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# JURISDICTION IN HIGH SEAS CRIMINAL CASES — PART II\*

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## ANALYSIS OF CORDOVA CASE—Continued

**A**N examination of the pertinent section of the new code (18 U.S.C. 7) shows that in the revision it was found unnecessary to repeat the words so strongly relied upon by the *Cordova* case. The words "on" in Ground One, and "upon" in Ground Two were *entirely eliminated*. The heading was also changed, and the word "vessel" which appeared in the older version also disappeared. The new section starts as follows:

### "SECTION 7—SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES DEFINED.

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging, etc."

West Publishing Company, which helped in the official revision, have issued a book — "Congressional Service, pp. 2175-2885 — 80th Congress — 2nd Session — Epochal Legislation — New Title 18, Etc." In the copious "Revisor's Notes," which follow the official text, an explanation is given, section by section, of the history behind, and the reasons for, changes in each section. Regarding this new section, the comments indicated where some of the words not appearing in old section 451 were transferred from other parts of the former code, why certain new words were added, that "the enumeration of the Great Lakes was omitted as unnecessary" and that "*other minor changes* were necessary now that the section defined a term rather than a *place of commission* of crime or offense; *however the extent of the special juris-*

\* Continued from Autumn Issue of Journal, 18 J. Air L. & Com. 427 (1951).

\*\* The opinions or assertions contained in this article are those of the writer and are not to be construed as reflecting the views of the Navy Department.

diction as originally enacted has been carefully followed." (Emphasis supplied.)

It would thus appear that among the "minor changes" which allow the "extent of the special jurisdiction as originally enacted" to be "carefully followed" is the entire elimination of the presently contentious words "on" and "upon" which appear to have been partially relied upon as a basis for the *Cordova* decision.

The *Cordova* case refers to a few examples of what may be considered the expanding concepts of our law, but unfortunately failed to recognize the signs of progress which they indicate. On p. 302 this comment appears:

"It is perhaps irrelevant, but I have little doubt that had it wished to do so Congress could, under its police power, have extended federal criminal jurisdiction to acts committed on board an airplane owned by an American national, even though such acts had no effect upon national security,"

A footnote at this point indicates the situation where, under the present status of the law, the Supreme Court has sanctioned the exercise of Federal jurisdiction over acts which took place "on land within the jurisdiction of a foreign sovereign, *U.S. v. Bowman*, 1922, 260 U.S. 94 \* \* \*; *United States v. Chandler*, D.C. Mass. 1947, 72 F. Supp. 240 \* \* \* certiorari denied 1949, 336 U.S. 918."

It is to be noted here, that this principle of the *Bowman* case, regarding jurisdiction of acts on land of a foreign sovereign, goes much further than that which was later disapproved in the *Cordova* case when it discusses the case of *U.S. v. Flores* (1933) 289 U.S. 137. Both *Bowman* and *Flores* cases will be further discussed. It may also be pertinent to say that the ancient British courts of admiralty had jurisdiction over acts of Englishmen abroad, irrespective of the element of National security, or of location.

The judge's footnote continues:

"But Congressional power over vessels on the high seas, or in admiralty waters outside the jurisdiction of any state, is even wider. It can be exercised to punish acts (such as assault) which have no relationship to national security. A different theory of jurisdiction comes into play, namely, that the American flag vessel is itself territory of the United States. There are no international complications, as there might be for land crimes against a person."

With these views expressed in the footnote, as being the possibilities within the power of Congress, it is most unfortunate that the deductions drawn from the cases which the court next considered failed to elicit the view that Congress had *already exercised the necessary powers for full jurisdiction in this case.*

The opinion continues:

"In *U.S. v. FLORES*, 1933, 289 U.S. 137, 53 S C t. 580, 77 L Ed 1086, the Supreme Court of the United States WENT THE EXTREME LENGTH OF holding that the criminal jurisdiction of the United States, under this very statute (18 U.S.C. Sec. 451), WAS BROAD ENOUGH to include acts committed on an American flag

vessel, EVEN THOUGH SHE WAS WITHIN THE TERRITORIAL WATERS OF ANOTHER SOVEREIGN." (Emphasis supplied.)

