its contact with the DURABLE, its flying of a false flag, its crew's claim of a false nationality and its being overmanned." *Id.* at 400.

²¹ The Coast Guard based its boarding only on this second justification put forward by the court. *Id.* at 392.

²² *Id.* at 400. See also authorities cited in note 4 *supra*.

on board, probable cause to search was supplied by the odor of marijuana.²³ Additionally, the marijuana found in the hold during the verifications of the main beam number was admissible under the plain view doctrine.²⁴

The court also addressed the defendants' contentions that the authority of the Coast Guard under section 89(a) was curtailed by the Convention on the High Seas.²⁵ The court held that since the SUPERFLY II was a stateless vessel, it was not entitled to the treaty's protection.²⁶ Additionally, the court stated that even if the provisions of the treaty had been broken, dismissal or suppression of the evidence would not necessarily follow. Noting that exclusion would be a severe remedy, the court cited *United States v. Cadena*²⁷ as authority for the proposition that other remedies, specifically those under article 22 of the Convention dealing with compensation for damages, were sufficient to satisfy any damages sustained by the defendants.²⁸

Finally, the court addressed the constitutional arguments that exclusion should result from the lack of probable cause to search and seize and from the failure of the Coast Guard to procure a search warrant. Probable cause was discerned from the suspicious circumstances surrounding the SUPERFLY II.²⁹ Additionally, it was held that the defendants lacked standing to contest the contraband found in the cargo hold of the ship because none of those aboard had a legitimate expectation of privacy therein.³⁰ This evidence was also admissible under the plain view doctrine because it was necessary to enter the hold to ascertain the main beam number. Furthermore, exigent circumstances justified the failure to procure a search warrant because the vessel was capable of movement and had twice previously taken evasive maneuvers.³¹ Thus, the court pronounced the Coast Guard's actions in this case constitutionally sound.

The broad issue in *May May* concerns the legal authority of the United States to police the high seas adjacent to its territorial waters in efforts to prevent drug smuggling. The decision is quite important with respect to this problem and preventive efforts. Within this issue, three areas of inquiry arise. First, what is the extent of U.S. jurisdiction with regard to extraterritorial drug conspiracies? Second, is the Coast Guard statutorily authorized to board, search and seize vessels in international waters? And third, to what extent does the fourth amendment protect defendants in such situations?

Resolution of these questions will be facilitated by an analysis of the

²³ 470 F. Supp. at 400.

²⁴ *Id.* at 399 n.31.

²⁵ 13 U.S.T. 2312, 450 U.N.T.S. 82, T.I.A.S. No. 5200 (1958).

²⁶ 470 F. Supp. at 398.

²⁷ 585 F.2d 1252 (5th Cir. 1979).

²⁸ 470 F. Supp. at 398-99.

²⁹ See note 20 *supra*.

³⁰ 470 F. Supp. at 399.

³¹ *Id.* at 400.

case law concerning extraterritorial drug conspiracies. The Fifth Circuit, which encompasses the southeastern shores of the United States, has handled a large number of these cases and has been at the forefront in the development of the law in this area. Consequently, five major Fifth Circuit cases dealing with extraterritorial drug conspiracies must be analyzed with respect to the evolution of the law and with an eye to their ultimate impact on *May May*.

One of the first cases to deal with the jurisdictional range of 21 U.S.C. § 963 and with the statutory power of the Coast Guard to make extraterritorial searches, seizures and arrests under 14 U.S.C. § 89(a) was *United States v. Winter*.³² The Coast Guard had seized an American-owned and registered vessel carrying 1,130 pounds of marijuana thirty-five miles off the coast of Florida and 11.9 miles from the nearest island of the Bahamas. Sufficient probable cause was demonstrated for the seizure and the court found adequate evidence of overt acts within the jurisdiction of the district court. The defendants, (two American citizens, two Jamaican nationals and one Bahamian national), were charged with conspiracy to import a controlled substance pursuant to 21 U.S.C. §§ 952(a) and 963. The appeal by the two Americans and two Jamaicans was limited to challenging the trial court's jurisdiction over their persons and the crime.

