Freedom of the Seas in the Old Fifth Circuit:
For the unpronounceable ship 'PHGH' or not? Court resolution

By David A. Bagwell

All lawyers and judges have war stories, and some are boring, but others riveting. Mine are no better than anybody's, but by pure blind luck a couple of mine implicate old Fifth Circuit and new Eleventh Circuit history.[1]

One of my war stories flows from an international law dispute, and led to one of the last *en banc* hearings of the old Fifth Circuit, this one with *26* appellate judges sitting in two concentric horseshoe-shaped benches. Talk about a scary sight. Maybe you would enjoy hearing the story? Grab a glass of wine and pull up a chair next to me, here under the ceiling fan. See if you think Courts are any better for the resolution of these freedom of the seas issues than the Arbitration was in The ALABAMA, or the Commission in The I'M ALONE.

The PHGH

The ***very*** unprepossessing ship M/V (for "Motor Vessel") PHGH[2] – a name that sure looks unpronounceable but is said like "Piggie" – in 1980 led to the biggest international law of the sea case in Gulf Coast history since the I'M ALONE, the 1980 en banc old Fifth Circuit case *U.S. v Williams*, 617 F.2d 1063 (5th Cir. 1980).

She was what we would now call a small freighter, well-built in Hamburg, Germany, in 1956. Twenty-two years later she was a rust bucket freighter registered in Panama, looking for all the world like some old tub out of a Joseph Conrad or Graham Greene novel, and knocking around South American waters.

The Peruvian subsidiary of the Celanese Corporation – "Rayon y Celanese Peruana, S.A." or "Raycel"– shipped a legitimate cargo of bulk yellow sulfur aboard her in the winter of 1977-78, from Venezuela to Peru. Unfortunately, on January 25, 1978, an American DEA pilot spotted her anchored a mile and a half off Colombia, rendezvousing with several smaller vessels, suggesting to the DEA what turned out in fact to be the loading from lighters onto a mother ship of 20 tons of bales of marijuana on top of the legitimate cargo of sulfur.

Five days later, Jan. 30, the U.S. Coast Guard Cutter ACUSHNET was loafing around the Gulf of Mexico, on picket duty. The ACUSHNET was a 213-foot ship that had been built right at the end of World War II, when she served as a Navy salvage ship, moving to the Coast Guard just after the war.

During the late 1970s and 1980s, she was assigned to the Gulf of Mexico, where her size and range – 20,000 miles at 7 knots, less at faster speeds – allowed long cruises with an emphasis on picket duty on dope smuggling in the Gulf. The ACUSHNET sighted the PHGH a hundred miles off the Yucatan Peninsula, and found her in their book of suspect ships, though naturally the name was misspelled. The ACUSHNET approached the PHGH, which hoisted a distress flag. The Coast Guard hailed her on the radio, and she reported to be of Panamanian registry – she flew no Panamanian flag but Panama was on her stern and she was in fact Panamanian. She reported to be carrying a cargo of sulfur – which was true –and claimed to be going from Aruba to Mobile, but was having generator troubles, which they said did not need Coast Guard help.

At 5 the next morning, crew members started waving flashlights, making hand signals and waving clothes and toilet paper. Twelve hours later, by 5 in the afternoon, the ship had stopped dead in the water. With no encouragement from the Coast Guard, a PHGH crewman jumped in the Gulf, swam to the ACUSHNET and went aboard, and said there was "dirty business" on the PHGH, and complained of working conditions.

So what's a Coast Guard cutter to do? Under International law it is at minimum arguable that they were quite

continued, next page

Bales of marijuana on top of sulfur in the hold of the M/V PHGH in Mobile, Ala., 1978

restricted in what they could do. Could they just board the PHGH? International law tends to call that "visit and search." Hugo Grotius invented the concept of "freedom of the seas" in 1604, and both the history and the legal history of the United States show her to be an adamant foe of any claimed general right of visit and search.

