

STATEMENT
OF
REAR ADMIRAL RICHARD P. CUERONI
COMMANDER, SEVENTH COAST GUARD DISTRICT
BEFORE THE
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME
ON 16 MAY 1985

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I APPRECIATE THIS OPPORTUNITY TO APPEAR BEFORE YOU TODAY, REPRESENTING THE SECRETARY OF TRANSPORTATION, TO COMMENT ON H.R. 2132, WHICH WOULD AMEND PUBLIC LAW 96-350. I HAVE WITH ME LIEUTENANT COMMANDER MARK A. O'HARA, THE ATTORNEY ADVISOR TO THE OPERATIONAL LAW ENFORCEMENT DIVISION AT COAST GUARD HEADQUARTERS.

PUBLIC LAW 96-350 (SOMETIMES CALLED THE "BIAGGI-GILMAN BILL") WAS SIGNED INTO LAW ON SEPTEMBER 15, 1980. IT IS NOW CODIFIED AS 21 USC 955a-d. THE ENACTMENT OF THIS STATUTE WAS NECESSARY TO CLOSE A LOOPHOLE IN THE THEN EXISTING LAW. THE LOOPHOLE WAS CREATED WHEN PROVISIONS PROHIBITING POSSESSION OF ILLICIT DRUGS ON THE HIGH SEAS WERE INADVERTENTLY REPEALED BY THE ENACTMENT OF THE 1970 COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT. THAT OVERSIGHT RESULTED IN AN ANOMALY IN THE CRIMINAL LAW: POSSESSION OF CONTROLLED SUBSTANCES WITHIN THE UNITED STATES AND ITS TERRITORIAL SEA WAS A FEDERAL CRIME, WHILE SIMILAR CONDUCT ON THE HIGH SEAS WAS NOT. DRUG TRAFFICKERS THEN COULD ONLY BE PROSECUTED IF THE GOVERNMENT COULD PROVE A CONSPIRACY TO BRING THE ILLEGAL DRUG INTO THE UNITED STATES. SHOWING THIS INTENT TO IMPORT OR NEXUS WITH THE UNITED STATES AT TRIAL WAS VERY DIFFICULT.

IN RESPONSE TO THAT PROBLEM, PUBLIC LAW 96-350 MADE DRUG TRAFFICKING ON THE HIGH SEAS ABOARD VESSELS SUBJECT TO THE EXTRATERRITORIAL JURISDICTION OF THE UNITED STATES A CRIMINAL OFFENSE. FIRST, INDIVIDUALS ABOARD A U.S. OR OTHER VESSEL SUBJECT TO THE JURISDICTION OF THE UNITED STATES (WHICH INCLUDES

STATELESS VESSELS); SECOND, ANYBODY ABOARD ANY VESSEL IN THE U.S. CUSTOMS WATERS; AND THIRD, U. S. CITIZENS ABOARD ANY VESSEL, CAN BE PROSECUTED FOR POSSESSION WITH THE INTENT TO DISTRIBUTE ILLEGAL DRUGS, WITHOUT HAVING TO PROVE WHETHER THE DRUGS ARE ULTIMATELY DESTINED FOR THE UNITED STATES. WITH FOREIGN NATIONALS ON BOARD A FOREIGN VESSEL OUTSIDE U.S. CUSTOMS WATERS (AS DEFINED IN 19 USC 1401(j)), THE PROSECUTION STILL HAS TO DEMONSTRATE A CONNECTION BETWEEN THE ILLEGAL DRUGS AND THE UNITED STATES.

THE PASSAGE OF PUBLIC LAW 96-350 HAS GREATLY FACILITATED CONVICTIONS OF MARITIME DRUG TRAFFICKERS. DURING JANUARY TO SEPTEMBER 1980, JUST PRIOR TO THE SIGNING OF THIS LAW, ONLY ABOUT 64% OF THOSE ARRESTED BY THE COAST GUARD WERE ACCEPTED FOR PROSECUTION, AND THEN ONLY ABOUT 45% OF THOSE TRIED WERE CONVICTED. STATISTICS FROM THE SEVENTH COAST GUARD DISTRICT, WHICH ACCOUNTS FOR APPROXIMATELY 80% OF OUR SEIZURES, INDICATE THAT ABOUT 76% OF THOSE ARRESTED IN 1984 WERE ACCEPTED FOR PROSECUTION AND OF THOSE CASES, 85% HAVE RESULTED IN GUILTY FINDINGS IN FEDERAL COURT.