The *Flores* Case can bear much closer examination than the bit given to it in the case as set forth above. As a matter of fact, it is a remarkably well-reasoned case and now stands as a leading case in Admiralty Law. Mr. Justice Stone therein made a most valuable contribution to the natural growth of our law. Two phases of the problem in that case are directly material to our aviation question, *i.e.* (1) the extent of the waters of the world which meet the "locality" test necessary for criminal jurisdiction, and (2) the development of the theory of "extraterritorial" jurisdiction over U.S. property which finds itself outside the physical limits of the United States.

In the *Flores* case an American citizen was tried and convicted in the District Court of Pennsylvania, as the first port of entry, for a murder of another U.S. citizen committed on board a U.S. merchant vessel moored at Matadi, Belgian Congo, 250 miles inland on the Congo River — *i.e.* far above the ocean tide's ebb and flow. Mr. Justice Stone, in the opinion affirming the conviction said:

"The appellee insists that even though Congress has power to define and punish crimes on American vessels in foreign waters, it has not done so by the present statute, since the criminal jurisdiction of the United States is based upon the territorial principle and the statute cannot rightly be interpreted to be a departure from that principle. But the language of the statute making it applicable to offenses committed on an American vessel outside the jurisdiction of a State "within the admiralty and maritime jurisdiction of the United States," is broad enough to include crimes in the territorial waters of a foreign sovereign. For Congress, by incorporating in the statute the very language of the constitutional grant of power, has made its exercise of the power coextensive with the grant."

How closely the contention of appellee of the *Flores* case parallels that of our jurisdictional question, and how aptly Mr. Justice Stone has put his finger on the appropriate answer to our problem, *i.e.* that the authority is already there and has been there from the very beginning of our Federal System! Except for the case of *U.S. v. Rogers* (1893) 150 U.S. 249, it appears to have been generally believed that Federal courts lacked jurisdiction of offenses committed in strictly foreign territorial waters. In the *Rogers* case (assault on a U.S. vessel on the Canadian side of the Detroit river) the Federal court took jurisdiction by virtue of belief that the Great Lakes were "High Seas," and the Detroit river was a tributary thereof, and that the offense was therefore punishable under Act of Congress of March 3, 1825 (4 Stat. 115) and within the meaning of Title 18, U.S.C. 455 (former code — and now sec. 113).

As pointed out by Mr. Justice Stone in the footnote, the *Flores* case marks the latest link in the chain of cases which have returned the extent of the U.S. admiralty jurisdiction to the point where it was under our colonial governors at the time of our Revolution and as it

was in early English law before its power was whittled down by three centuries of open warfare with the powerful common law judges.

The English Admiralty test is "Ebb and Flow" of tide. But in England all navigable rivers are tidal. It took Mr. Justice Taney, in "*The Genesee Chief*" (1881) (12 How. 457) to show that the true test was "navigability" — that in England this was synonymous with ebb and flow of tide, but that the healthy development of our law, to keep pace with expanding inland commerce, required our true test to be "navigability" — and that jurisdiction for offenses on *all* navigable waters were intended by the drafters of the Constitution. But it has taken many cases to bring all inland waterways, rivers, canals and interstate lakes, under the exclusive admiralty jurisdiction of the Federal Courts. It is to be fervently hoped that we won't make the same antiquated mistakes in the development of the case history of our rapidly expanding aviation industry.

The *Flores* case also brought up to date another phase of the law concerning jurisdiction in cases of crimes similar to the problem we face in the *Cordova* decision. It was claimed for a long time that murder could not be punished in a U.S. court, if committed on a U.S. vessel in foreign waters. It should be noted, however, that in this type of case, there is, theoretically, an alternative jurisdiction, *i.e.* the foreign sovereign in whose waters it is committed. It is now clear that under the *Flores* case, U.S. Federal courts do have that jurisdiction by virtue of the fact that foreign waters fall within the definition of Ground Two. In Ground Two the exclusive word "State" means a "U.S. State" and not a "foreign State."