No country can just go around boarding foreign ships willy-nilly on the high seas; remember the Barbary Pirates (wait; aren't we still fighting them?) and The War of 1812 and impressment and all that? We carry a national chip on our shoulder about this "freedom of the seas" stuff, or at least we used to.

In 1824, Justice Story wrote for the U.S. Supreme Court against "an exercise of a universal right to search, a right which has never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the American".[3] The Convention of the High Seas of 1958, then in effect and of which the United States was a signatory, said that absent a treaty, there are only three instances in which a warship may properly board a foreign merchant vessel on the high seas: Piracy (*ixnay* on that), the slave trade (*ixnay* on that too), or flying a false flag (*ixnay* on that; the PHGH flew no flag, but her registry was in fact in Panama, as was written on her stern).

So the ACUSHNET and M/V PHGH, by late afternoon of Feb. 1, just sat dead in the water there a hundred miles off the Yucatan Peninsula, and looked at each other. I'm not too sure what they did on the PHGH but on the ACUSHNET they radioed headquarters, which called up the State Department.

The State Department probably thought about the giant problems created by the I'M ALONE affair 50 years earlier (for which see above), and thinking in a manner that businessmen seem to call "proactive" (my law practice shows it to be their favorite current word behind "cash burn") decided to call up Panama, the flag nation, and ask them the diplomatic version of "Hey, can we just, like, you know . . . . ***search your ship***, and stuff?"

At the time, U.S.-Panamanian relations were, let us say, "in flux." The Panama Canal Treaties were pending and the vote was expected to be quite close. Omar Torrijos was The Man just then; he was killed in a plane crash just afterward in 1981. Somewhere below Torrijos was Manuel Noriega. Remember him? Apparently sometimes he did work for the CIA, and sometimes he didn't, but he always smuggled dope, and I guess he is still in federal prison somewhere; maybe some of you deal with his prisoner petitions. Leaving aside the Canal issues, some of these Panamanian government face cards were either then under secret indictment or being investigated, and they certainly had serious personal reasons to cooperate with Uncle Sam.

On Feb. 2 – Groundhog Day in Punxsutawney, Pa., (that place has a worse name even than "PHGH") but maybe not on the High Seas or in Panama – the ACUSHNET got a message from the State Department that Judge Tjoflat for the Fifth Circuit en banc two years later summarized: "that the Panamanian Vice-Minister of Foreign Affairs had authorized the Coast Guard to stop, board, and search the PHGH, and, if contraband were discovered, to take the vessel to a United States port and hold those on board for criminal prosecution".[4]

Bales of marijuana being hoisted off the M/V PHGH

Well, was that "legal", and all? This was mainly a question of international law, and under it Panama had the clear right to board its own ships and enforce its own laws, but did Panama have the right to lend or give to the United States the right for a U.S. military ship to visit and search a Panamanian-flagged ship? Good question. And at the time, there just was no clear answer under the interpretation by U.S. courts of this question under international law.

In dictum in a footnote of a 1975 Fifth Circuit case, the Court had written that the international law treatises under discussion in that case "do not deal with that more sensitive matter of one sovereign obtaining from another permission to board and if necessary arrest foreign nationals on a vessel of such foreign nation, an act which, in the absence of a treaty, would be a violation of freedom of the high seas".[5]

Bales of marijuana after being taken off the MV/PHGH

Under international law generally, the rule was that one nation could transfer to another the right of visit and search of its vessels only by treaty,[6] and not just by some telephone call, and this was the position of international law as stated by the governments of Great Britain[7] and France.[8] And it seemed to be the rule under Article 22 of the Convention on the High Seas that outside of piracy, the slave trade or false flag, only by a treaty could the flag nation transfer this power or right to another.

The Coast Guard boarded the PHGH and found 20 tons of marijuana in paper bales sitting on top of the bulk sulfur cargo (sulfur? There must *not* have been any redbugs in the marijuana) and they brought the ship to Mobile, Ala. Once it got to Mobile, a DEA agent found a map on board with in line drawn to Mobile, although the papers showed that the legitimate cargo of sulfur was bound for Peru, consigned to the Peruvian subsidiary of the Celanese Corporation.