The Jamaicans argued that the court lacked subject matter jurisdiction because they had not been in the territory of the United States prior to the involuntary termination of the conspiracy and had committed no overt acts within the country. The Fifth Circuit replied that the United States subscribes to the objective view of the territorial principle of jurisdiction, which extends jurisdiction to all acts which have an effect within the country.³³ The court observed that the overt acts of the Jamaicans' co-conspirators were sufficient for jurisdiction to attach under the conspiracy statutes even if the Jamaicans had never been in the country. In dictum it was noted that section 963 did not explicitly require proof of an overt act, but the court resolved to settle that issue another day since the indictment in the case did contain such an allegation.

One of the bases for contesting jurisdiction over the person was that the Coast Guard had exceeded its jurisdiction to arrest. The defendants asserted that jurisdiction could extend only to a maximum of twelve miles from the U.S. coast as prescribed by statute³⁴ and treaty.³⁵ The

³² 509 F.2d 975 (5th Cir. 1975).

³³ *Id.* at 981. See also *Ford v. United States*, 273 U.S. 593 (1927) where the Supreme Court discusses the effects doctrine under the objective theory of jurisdiction which extends it to acts that have an effect within this country.

³⁴ The defendants based this argument on 14 U.S.C. §§ 2, 89(a) (1976).

³⁵ This argument was based upon article 24 of the Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1606, 516 U.N.T.S. 205, T.I.A.S. No. 5639 (1958). Article 24 provides that "a coastal state may exercise control over an area contiguous to its territorial sea but not extending beyond 12 miles from its coast for the purpose of preventing and punishing infringements of its customs, fiscal immigration and sanitary regulations." 509 F.2d at 984 n.30.

court responded by stating that there was little if any current authority relating to the personal jurisdiction requirements of section 89(a). Nevertheless, the personal jurisdiction attack was rejected with a citation to the *Ker-Frisbie* doctrine.³⁶

After *Winter* it was unclear whether the "intended impacts" doctrine conferred personal jurisdiction over defendants involved in extraterritorial drug conspiracies, because the *Ker-Frisbie* doctrine allowed the court to evade this issue. It was clear, however, that subject matter jurisdiction attached to such crimes intended for the United States, and that where probable cause existed, the Coast Guard had statutory authority to board, search and seize domestic vessels on the high seas.

Two subsequent decisions dealt with the statutory power of the Coast Guard under section 89(a) to make searches without probable cause of American vessels on the high seas. In *United States v. Odom*³⁷ and *United States v. Warren*³⁸ the government argued that section 89(a) authorized warrantless safety and documentary inspections (*i.e.*, administrative searches)³⁹ of American vessels upon the high seas. The Fifth Circuit agreed, but specified that the search must be limited in scope to its original purpose of inspecting documents and safety equipment.⁴⁰ If, however, while conducting a valid safety inspection, evidence emerged providing probable cause to suspect a crime was being or had been committed, the Coast Guard was allowed to extend its search in ferreting out criminal activity.⁴¹

In *Odom*, inoperative fishing equipment, the reluctance of the captain to open the hold for a check of the main beam number, and the apparent absence of ice and fish that the captain had asserted were in the hold, supplied probable cause for the Coast Guard to extend its search, resulting in the discovery of 6,000 pounds of marijuana. In *Warren*, however, the Coast Guard had brought along government agents and had extended the safety and documentation inspection without probable cause to do so. Evidence was ultimately found which implicated the passengers in marijuana smuggling. The Fifth Circuit upheld the search in *Odom*, finding adequate probable cause to extend the administrative search once the Coast Guard was validly on board. However, the court found that the general search undertaken in *Warren* was offensive to the fourth amendment due to the absence of probable cause during the administrative safety and documentation inspection. The court stated that section 89(a) authorized warrantless safety and documentation inspection.

³⁶ See note 12 and accompanying text *supra*.

³⁷ 526 F.2d 339 (5th Cir. 1976).

³⁸ 550 F.2d 219 (5th Cir. 1977).

³⁹ An administrative search is limited to verifying a vessel's documentation or safety equipment. For an excellent discussion of the administrative search doctrine as it relates to the high seas, see Carmichael, *supra* note 11, at 83.