In 1820 such a murder took place in the tidal waters at the mouth of the river Tigris, below Canton, at a point about 100 yards from shore off Wampoa, China. It came to trial in a U.S. Federal Court. *U.S. v. Wiltberger*, 18 U.S. (5 Wheat) 76). Since the Chinese at that time looked down on all foreigners, and would not be bothered with our private affairs, and since the U.S. Federal court thought that it lacked jurisdiction in tidal rivers within a foreign state, the defendant went free.

In spite of the fact that the Supreme Court in the *Flores* case has absolutely overruled the *Wiltberger* case, the latter case almost to the exclusion of all others, is approved and cited in the *Cordova* case as "the proper approach" to our problem of airspace over the high seas.

The question of where the High Seas starts, relative to distance from the shore, has not always been uniformly answered. Under International Law, the "Three Mile Limit" is now almost universally accepted, and for the United States the limiting line between high seas and inland waters was fixed by statute in 1895 and may be found in Title 33 U.S.C. 151. But a century ago it was generally held that jurisdiction to try offenses committed on the high seas (Ground One) reached to cases very close to the shore. At that time the present three mile limit was not accepted by many nations. In *U.S. v. Ross* (C.C.R.I. 1813) Fed. Cas. No. 16, 196, the Court said "High Seas, within the Act

of April 30, 1780 meant any waters on the sea coast which were outside the boundary of the low-water mark." A few outstanding cases where this low watermark test, even in foreign open roadsteads, was approved are the following: Judge Story in *U.S. v. Hamilton* (C. C. Mass. 1816); Fed. Cas. No. 15290; *U.S. v. Seagrist* (C.C. N.Y. 1860) Fed. Cas. No. 16, 245; *U.S. v. Morel* (C.C. Pa. 1834); Fed. Cas. No. 15,807. One case went so far as to say that the section between high and low watermarks is "high seas" to the extent that it happens at the moment to be covered with water, and land when not covered. These definitions may well be considered correct as of that time, on the basis of the then existing definition of High Seas in International Law. It is to be wondered why similar construction was not applied in the *Wiltberger* case which happened very close in time to cases cited above, and many other similar decisions. The *Wiltberger* decision would thus appear to be wrong on two grounds: first that the court failed to apply the meaning of High Seas as it existed at that time and convict on Ground One, and secondly under the recent authority of the *Flores* case it would be punishable on Ground Two.

Regarding the second part of Mr. Justice Stone's remarks in the *Flores* case — *i.e.* that concerning affording a U.S. merchant vessel an extraterritorial status — it is submitted that exactly the same status is due to and could be accorded to a U.S. airplane, public or private. This special status for vessels, while outside home waters is now universally accepted in International Law. For an able exposition of the rights and duties, and which nation should take jurisdiction, see *Wilderhus' Case*, 120 U.S. 1. In general terms, the U.S. view is that, for matters which effect only the internal activities of a foreign ship in U.S. waters, the vessel's home government should hear the case, but if the offense is one which does or may affect the tranquility of the port, if it should become known, the local sovereign should take jurisdiction. There are also a few treaties regulating this subject.

In the *Cordova* case, after depreciating the *Flores* and *Rogers* cases, and two more yet to be covered, *i.e.* *Skiriotes v. Florida*, 313 U.S. 69 and *U.S. v. Holmes* (1820) 18 U.S. (5 Wheat) 412 — the opinion (p. 303) goes on to say:

"But none of these cases, nor the principles on which they rest would justify the extension of the words "high seas" to the air space over them. It is at this point that the case at bar, I think, becomes one of first impression. The proper approach is, nevertheless, to be gathered, for example, from *United States v. Wiltberger*."

Does this mean that the *Cordova* decision stands for the principle that the proper approach to the air law problem should be to turn back the hands of time 130 years — and to overrule the recent well-reasoned "approach" of the *Flores* case, and to fail entirely to recognize that the advent of widespread use of aircraft into the high seas areas is merely a new application of an ever changing world?

It would appear that, of all the cases considered by the court, the *Holmes* case (*supra*) perhaps most clearly points the way to the proper

solution of our high seas problem. Since, however, the *Skiriotes* case was first mentioned by the Court, it deserves a few remarks here. Concerning the *Skiriotes* case the opinion merely comments (p. 303):

"The Court (Supreme Court) has even suggested that a state of the Union may make a regulation valid and effective to rule conduct on the high seas, so long as the federal government has not occupied the field."