Once the ship got to Mobile, there were three different proceedings in the U.S. District Court, and the judge who drew the duty to sort them out was the Hon. W. Brevard Hand, who had been appointed to the bench by President Nixon.

First, there were criminal cases. The United States tried the foreign crew members and they were convicted, sentenced to probation and deported. The only American involved, Frank Gunnar Williams,[9] was tried on a stipulation of facts and convicted. He appealed.

Next, there were two civil cases and, in full disclosure, I filed both of them. Some 32 or so years ago when I was a 33-year-old admiralty lawyer (oh, go on and add it up: that makes me 65 now], I got a call from a seasoned corporate lawyer in New York for the Celanese Corporation, who told me that their Peruvian subsidiary Raycel had been consignee of a cargo of legitimate sulfur on the Panamanian-flag ship, going from Venezuela to Peru, but that the ship had been seized on the high seas and brought to Mobile, and the sulfur cargo was stuck here. He explained the difficulties of paying a lawyer from a company based in Peru, but the case sounded like fun and I figured I'd get paid something sometime, somehow, so I took it. I'm sure that I was the very last admiralty lawyer who was called, and that the first ones took great glee in sending it to me, but it was a great case. He and I both said "the United States can't DO that, can they?" Maybe so.

I figured that the United States surely would promptly forfeit the vessel and promptly sell her and that I would intervene and fight over the seizure and the money from the sale of the vessel, but for reasons that I have never understood, the United States for four and a half months did not file a forfeiture action against the ship.

Finally, after I had waited almost two months for the forfeiture case which the government never quite got around to filing – though they were paying custodial fees the whole time – I filed two civil lawsuits.

The first *civil* lawsuit was a complaint that I filed for Raycel against the vessel *in rem* in the Southern District of Alabama on March 31, 1978, under the general maritime law for maritime tort in connection with the cargo, mostly that the dope voyage was an improper "deviation" as admiralty so nicely puts it. All kinds of other commercial claimants jumped in, and we got a court order to sell the ship at a marshal's sale on the Courthouse steps, and it sold for the grand sum of $40,000, and we were lucky to

continued, next page

get it. I got a court order on May 25th that Raycel owned the sulfur, and we got it off the ship after the marshal's sale and transshipped it on to Peru, where they needed it in their factories. When I left the ship, its new owner presented me with a life ring from the ship, on which was painted "M/V PHGH"; more about that later.

The United States finally forfeited the vessel just two days before the Court-ordered sale, but the sale went on, the money was paid into court, and everybody duked it out over the priorities of the relevant maritime liens. The judge decided the case on June 13, 1979, 13 days after I had left practice at age 35 to become the only U.S. Magistrate for the District-- and in accordance with law, justice, truth, light, and the American way, my client got every dime of the forty grand after expenses *in custodia legis*, and the judge chewed the government out in writing rather thoroughly too. It wasn't full payment – Judge Hand wrote "Raycel is clearly entitled to damages beyond the amount in the registry"– but it was all there was, from the ship sale. So my client and I finally got some money out of which I could be paid a fee without violating international currency restrictions! Victory at sea! (Wrong: seizure at sea, victory on land) So much for the money angle.

The second *civil* lawsuit was in the spring of 1978 when I also filed suit in the Southern District of Alabama against the United States for wrongful seizure of the ship, in violation of international law, as I thought was clearly recognized by the U.S. Supreme Court, mostly in a bunch of early 1800s decisions by people like Justice Joseph Story; great cases with names like *The MARIANA FLORA*,[10] *The CHARMING BETSY*[11], *The Apollon*,[12] *The Peggy*,[13] and even *The MAZEL TOV*.[14] You know; all those "Cranch" cases, and stuff (Justice Story was my hero at the time, for among other reasons that he had gone on the Supreme Court at age 32, and at the time I wanted to go on the District Court at age 35, and some people said I was too young; Judge Rip Cox got the job instead and turned out a lot better than I would have.)