WHILE PUBLIC LAW 96-350 HAS PROVEN TO BE OF GREAT ASSISTANCE IN BRINGING MARITIME DRUG TRAFFICKERS TO JUSTICE, SOME DIFFICULTIES STILL REMAIN. H.R. 2132 ADDRESSES ONE OF THEM: WHAT CONSTITUTES AN "ARRANGEMENT" (MORE FREQUENTLY REFERRED TO AS A "SPECIAL ARRANGEMENT") WITHIN THE DEFINITION OF "CUSTOMS WATERS" AS FOUND IN 19 USC 1401(j) AND ALSO USED IN 21 USC 955b(a) THERE IS SOME DISAGREEMENT ON THIS QUESTION IN OUR COURTS. SOME BACKGROUND HERE WOULD BE APPROPRIATE.

UNDER INTERNATIONAL LAW, A FOREIGN VESSEL ON THE HIGH SEAS (OUTSIDE THE TERRITORIAL SEA OF ANY NATION) IS GENERALLY SUBJECT ONLY TO THE EXCLUSIVE

JURISDICTION OF ITS FLAG STATE. BUT, THERE ARE CERTAIN EXCEPTIONS TO THIS GENERAL RULE FOR MAINTAINING FREEDOM OF THE SEAS. AN IMPORTANT ONE FOR US IS THE BOARDING AND SEIZURE OF A FOREIGN VESSEL WITH THE CONSENT OF ITS FLAG STATE. THIS CONSENT WE CALL A "SPECIAL ARRANGEMENT".

WHEN DOES THE NEED FOR A SPECIAL ARRANGEMENT ARISE? AND, HOW DO WE GO ABOUT GETTING ONE?

IN THE TYPICAL SITUATION, ONE OF OUR CUTTERS WILL BE ON PATROL. IT ENCOUNTERS A SUSPICIOUS VESSEL, CLAIMING A FOREIGN REGISTRY, ON THE HIGH SEAS BEYOND THE U.S. CONTIGUOUS ZONE. THE CUTTER THEN COMMUNICATES TO ITS OPERATIONAL COMMANDER ITS REASONS FOR WANTING TO GO ABOARD THE VESSEL, USUALLY TO VERIFY REGISTRY AND CARGO. THIS REQUEST TO BOARD AND ANY SUPPORTING INFORMATION IS RAPIDLY SENT UP THE CHAIN OF COMMAND TO COAST GUARD HEADQUARTERS AND THE DEPARTMENT OF STATE. THIS IS USUALLY DONE BY TELEPHONE, FOLLOWED BY WRITTEN MESSAGE. IF THE FACTS WARRANT, THE STATE DEPARTMENT WILL CONTACT BY TELEPHONE OUR EMBASSY IN THE COUNTRY CLAIMED BY THE SUSPECT VESSEL. OUR EMBASSY IN TURN CONTACTS THE APPROPRIATE FOREIGN OFFICIALS. IF THE VESSEL'S CLAIM OF NATIONALITY IS REFUTED, WE WILL TREAT THE VESSEL AS STATELESS AND, THEREFORE, SUBJECT TO OUR UNILATERAL ENFORCEMENT JURISDICTION. IF THE VESSEL'S CLAIM OF NATIONALITY IS CONFIRMED, OUR EMBASSY WILL ATTEMPT TO NEGOTIATE A SPECIAL ARRANGEMENT WITH THE FOREIGN GOVERNMENT, PERMITTING OUR CUTTER TO BOARD AND SEARCH THE VESSEL. TO MINIMIZE ADDITIONAL DELAY, THAT REQUEST IS NORMALLY ACCOMPANIED BY A REQUEST FOR APPROPRIATE DISPOSITION, SUCH AS SEIZURE AND ARREST FOR PROSECUTION IN THE UNITED STATES OR IN THE FOREIGN COUNTRY, SHOULD ILLEGAL DRUGS BE DISCOVERED DURING THE BOARDING. IF NEGOTIATIONS ARE SUCCESSFUL, THE DETAILS OF THE SPECIAL ARRANGEMENT ARE RELAYED BACK VIA THE

SAME CHAIN OF COMMAND TO THE CUTTER, WHICH THEN TAKES APPROPRIATE LAW ENFORCEMENT ACTION. THE SPECIAL ARRANGEMENT AMOUNTS TO A WAIVER OF THE EXCLUSIVE JURISDICTION OVER THAT VESSEL BY THE FLAG STATE.

AS YOU CAN SEE, THE PROCESS RELIES HEAVILY ON ORAL COMMUNICATIONS TO MINIMIZE THE TIME NECESSARY TO OBTAIN THE FOREIGN COUNTRY'S CONSENT FOR THE COAST GUARD TO TAKE LAW ENFORCEMENT ACTION. THE REQUEST FOR THE SPECIAL ARRANGEMENT AND ITS RESULTS ARE NORMALLY CONFIRMED IN WRITING, USUALLY BY MESSAGES AND/OR DIPLOMATIC NOTES. SOME LOWER COURTS QUESTION THIS PROCESS AS BEING TOO INFORMAL TO QUALIFY AS A SPECIAL ARRANGEMENT WITHIN THE MEANING OF THE STATUTE. H.R. 2132 SEEKS TO CONFIRM THAT OUR PRESENT PRACTICE IS LEGALLY SUFFICIENT. THIS ISSUE IS PENDING BEFORE APPELLATE COURTS.