In this connection on p. 304, in the summing up of the *Cordova* case, there appears this statement:

"as the law now stands, acts like those committed by *Cordova* will go unpunished, unless the law of the domicile of the corporation can be considered to cover them."

It would hardly be amiss to presume that most state aviation authorities have received a rude awakening by the thoughts conveyed above. It is difficult to conceive that they must have understood that the Federal Government was powerless to carry out its obligations in what would seem to be its exclusive jurisdictional domain, and that it was up to the States to fill in the gap. At least, no State statute has been found which purports to take over the High Seas Criminal Law field in aviation matters. The plane in the *Cordova* case was under charter by a California corporation. California is one of the leading States, both in aviation activities and in laws applicable to aviation. It does have a law ("Laws of Calif." 1945, Ch. 941) which covers crimes of the assault category committed in aircraft, but the law is strictly territorial in effect and applicable only to acts committed while over California. Under a similar statute in Texas, a murder conspiracy conviction was obtained in a Texas State Court (*Texas v. Dodson*) (1933 U.S. Av.R 256). But it is highly doubtful whether, even if a state law did attempt to confer such extraterritorial jurisdiction in a high seas situation, it would be held constitutional on a direct test. It would appear to come under the pronouncement of the District Court of N.Y. in 1921, *U.S. v. Bowman*, 287 F. 588, where it was said that for the purposes of determining the applicability of the criminal laws, the high seas outside of a marine league from the shore and outside of the jurisdiction of a particular state are constructively a part of the territory of the United States, and are peculiarly within the jurisdiction of the U.S. as distinguished from that of a State. This *Bowman* opinion was approved by the Supreme Court in 206 U.S. 94 but case was reversed on other grounds. Unless it can be said that the dictum in the *Skiriotes* case overrules the *Bowman* case it would appear that the high seas is an exclusively federal jurisdictional area. Similar logic should apply if the plane is over a sister State, or over "exclusively Federal land or water areas."

It is possible, however, that in some instances a state law and state jurisdiction may be applicable to certain crimes, parts of which are committed in planes over the high seas and parts within the state. An example would be the crime of murder, where the act, which later

produced the death, occurred in a plane over the high seas, and the death, and therefore the crime itself — is consummated on land. Analogous cases where the first act took place on a ship on the high seas are *Commonwealth v. MacLoon* (1869) (101 Mass. 1) and *U.S. v. McGill* (C.C. Pa. 1806) (Fed. Cas. No. 15,676). Similarly, if the first act of a chain of acts which make up the crime, starts within a state, while the final act occurs over the high seas, the state of initial embarkation should also have jurisdiction. This type of situation is specifically covered in Title 18 U.S. C. 3236. *Quere* — in the *Cordova* case, did Cordova also commit an offense against the United States or Puerto Rico when he carried liquor aboard the plane?

Returning now to the *Holmes* case, we approach a phase of our problem which may hold the key to the desired solution. It is 130 years old, yet one of the few U.S. cases which pronounce a rule clearly falling under Ground One. The most important aspect is the deliberate elimination from the jurisdictional test of the magic word "Vessel." That word has loomed so large in practically all other cases that it has partaken of the nature of a stumbling block to proper legal thinking. It deserves a few special remarks. Hundreds of needless cases, especially in admiralty law, have taken time, energy, and expense, because of its deceptive meaning, until today the broad definition indicated below has been established. Yet it now seems that the evil genius "vessel" has had a rebirth as a trouble maker, in the field of Aviation Law. In Title 1 U.S. C. sec. 3, dealing with rules of Statutory Construction, "vessel" is defined as "every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water." The new Title 18 U.S.C. sec. 9 (old s. 501) defines the possessory aspects of "Vessel of the U.S.," and now makes it applicable to the entire title. It may be seen that the modern definition is very broad and includes *all* types of watercraft, be they steamships, sailing vessels, row boats, rafts of logs, dredges, floating bath houses, and even under certain circumstances wrecks and sunken drillboats (Sprague and Healy, "Cases on Admiralty" (1950) pp. 84-86). *But* as already stated, the word "Vessel" does not appear in the legal description of Ground One or Two, but it is "the sum and substance" of Ground Three. Admitted, an airplane is not a "vessel," even when ditched upon the water. But in tort law, claims are allowed for High Seas salvage work, by or upon airplanes. And two recent compensation cases for death due to plane accidents, on and over the high seas, were settled under the "Death on the High Seas Act" (46 U.S.C. 761). In *Hart v. Transcontinental Western* (1950 U.S. Av.R. 287) the navigator was killed when blown out of a plane at 19,000 feet. In *Lacy v. Wiggins* (1951 U.S. Av.R. 16 and 224) a negligent repairman ashore was held liable for a plane crash at sea.