⁴⁰ 550 F.2d at 225.

⁴¹ *Id.*

tions of American vessels by the Coast Guard, and that these searches could be extended if probable cause to believe a crime was being committed became apparent. What was proscribed was the extension for insufficient reason of a search for safety purposes beyond that reasonably needed to determine if the safety and documentary regulations had been followed.⁴²

The jurisdiction of the court and statutory authority of the Coast Guard were subsequently extended to foreign vessels on the high seas in *United State v. Cadena*.⁴³ The Coast Guard had probable cause to believe a foreign freighter 200 miles off the Florida coast was carrying a large quantity of marijuana. The Coast Guard boarded the vessel and, after finding 50,000 pounds of marijuana, seized it along with thirteen Colombian crew members. The defendants were charged with conspiracy to possess marijuana with intent to distribute and with conspiracy to import marijuana pursuant to sections 846 and 963. The defendants argued against the search and seizure on three grounds: (1) no authority existed, statutory or otherwise, for boarding, searching and seizing a foreign vessel in international waters; (2) if such authority did exist, the search and seizure nonetheless violated the Convention on the High Seas which overrides any domestic law to the contrary; and (3) the fourth amendment was violated because no warrant was obtained and because the lack of authority for the search and violation of the Treaty rendered the search unreasonable for fourth amendment purposes. The Fifth Circuit rejected all three arguments.

The court resorted to the objective theory⁴⁴ to find that jurisdiction attached to the crime and the vessel used to carry it out because the defendants' acts were intended for the United States and adequate overt acts had been alleged on the part of co-conspirators within this country.⁴⁵ Because jurisdiction attached under the conspiracy statutes, the court asserted that the Coast Guard had statutory authority to board and search the vessel pursuant to section 89(a). "The Coast Guard detained the vessel and searched it to detect and prevent a violation of the laws of the United States, thus acting in accordance with the purpose of the statute as set forth in its opening sentence."⁴⁶ The challenge to personal jurisdiction was again dismissed by citation to the *Ker-Frisbie* doctrine.⁴⁷

The court addressed the defendants' contentions that the search, seizure and arrest violated the Convention on the High Seas, and that

⁴² *Id.*

⁴³ 585 F.2d 1252 (5th Cir. 1979).

⁴⁴ *Id.* at 1257. The objective theory of jurisdiction asserts that jurisdiction is not limited to the territorial limits, and is the basis for the intended impacts doctrine. *See Ford v. United States*, 273 U.S. 593 (1927).

⁴⁵ 585 F.2d at 1257-58.

⁴⁶ *Id.* at 1259.

⁴⁷ *Id.*

dismissal of the indictment or exclusion of the evidence should follow. Violations of the Convention were held not to require dismissal or exclusion because neither Canada (where the freighter was registered) nor Colombia (where those aboard resided) had signed the Treaty.⁴⁸ It was asserted that only the signatory nations to a treaty, and not their individual citizens could protect its violation. Furthermore, dismissal or exclusion was not mandated because article 22 of the Convention specified remedies in the form of compensation for damages for violations of the Treaty.⁴⁹

Finally, the court rejected the defendants' fourth amendment arguments. The court stated that section 89(a) authorized the Coast Guard to stop the vessel and that the stop was justified by the existence of probable cause.⁵⁰ The warrantless search was justified because of exigent circumstances since the vessel was mobile and had made an attempt to escape when first sighting the Coast Guard. Respecting the defendants' claim that the Coast Guard had violated international law thereby rendering the search unreasonable for fourth amendment purposes, the court found that even if international law had been violated, the fourth amendment would not require exclusion because the interests to be served by the amendment had not been violated.⁵¹

In *Cadena* it was found that the Coast Guard had sufficient probable cause to believe the defendants were engaged in criminal activity; thus, the subsequent search and seizure in international waters was justified. Additionally, the traditional requirement under the conspiracy charge of an allegation of an overt act within the judicial district was met. In the following year it became necessary for the Fifth Circuit to address two issues which had been left unresolved: what was the legality of a warrantless, non-probable cause, administrative search of a *non-domestic* vessel on the high seas, and what was the status of jurisdiction of a conspiracy charge when no overt act within the United States was alleged.