Our claim against the United States for wrongful seizure in violation of international law was under the Public Vessels Act, and the *Bivens* remedy[15] and some stuff. We had to prove "reciprocity", meaning, that the admiralty law of Peru would let an American sue on such a case there, before America would let a Peruvian company like Raycel sue here. I got a great affidavit from the President of the Maritime Law Association of Peru, attesting under oath to reciprocity, and I moved for summary judgment on that issue, so I would not have to bring him to trial in the United States, an expensive proposition. The United States filed nothing in response to my motion, but the judge denied my motion anyway! Pretty soon, on April 5, 1979, Judge Hand threw the whole case out[16]– he was not nearly as impressed by Joseph Story and all those old ship names and freedom of the seas as I was. I appealed to the old Fifth Circuit.

OK, so by this time in the summer of 1978, 33 years ago, there were two separate cases in the old Fifth Circuit, raising and claiming the illegality of the seizure of the M/V PHGH on the High Seas. There was the criminal case against Frank Gunnar Williams, and there was my civil wrongful seizure case under international law and under the law of admiralty, *Rayon y Celanese Peruana, S.A. v. United States*. My civil case was a much cleaner presentation of the international law issues, but the criminal case got put on a fast track by reason of its nature. I was plenty afraid that before we knew it, the international law issues could be decided by the Fifth Circuit in the much-truncated record in the criminal case.

So I, 35-year-old whippersnapper admiralty lawyer that I was, and in the nature of our other claims, got permission from the Fifth Circuit to appear Amicus Curiae in the criminal case, and on July 25, 1978, filed an Amicus brief in the criminal case before the panel, making all of our international law arguments and citing international law texts and Joseph Story cases involving vessels with great old New England girls' first names, and all of that. It was grand and glorious.

But, the Fifth Circuit Panel did not buy any of it, and on Feb. 6, 1979, the Fifth Circuit Panel affirmed the criminal conviction of Frank Gunnar Williams.[17] I encouraged the criminal lawyers to ask for *en banc* rehearing and I did something I had never done before or since, for very good reasons: I filed an Amicus Curiae Brief in support of *en banc* rehearing; just imagine the nerve of it.

To my surprise, in the spring of 1979 upon the vote of the Fifth Circuit, the criminal case went *en banc*. One more chance to argue Joseph Story cases named for old ships with flouncy 19th century New England girls' names!

About this time I must have slipped the gravitational field of earth, for I decided that if we lost *en banc,* I would petition for certiorari and if it were denied, I would take the case to the World Court in The Hague at my own time and expense, just for the experience of it! To take a case in the World Court at The Hague, you cannot have private companies suing willy-nilly, but apparently only governments can sue there, at least nominally. So I asked my Peruvian businessmen clients this question: if we *did* sue in the World Court at The Hague, did our company have enough juice in Peru to get permission for me to represent Peru there? Ha! Did we? Turns out our company president had a shot at being the next president of Peru! The Hague, here we come!

But before the en banc hearing, I was appointed the

(*only*) full time U.S. Magistrate for the Southern District of Alabama, in May of 1979. I persuaded my smart law partner Pat Sims to take over the case (Pat would shortly afterward become the *second* full time U.S. Magistrate in the Southern District of Alabama, where we had a lot of fun serving together for several years; now there are *four* of them there.)

But the *en banc* court would only let the criminal lawyer argue, who was Warren Jacobs of Miami. When it came up for argument, I took the day off from my Magistrate Job, and Pat Sims and I went to New Orleans to watch the magnificent show. There were *26*[18] appellate judges sitting up there, in two concentric horseshoe-shaped benches. The clerk announced that out of deference to the poor lawyers, there would first be a few minutes of argument allowed – five minutes or something– before any Judge could ask a question.