WE CERTAINLY DON'T WANT TO SEE OUR WAY OF OBTAINING SPECIAL ARRANGEMENTS BECOME MORE COMPLICATED. RATHER, OUR GOAL SHOULD BE TO MAKE THE PROCESS MORE EFFICIENT, CONSISTENT WITH THE REQUIREMENTS OF THE LAW. TIME IS OF THE ESSENCE BECAUSE OF THE RAPID CHANGE OF CONDITIONS IN THE MARITIME ENVIRONMENT; FOR INSTANCE --- WEATHER, PROXIMITY TO A THIRD COUNTRY'S WATERS, USE OF DECOYS TO OCCUPY LIMITED CUTTER TIME, AND THE FATIGUE FACTOR ASSOCIATED WITH PROLONGED SURVEILLANCE AND READINESS TO TAKE ACTION ON A PLATFORM LESS STABLE THAN A POLICE CAR AT A STAKE OUT. THE LONGER IT TAKES TO GET A FLAG STATE'S AUTHORIZATION TO ACT, THE MORE OPPORTUNITY THE SUSPECT VESSEL HAS TO JETTISON CONTRABAND OR TO DISPOSE OF OTHER EVIDENCE, MAKING PROSECUTIONS MORE DIFFICULT. MOREOVER, ANY ADDITIONAL DELAYS IN THE PROCESS, WOULD ONLY CONSUME MORE OF OUR VALUABLE PATROL VESSEL TIME, REDUCING OUR OVERALL LAW ENFORCEMENT EFFECTIVENESS. ANYTHING THIS COMMITTEE CAN DO TO PREVENT THAT HAS THE COAST GUARD'S WHOLEHEARTED SUPPORT.

H.R. 2132 IS A STEP IN THE RIGHT DIRECTION. BUT, THERE ARE ADDITIONAL CONCERNS WITH PUBLIC LAW 96-350 THAT I WOULD LIKE TO POINT OUT.

WHEN PUBLIC LAW 96-350 WAS ENACTED, THERE WAS CONCERN THAT THE UNITED STATES SHOULD NOT EXCEED THE SCOPE OF CRIMINAL JURISDICTION PERMITTED UNDER CUSTOMARY INTERNATIONAL LAW. THEREFORE, THE STATUTE INCORPORATED INTERNATIONAL LAW JURISDICTIONAL PRINCIPLES IN ITS DEFINITION OF THE SUBSTANTIVE OFFENSES IN 21 USC 955a. THAT IS, THE OFFENSE OF POSSESSING A CONTROLLED SUBSTANCE WITH THE INTENT TO DISTRIBUTE IT APPLIES TO:

[955a](a) VESSELS SUBJECT TO U.S. JURISDICTION (U.S. AND STATELESS VESSELS);

[955a](b) U.S. CITIZENS;

[955a](c) U.S. CUSTOMS WATERS; OR

[955a](d) FOREIGN CITIZENS ABOARD FOREIGN VESSELS WITH AN INTENT TO IMPORT INTO THE U.S.

UNFORTUNATELY, THIS HAS CREATED SIGNIFICANT PROBLEMS. THE INCORPORATION OF LANGUAGE REFERRING TO THE STATUS OR LOCATION OF THE VESSEL OR PERSON INTO EACH SUBSTANTIVE OFFENSE UNDER 21 USC 955a HAS LED SOME COURTS TO HOLD THAT SUCH STATUS OR LOCATION IS AN ELEMENT OF THE OFFENSE, WHICH MUST BE PROVED AS A FACT TO THE JURY BEYOND A REASONABLE DOUBT, RATHER THAN SOLELY AS A QUESTION OF JURISDICTION TO BE DECIDED BY THE JUDGE ALONE AS A MATTER OF LAW UNDER A LESSER STANDARD OF PROOF.