For the Fifth Circuit the administrative search doctrine was expanded to apply to stateless vessels in extraterritorial waters in *United States v. Cortes*.⁵² In a situation similar to *May May*, the Coast Guard came across a vessel anchored in international waters which was flying no flag and had no permanently affixed name. The crew members stated that the ship was Colombian, but this could not be verified by the operations center in Miami. Consequently, the Coast Guard was authorized to board to determine the nationality of the vessel. The crew members of the vessel could produce no registration papers, so a limited administra-

⁴⁸ *Id.* at 1260-61.

⁴⁹ *Id.* at 1261.

⁵⁰ *Id.* at 1263. The authority cited by the court, *Praper v. United States*, 358 U.S. 307 (1959), held that an arrest without a warrant may be made if the arresting officer has probable cause to believe that the arrestee has committed or is committing a felony.

⁵¹ 585 F.2d at 1264.

⁵² 588 F.2d at 106 (5th Cir. 1979).

tive search was undertaken to locate the main beam number of the ship. The boarding party entered the cargo hold and found it full of marijuana. The Colombian crew members were arrested and charged with conspiracy to import and with conspiracy to possess marijuana with intent to distribute pursuant to sections 846 and 963.⁵³

The defendants contested the legality of the search because it was of a foreign vessel in international waters. The court replied that under the circumstances the Coast Guard was justified in its conclusion that the vessel was stateless and that section 89(a) authorized the boarding to determine the ship's nationality since the crew members could not give a verifiable nationality. When no registration papers were forthcoming, the extension of the search to locate the main beam number was justifiable. The marijuana found in plain view created probable cause for seizure of the vessel and exigent circumstances (*i.e.*, the possibility that the vessel would weigh anchor and flee) justified the general search during which additional evidence against the defendants was found.⁵⁴

It was also found that the Convention on the High Seas gave no protection to the defendants because it was inapplicable to stateless vessels. Additionally, the right of approach⁵⁵ was cited as justification for the Coast Guard's approach of the unidentified vessel to ascertain its identity.⁵⁶

Less than a month later the Fifth Circuit, in *United States v. Williams*,⁵⁷ addressed the jurisdictional applicability of the conspiracy to import marijuana statute where no proof of an overt act within the judicial district existed. The Panamanian vessel of the defendants, spotted by the Coast Guard in international waters, was suspected of being involved in international drug smuggling. Various factors supplied probable cause to believe those aboard were engaged in criminal activities.⁵⁸ The Coast Guard received authority from the Panamanian Embassy via the State Department to board the vessel and 21,000 pounds of marijuana were found on board.

The defendants were charged with conspiracy to import marijuana pursuant to section 963. The defendants objected to the charge on the ground that no overt act had occurred within the territorial jurisdiction of the district court. The Fifth Circuit countered by observing that the indictment was brought in under section 963 which, unlike the general

⁵³ *Id.* at 107, 108.

⁵⁴ *Id.* at 110, 111.

⁵⁵ See note 4 *supra*.

⁵⁶ 588 F.2d at 110.

⁵⁷ 589 F.2d 210 (5th Cir. 1979).

⁵⁸ The ship was seen hovering off the coast of Colombia with support boats nearby. Crew members had beckoned the Coast Guard for over six hours and one crewman had jumped overboard and swum to the Coast Guard cutter, where he stated that the vessel was engaged in "dirty business." Also, in a business where time is money, the Panamanian vessel had remained dead in the water, rejecting offers of assistance from the Coast Guard. *Id.* at 214.

federal conspiracy statute,⁵⁹ did not explicitly require the commission of an overt act.⁶⁰ The court referred to decisions which had held that section 963 required no proof of an overt act⁶¹ and went on to hold that under section 963, proof of an overt act within the judicial district was not a prerequisite for district court jurisdiction.⁶² "Any other result would have the anomalous requirement that more be shown for jurisdiction than is necessary for conviction of the crime."⁶³