In the *Holmes* case it was pointed out that, to constitute a crime at sea, it need not be confined to a "vessel." That case, tried in the Circuit Court of Massachusetts in 1818, concerned an indictment alleging stab-



bing with a knife, by defendant Holmes, of another U.S. mariner named Reed, on board a vessel, following which Reed was cast into the water where he died by drowning. The vessel had changed hands several times under claim of prize, but was at the time not lawfully sailing under the flag of any nation, and was therefore considered piratical. For "murder" the offense is deemed committed where the death took place. The defendant contended here that, since the death took place in the water, there was no offense committed under the same statute under consideration in the *Cordova* case. He claimed that to warrant conviction, all the acts, including the death which made it murder, must be committed on board a "Vessel." Holmes was convicted, and the Supreme Court of the U.S. affirmed the conviction, and laid down this extremely significant rule of law (p. 416):

"The court is of opinion, that it makes no difference, whether the offense was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him, when in the sea, though he was not thrown overboard. THE WORDS OF THE ABOVE ACT OF CONGRESS ARE GENERAL, and speak of certain OFFENSES committed UPON THE HIGH SEAS, WITHOUT REFERENCE TO ANY VESSEL WHATSOEVER on which they should be committed; and NO REASON is perceived, why a more restricted meaning should be given to the expressions of the law, than they literally import." (Emphasis supplied.)

The Supreme Court here clearly recognized the existence of cases falling into the first and second location categories of the Statute, *i.e.* where a "vessel" is not a necessary element of the crime.

A more recent case falling under Ground One was *U.S. v. Miller* (N.J. 1917), 242 F. 907, cert. denied 245 U.S. 660. There it was held that stealing fish from a "pound" erected by American citizens on the high seas area, was punishable under the laws of the U.S.

There is another group of cases which prove that vessels, *as limited in the statute*, do not occupy the whole field. In recent years there have been examples of cases which can only be upheld by saying that they fall within grounds One or Two, since they clearly are not within any of the other Grounds. Grounds Three and Four specify "vessels of the United States," and it is obvious that "Foreign Vessels" do not fall into either of these grounds. Federal courts have repeatedly taken jurisdiction in cases where only foreign vessels are concerned, both in collision and serious assault cases. In some the acts took place in U.S. waters,<sup>9</sup> in some on the high seas, and some even in foreign waters.<sup>10</sup> The Federal Court exercises its discretion as to whether it will hear a case in this class, but it does have jurisdiction, under Section 7.

In the closing paragraphs of the *Cordova* case, it is stated: "What I gather is that there is little likelihood, if any, of an international

<sup>9</sup> *Wildenhus's Case*, 120, U.S. 1.

<sup>10</sup> *Ingen v. H.K.K.K.* (9CCA, 1946); (112 F. 2d. 564); *The Mondu* (2CCA 1939); (162 F. 2d. 459); see also *Panama R.R. v. Napier Shipping* (1897) (166 U.S. 280) and the exhaustive opinion on the subject in *The Avon* (Brown's Adm. 170).