A RELATED PROBLEM INVOLVES THE DIFFICULTY OF PROVING IN OUR COURTS THE SPECIAL ARRANGEMENT AND THE VESSEL'S NATIONALITY AT THE TIME OF SEIZURE. WHILE A FEW COURTS HAVE HELD THAT THE WRITTEN MESSAGE TRAFFIC IS SUFFICIENT FOR THAT PURPOSE, QUITE A FEW OTHER COURTS HAVE REQUIRED AFFIDAVITS FROM FOREIGN GOVERNMENTS EITHER REFUTING THE VESSEL'S CLAIMED REGISTRY OR VERIFYING THE FLAG STATE'S CONSENT TO THE COAST GUARD TAKING LAW ENFORCEMENT ACTION. IT HAS OFTEN BEEN EXTREMELY DIFFICULT TO OBTAIN AFFIDAVITS, ACCEPTABLE TO OUR COURTS, BOTH IN CONTENT AND IN FORM, IN A TIMELY MANNER. THIS PROBLEM HAS JEOPARDIZED SOME PROSECUTIONS BECAUSE WE ARE AT THE MERCY OF FOREIGN OFFICIALS TO PROVIDE THE APPROPRIATE AFFIDAVIT.

THE CONSEQUENCE IS THAT THE MAJOR ISSUE FREQUENTLY LITIGATED AT TRIAL HAS NOTHING TO DO WITH WHETHER THE DEFENDANTS ENGAGED IN ILLICIT DRUG TRAFFICKING. RATHER, THE TRIAL FOCUSES ON THOSE ISSUES RELATING TO STATUS OR LOCATION OF THE VESSEL OR PERSON. IF PUBLIC LAW 96-350 IS AMENDED TO AVOID SUCH INTERNATIONAL LAW ISSUES, PROSECUTIONS OF MARITIME DRUG SMUGGLERS WOULD BE MORE SUCCESSFUL. IT MAY BE THAT SUCH ISSUES SHOULD BE TREATED SOLELY AS QUESTIONS RELATING TO FOREIGN RELATIONS, AND NOT LITIGATED IN THE COURTS AS A DEFENSE RAISED BY THE DEFENDANTS, WHICH SUCCEEDS ONLY IN CLOUDING THE ULTIMATE ISSUES BEFORE THE COURT. IN ANY EVENT, THE LAW AT A MINIMUM SHOULD BE REWRITTEN TO MAKE CLEAR THAT THE APPLICABILITY OF THE STATUTE IS TO BE DETERMINED BY THE COURT, RATHER THAN BY THE JURY AS AN ELEMENT OF THE OFFENSE.

ANOTHER PROBLEM ARISES WHEN VESSELS MAKE NO CLAIM OF NATIONALITY AT ALL AT THE TIME OF THE COAST GUARD BOARDING AND ARE BOARDED AND SEIZED AS A STATELESS VESSEL. THEN, AT TRIAL, THE DEFENDANTS CLAIM A FOREIGN REGISTRY. AT THAT

POINT, IT IS VERY DIFFICULT FOR THE GOVERNMENT TO REFUTE THE NEW CLAIM OR TO RECHARGE THE DEFENDANTS WITH ANOTHER OFFENSE. THE LAW SHOULD BE REWORDED TO MAKE VESSELS WHICH FAIL TO ASSERT A CLAIM OF NATIONALITY BEFORE SEIZURE PROSECUTABLE AS STATELESS VESSELS. IN THIS REGARD, THE LAW SHOULD ALSO DELINEATE WHAT CONSTITUTES A RECOGNIZABLE CLAIM OF NATIONALITY.

FINALLY, WE CONSIDER A VESSEL DOCUMENTED UNDER U.S. LAW WHICH HAS BEEN PLACED UNDER A FOREIGN FLAG WITHOUT THE MARITIME ADMINISTRATION'S PERMISSION, WHICH IS A VIOLATION OF 46 APP. USC 808, TO BE A U.S. VESSEL FOR PURPOSES OF PROSECUTION UNDER 21 USC 955a. ONE APPELLATE COURT HAS AGREED WITH THIS INTERPRETATION. HOWEVER, THE PRESENT WORDING OF THE LAW STILL LEAVES ROOM FOR THE ARGUMENT THAT, DESPITE THE FAILURE TO COMPLY WITH 46 APP. USC 808, THE VESSEL SHOULD BE CONSIDERED A FOREIGN VESSEL FOR DRUG PROSECUTIONS. TO ELIMINATE THAT ARGUMENT, THE PRESENT STATUTORY LANGUAGE SHOULD BE CLARIFIED.

MR. CHAIRMAN, PUBLIC LAW 96-350 HAS PROVED TO BE OF GREAT ASSISTANCE IN OUR WAR ON DRUGS. HOWEVER, IF PUBLIC LAW 96-350 WERE AMENDED TO ADDRESS THE PROBLEMS THAT I'VE RAISED HERE TODAY, IT COULD MAKE OUR EFFORTS EVEN MORE EFFECTIVE. I WILL BE HAPPY TO ANSWER ANY QUESTIONS WHICH YOU OR THE MEMBERS OF THE COMMITTEE MAY HAVE.