Additionally, the defendants alleged the stop of the vessel and its warrantless search violated the fourth amendment. The court conceded that before the government could order a foreign vessel to stop there must be a reasonable suspicion that criminal activity may be afoot, but it held that standard was amply met in *Williams*.⁶⁴ Furthermore, though no search warrant was obtained, the court stated that the defendants lacked standing to contest the search of the cargo hold. The court noted that the cargo of a merchant vessel is subject to inspection upon entering and leaving a port, and consequently there could be no legitimate expectation of privacy in the hold of a merchant vessel.⁶⁵

Williams was the last major case decided by the Fifth Circuit that had a significant impact on *May May*. The previously summarized cases exemplify the case law within the circuit at the time the *May May* case came before the district court. Consequently, the decision is of no surprise. All of the defendants' arguments had been previously struck down in the Fifth Circuit Court of Appeals, which encompasses the Southern District Court of Texas. Immunity from serious scrutiny, however, is not a necessary by-product of precedent. Various aspects of the decision, especially with regard to the three areas of inquiry previously mentioned, are subject to doubt and may present future dilemmas which return to challenge the court.

The defendants' attacks on personal jurisdiction in these cases received little consideration in light of the Supreme Court's consistent response on this issue. The *Ker-Frisbie* doctrine is unequivocal authority for dismissing such attacks. The only reported exception is *United States v. Toscanino*.⁶⁶ In that case the Second Circuit found governmental conduct which involved emotional and physical brutality so outrageous that the defendant's attack on personal jurisdiction was sustained.⁶⁷ Appre-

⁵⁹ 18 U.S.C. § 371 (1976). See note 10 *supra*.

⁶⁰ 589 F.2d at 213.

⁶¹ *United States v. Thomas*, 567 F.2d 638, 641 (5th Cir. 1978); *United States v. Palacios*, 556 F.2d 1359, 1364 (5th Cir. 1977).

⁶² 589 F.2d at 213.

⁶³ *Id.*

⁶⁴ *Id.* at 214.

⁶⁵ *Id.*

⁶⁶ 500 F.2d 267 (2d Cir. 1974).

⁶⁷ *Toscanino* appealed from a narcotics conviction on the ground that the court had unlawfully acquired jurisdiction over him. He had been kidnapped from Uruguay by American agents who took him to Brazil. There he was tortured for 17 days by such methods as electric shock to his earlobes, toes and genitals, denial of food and denial of sleep. Although Brazilians

hensions which fall short of the callous acts perpetrated in *Toscanino* will assuredly overcome personal jurisdiction attacks. Because the Coast Guard usually makes arrests in such situations without the use of any force, attacks on personal jurisdiction in extraterritorial drug arrests will be useful to the defendant only in extremely rare factual contexts.

With respect to subject matter jurisdiction, the court in *May May* held that under the conspiracy statutes, sections 846 and 963, intended impact within this country is sufficient for jurisdictional purposes and an allegation of an overt act within the jurisdiction is unnecessary. Under this standard, there appears to be no limit to the extension of U.S. jurisdiction under the conspiracy statutes if it can be demonstrated that the crime's intended impact is within this country. Principles of national sovereignty would prevent apprehension of defendants within the borders of another country, but within international waters the intended impacts doctrine suggests complete jurisdiction.

Extension of jurisdiction to such limits with respect to foreign vessels violates the Convention on the High Seas.⁶⁸ Article 2 states that "the high seas, being open to all nations, no state may validly purport to subject any part of them to its sovereignty." Article 6 confers exclusive jurisdiction on a nation over ships flying its own flag on the high seas, and article 22 prohibits the boarding of a foreign merchant ship on the high seas unless there is a reasonable ground for suspecting the vessel is engaged in piracy, slave trade, or, though flying a foreign flag, is of the same nationality as the boarding warship. This treaty, however, has been interpreted narrowly where its provisions pose a barrier in an extra-territorial drug conspiracy case. As demonstrated in the developmental analysis, its provisions have been held inapplicable to non-signatory nations, not protective of a valid fourth amendment interest, and with remedial requirements of only compensation for damages.