agreement involving, as it necessarily would, difficult and delicate questions of sovereignty." The meaning here is not too clear, but the inference seems to be that international agreement could not be reached giving the country of the flag of an airplane jurisdiction over crimes committed on board while outside the national domain. Even at the present moment England, France and Italy, whose legal systems are different from our constitutional system, effectively cover these cases in their written law. In those countries a case involving facts present in *U.S. v. Cordova* would present no jurisdictional problem. International agreement is already in existence requiring that "Each member nation undertaking to adopt measures to insure that every aircraft \* \* \* carrying its nationality mark, wherever it may be, shall comply with the rules and regulations relating to flight and maneuver of aircraft there in force. Each member State undertakes to insure the prosecution of all persons violating the regulations applicable." (International Civil Aviation Conference (Chicago, 1944), Appendix I Art. VIII, section 6 — effective June 6, 1945, and the U.S. being a treaty member). While this refers to Rules of Flight, it can justly be said that all nations already expect that other nations will carry out their duty to punish criminal acts on their own flag-airships over the high seas, especially if it affects a foreign national. But if further international agreement is necessary on that score, either within the United Nations organization or by treaty, it is seriously doubted that quick assent would be refused.

In the light of the position in which a foreign passenger on one of our planes has been placed by the *Cordova* case it would be interesting to follow the above thought a bit further. Until the effects of that decision are overcome, a crime committed over the High Seas aboard a U.S. plane — using assault as an example — falls under one of the following categories:

- (1) U. S. passenger strikes another U.S. passenger.
- (2) Member of plane crew strikes a U.S. passenger.
- (3) Foreign passenger of State X strikes a U.S. passenger.
- (4) U.S. passenger strikes a foreign passenger of State X.
- (5) Member of plane crew strikes a foreign passenger of State X.
- (6) Foreign passenger of State X strikes a foreign passenger of State X.
- (7) Foreign passenger of State Y strikes another foreign passenger of State X.
- (8) U.S. passenger strikes member of U.S. crew. (*Cordova* case).
- (9) Foreign passenger of State X strikes member of U.S. crew.

In all nine classes no U.S. court — Federal or State — appears to have jurisdiction to punish the offender. Whether the foreign courts in classes (3), (6), (7) and (9) may punish their own offending citizens is a matter for their own domestic law to decide. In classes (2) and (5) the offending crew member would probably, as a side issue, receive the indirect punishment of loss of job and, if a licensed person, might,

through action of a Federal or State regulatory body, lose his license as well.

Since, except as above, punishment of offender is unlikely, what redress for the injury to person and dignity of the assaulted foreigner and his government (X) would be available under classes (4) (5) (6) and (7)? If State X asks the embarrassing question, it is hardly likely that a mere "So sorry, but our laws do not cover" reply from our State Department would satisfy. A grave formal official apology, and possibly compensation via special Act of Congress, would appear required. The weakness of the present U.S. position is expressed in the following quotations from two of the leading American exponents of international law:

"The individual State cannot itself alter the international standard. The freedom of a State in adopting a form of government of its own choice, or in framing a constitution of its own devising, is always subject to the requirement that the territorial sovereign shall not thereby render itself impotent to fulfill acknowledged duties of doing justice with respect to foreign powers. If a State acting designedly, renders itself deficient in this regard, it not only fails to escape responsibility, but also, by reason of its conduct, invites the intervention of aggrieved States."<sup>11</sup>

and

"Lack of legislation which may be requisite to enable a State to fulfill its international obligations, however arising, never affords a defense in public law for the consequences of such inaction."<sup>12</sup>

It thus appears that the *Cordova* decision has placed us in a position which is legally unsound, internationally as well as domestically.

It is the belief of the writer that Congress must have thought that this High Seas aviation jurisdictional authority was included in the Statutes and Codes, otherwise it would surely have enacted additional laws. Within this field Congress has already seen fit to include aircraft with other vehicles or vessels in certain general laws, *i.e.*, To provide punishment for stealing an aircraft (Title 16, U.S.C. sec. 231); For burglary on an aircraft (Title 18 U.S.C. sec. 2117); for Stowaways on vessels or aircraft (Title 18 U.S.C. sec. 2199); Espionage from aircraft over national defense areas (Title 18 U.S.C. sec. 793). And it has defined aircraft as used in the Motor Vehicle Act (Title 18 U.S.C. sec. 2311) as "Aircraft means any contrivance now known or hereafter invented, used, or designed for navigation of or for flight in the air." Since in these statutes Congress provides for offenses on or over the land, wouldn't it be logical to assume that it believes that similar acts, committed over the high seas, just as offensive to our sense of justice or to our national security, were already covered by existing law? If it will save confusion and heartache to laymen, lawyers and the bench alike, it might be well for Congress to clarify the subject by enacting into law an additional subsection to Title 18 U.S. Code Sec-

<sup>11</sup> Charles Cheney Hyde "International Law Chiefly as Interpreted and Applied by the United States," Section 267.