So the appellant lawyer rabbit was off on oral argument, followed by a pack of 26 judicial beagles. Would it surprise you to learn that before the allotted no-question time had yet expired, Judge Gerald Bard Tjoflat asked his first question? (I was not sure, but I did not think it would surprise you.) Questions to both sides flew strong and frequent, about whether the Fourth Amendment applies at sea and if so where and how, and about various Coast Guard Statutes, and exceptions to the Fourth Amendment.

On May 12, 1980, the old Fifth Circuit decided the case *en banc*,[19] with an opinion by Judge Tjoflat. Judge Roney (with Judges Godbold, Hill, Fay, Tate, and Thomas A. Clark joined) specially concurred, and Judge Rubin also concurred (with Judges Kravitch, Frank Johnson, and Randall joined). Nobody dissented. The case dealt mostly with criminal law and Fourth Amendment issues, not international law. Judge Tjoflat wrote that "Panama's waiver . . . completely removed any international law concerns from the case".[20] They never mentioned nor, of course, decided our argument, clearly recognized under International law, that such nation-to-nation permission could only be given by treaty, not by an ad hoc telephone call.

The bottom line message of the case, as I saw it, was "we are cracking down on dope smuggling in the Gulf Coast."

Ah, well. We lost. I had lost before, and would lose again, but fortunately, won some too!

At the Judicial Conference for the (Old) Fifth Circuit in Dallas in 1980, just after the *en banc* decision – maybe the hottest judicial conference ever – a topic of discussion on the program was "Searches and Seizures at Sea," with a panel consisting of Circuit Judge John R. Brown, district Judge Terry Hodges of Florida, AUSA Jon Sale and Miami criminal lawyer Donald Bierman. I told the judges that I would be there and would bring the old life ring from M/V PHGH, and I hung it on the chart rack on the stage for the program. Judge Brown thanked me for bringing it.

Afterward, I brought that PHGH life ring home, and later hung it on my wharf house at Point Clear on Mobile Bay, where Hurricane Georges washed it away forever, unfortunately along with my wharf. But the holding *en banc* still stands.

Endnotes:

1 You have already tolerated the story that the Eleventh Circuit's first and most cited case, *Bonner v City of Prichard*, reversed me upon authority of my having been earlier reversed by the old Fifth Circuit on an identical case, making me the only Judge ever reversed by two circuits on the same point of law [as Judge Frank Johnson characteristically and laconically drawled to me, over a "Home Run" cigarette, "You'd THINK you would have learned after the first one!"].

2 None of us ever figured out if this was some kind of German or Spanish word or name, or the acronym for some company, or what. I wish I could help you.

3 *The Apollon*, 22 U.S. 361, 371-72 (1824).

4 617 F.2d at 1070.

5 *United States v Winter*, 509 F.2d 975, 989 n. 44 (5th Cir. 1975).

6 C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 311 (6th ed. 1967).

7 *Id.* at 146.

8 *Id.* at 311 n. 1.

9 Have you ever noticed the odd fact that for inexplicable reasons, in all federal criminal cases not involving a "street name", court officials always call the defendant by his full formal name?

10 24 U.S. 1 (1826).

11 6 U.S. (2 Cranch) 64 (1804).

12 22 U.S. 361 (1824).

13 5 U.S. (1 Cranch) 103 (1801).

14 288 U.S. 102 (1933).

15 *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). By an odd coincidence, eight years earlier as a freshman law student I had written a case note on Bivens: Constitutional Law -- Fourth Amendment -- Violation of Fourth Amendment by Federal Agents Gives Rise to a Cause of Action for Damages, 24 ALA.L.REV. 131 (1972). Judge Hand of course did not think my freshman case note entitled me to win the case.

16 *Rayon y Celanese Peruana, S.A. v United States*, 1979 A.M.C. 2682 (S.D. Ala. 1979). Judge Hand very logically said that the panel opinion in Williams answered the question.

17 *United States v Williams*, 589 F.2d 210 (5th Cir. 1979).

18 Two of them did not participate in the decision, it turned out, so there were 24 judges on the panel opinion.

19 *United States v Williams*, 617 F.2d 1063 (5th Cir. 1980).

20 *Id.* at 1090.