Various restrictive interpretations of the Convention are likely to be used in future intended impact cases, at least until a signatory nation formally protests a seizure of one of its citizens or vessels. Such an analysis is consistent with the opinion of the Fifth Circuit expressed in *Cadena* that only the signatory nations to a treaty and not their individual citizens can protest its violation.⁶⁹ Cooperation prevails among nations in the apprehension of drug smugglers, and it is safe to assume that few nations would protest the seizure of a citizen where substantial evidence of drug trafficking exists.⁷⁰ As a result, no end is seen to the use of the intended impacts doctrine, in contravention of the plain language of the

perpetrated most of the torture, there was evidence that agents from the Department of Justice and Bureau of Narcotics and Dangerous Drugs had supervised and participated in some of the torture and interrogation. *Id.* at 269-70.

⁶⁸ 13 U.S.T. 2312, 45 U.N.T.S. 82, T.I.A.S. No. 5200 (1958).

⁶⁹ 585 F.2d at 1261.

⁷⁰ 470 F. Supp. at 388.

Convention on the High Seas, to confer jurisdiction over non-domestic vessels charged with drug conspiracies.

A slight wrinkle in the intended impacts doctrine involves its application to foreign vessels seized on drug charges in international waters where the crew members can prove they had no intent to smuggle drugs into the United States, but instead were bound for another country. No other basis for jurisdiction appears in such circumstances and presumably the court would be forced to dismiss the case for lack of jurisdiction.

Connected very closely with the jurisdiction issue in *May May* is the statutory power of the Coast Guard to make arrests and seizures on the high seas. The court found that under section 89(a) the Coast Guard was authorized to board, search and seize any vessel subject to the jurisdiction of the United States. Because it was the intended impacts doctrine which granted the requisite jurisdiction upon which the Coast Guard's statutory authority was contingent, the statutory authority of the Coast Guard extends to any area of international waters where the intended impacts test is applicable. This is directly at odds with article 2 of the Convention on the High Seas which states that the high seas are open to all nations and that no state may validly purport to subject any part of them to its sovereignty. As *May May* and its predecessors illustrate, the courts, in extraterritorial drug smuggling cases, are inclined to interpret restraining international law very narrowly while, at the same time, giving broad effect to U.S. statutory law.

These interpretations reflect the inherent problems of policing an expansive coast in the face of an ever increasing volume of drug smuggling. Limiting jurisdiction and investigations to the twelve-mile contiguous sea has proved ineffective in dealing with the problem. If the courts restricted the Coast Guard to the contiguous zone, disallowing investigations and seizures beyond that area on the theory that the vessel had committed no crime within the territorial jurisdiction of the United States, smuggling prevention efforts would be severely hampered. Motherships would hover off the coast at will, dispensing their cargo to smaller, faster craft, which would transport the contraband to shore. A few of the smaller boats would be apprehended, but the number would be insignificant compared to those that made their destination.

The intended impacts test, with its broad delegation of jurisdictional and statutory power is thus geared to achieve a given policy objective. The decision has been made by the judiciary that the Coast Guard, to be effective in its efforts to prevent drug smuggling, must be allowed to operate outside the territorial jurisdiction of the United States. Toward this end, the courts have used the judicial vehicles of a liberal interpretation of statutory law with respect to jurisdiction and Coast Guard authority, and a narrow interpretation of international law. *May May* is a representative case applying this policy decision, and serves to illustrate various aspects of its application.

The broad statutory authority conferred upon the Coast Guard by section 89(a) has been limited somewhat by the fourth amendment requirement of probable cause. This is uniformly required before general searches of vessels can be undertaken. The only searches which have been authorized without probable cause are limited administrative searches of domestic vessels for documentation and safety equipment or, in the case of stateless vessels, administrative searches to confirm nationality and registration. The basic conditions under which searches and seizures have been validated on the high seas are:

- (1) in the case of an American vessel, if probable cause exists before the general search, or becomes apparent after a limited administrative documentation and safety search;
- (2) in the case of a stateless vessel, if probable cause exists before the general search or becomes apparent after the limited administrative search to confirm registration and nationality; or
- (3) in the case of a foreign vessel whose registration can be proven, if probable cause exists before the search.

Although probable cause must exist before extending an administrative search, this has proved to be of slight impediment to the Coast Guard. A haul of marijuana large enough to justify the trip is difficult to hide from anyone on board a vessel, especially those who are trained in its detection. Additionally, verifying the registration of a vessel by locating its main beam number in the hold will surely result in the application of the plain view doctrine with respect to any marijuana found therein. Consequently, the practical result of the administrative search doctrine is to undermine the probable cause requirement. Only verifiable foreign vessels are not subject to administrative searches, and once a domestic or stateless marijuana laden vessel is boarded for an administrative check, factors which provide probable cause to extend the search will usually be present.

The search warrant requirement has not impeded the Coast Guard in its search of vessels on the high seas. Where probable cause exists to search a vessel, the exigent circumstances doctrine has invariably been used to excuse failure to procure a search warrant. This doctrine excused the warrantless search in *United States v. Cadena*⁷¹ even where probable cause existed several days before the search. Because ocean going vessels are mobile and can easily dispose of their cargo, the rationale of the doctrine is clear; but, what is also clear is that these very factors will excuse the procurement of a search warrant in almost every situation. For practical purposes then, there is no search warrant requirement with respect to extraterritorial drug seizures on the high seas.

The eradication of illicit drug traffic is the primary purpose of the conspiracy statutes embodied in sections 846 and 963.⁷² As its decisions

⁷¹ 585 F.2d at 1263.

⁷² H.R. Rep. No. 1444, 91st Cong., 2d Sess. 1, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4566, 4566.

illustrate, the Fifth Circuit has decided that this policy is best implemented by preventing contraband from ever reaching the territory of the United States. *United States v. May May* is not a landmark case in this field, but is instead an aggregation of previous holdings from separate cases in the Fifth Circuit. It illustrates the various interpretations given to statutory, constitutional and international law effecting the prevention of coastal narcotics smuggling.

The "intended impacts" test has served to extend jurisdiction and Coast Guard police power with the fourth amendment asserting only a slight constraining force. As demonstrated, administrative searches and exigent circumstances effectively limit the usefulness of fourth amendment arguments to the majority of extraterritorial defendants charged with drug violations. The intended impacts doctrine, however, serves to foreclose jurisdiction if defendants can prove their extraterritorial acts were not intended for the United States.

The extension of U.S. police power under the intended impacts doctrine and the restrictive interpretation given to the Convention on the High Seas raise a number of potentially controversial legal questions. By legitimizing the assertion of jurisdiction over any area of the high seas where the intended impact test is applicable, is the United States estopped from contesting similar assertions by other countries? If the United States can restrict the application of the Convention on the High Seas with impunity, what justification is there to prevent other nations from doing likewise? Might this not forbode the gradual demise of the time-honored concept of freedom of the seas? By adopting this approach, the United States has set an example and given tacit approval for other nations to assert jurisdiction to enforce their own domestic laws on the high seas.

Hovering narcotics smugglers are a serious problem and it is clear that restricting the Coast Guard to the territorial limits would prove ineffective in eliminating their activities. In extending the police power, however, some steps should be taken to accommodate international law. In its present form the intended impacts test is too flexible to be consistent with the concept of freedom of the seas. What is proposed is a 200 mile limit on statutory and jurisdictional authority, at least as far as non-resident aliens and their vessels are concerned. This would be analogous to the 200 mile fishing conservation zone established by the Fishery Conservation Act of 1976.⁷³ Within this zone Coast Guard statutory power and jurisdiction of the court would attach in much the same manner as presently allowed by the Fifth Circuit. Outside the 200 mile limit the authority of the United States would be limited to American vessels and citizens, at least where no overt act within U.S. territory could be shown on the part of the non-residents. This limit would support the concept of freedom of the seas, while not seriously hampering efforts to prevent

⁷³ 16 U.S.C. §§ 1801-1882 (1976).

coastal drug smuggling. Although a 200 mile limit is somewhat arbitrary, a line must be drawn in order that the broad assertion of jurisdiction under the intended impacts doctrine does not serve to undermine freedom of the seas and does not result in serious sovereignty disputes which undermine U.S. relationships within the international community.

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