<sup>12</sup> Elihu Root (Vol. IV. Proceedings American Society International Law, p. 25), cited by Hyde (*ibid.*).

tion 7, similar to the proposal of the McCarran bill.<sup>13</sup> Such a procedure was followed, in 1845 in an almost identical situation, and touching this very same code section, clarifying the federal jurisdiction on the Great Lakes.

#### MARGINAL SEAS

The recent widespread extension of the principle of "Marginal Sea" areas has already been remarked. Its chief significance in our present consideration is that it presents new problems in the superimposed air spaces, for the areas are large, imperfectly defined, the

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<sup>13</sup> See note (1). Since this article was written, the McCarran Bill S. 2149 was passed by the Senate on February 26, 1952, with only one minor change, and sent to the House of Representatives for its consideration. It now reads:

"AN ACT To confer Federal jurisdiction to prosecute certain common-law crimes of violence when such crimes are committed on an American airplane in flight over the high seas or over waters within the admiralty and maritime jurisdiction of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7 of title 18, United States Code, is hereby amended by adding at the end thereof a new subsection reading as follows:

"(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."

Under date of Jan. 10, 1952 Mr. McCarran, for the Judiciary Committee, submitted a REPORT (No. 1155—Senate Calendar No. 1086) to the Senate, stating the purpose of the Bill. He said in part:

"The need \* \* \* became apparent after the decision of \* \* \* UNITED STATES v. CORDOVA \* \* \*

\* \* \* "That aircraft was excluded from the special maritime and territorial jurisdiction of the United States, by judicial decision. The decision in UNITED STATES v. CORDOVA turned on the point that an airplane is not a vessel within the meaning of the "maritime and territorial jurisdiction of the United States." This bill would plug that gap in the original law and allow prosecutions under title 18 for assaults, section 113; maiming, section 114; larceny, section 661; receiving stolen goods, section 662; murder, section 1111; manslaughter, section 1112; attempts to commit murder or manslaughter, section 1113; rape, section 2031; carnal knowledge, section 2032, and robbery, section 2111, if committed on an American plane over waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."

The REPORT quotes a letter dated September 17, 1951 from the Department of Justice forwarding a draft copy of the bill and recommending its enactment, wherein the following paragraph appears:

"It is noted that the jurisdiction would be limited to the time during which the plane is in flight which would eliminate concurrent jurisdictional problems that might arise were the offense to occur while the plane was on the ground in a foreign airport. The jurisdiction would also be restricted under the measure to flight over the high seas or other waters within the admittedly American jurisdiction which would avoid encroachment upon existing treaty commitments in civil aviation law which have reserved to each participating nation exclusive sovereignty in the air space overlying its own territorial boundaries."

While within the scope of this article (e.g. The High Seas) the McCarran bill plugs the "gap" created by the CORDOVA decision, the Justice Department letter raises two interesting questions regarding further "gaps" in the law:

Q. 1. Would offender go unpunished for lack of U.S. court jurisdiction if offense is committed over land mass of a nation never covered by U.S. treaty, or

claims varied, and this airspace has heretofore been recognized as *Free*. Unless this potentially complicated situation is settled with expedition and finality, the jurisdictional question may become confused.<sup>14</sup> A discussion of the situation, and how it came about, would therefore serve a useful purpose.

Thirty nations have set up such areas within the past few years and others are sure to follow. Twelve nations in the Western Hemisphere have already followed the lead of the 1945 United States Proclamations. National claims have been made, mostly by Proclamation, but in some instances by National Laws, or by a change in a National Constitution. Claims vary, both in "linear distance" from the coast and "in kind." Several go far beyond the U.S. example. Some, as does the U.S., say "continental shelf,"<sup>15</sup> others set the outer limit at a fixed depth; *e.g.*, the 100 fathom mark, some 200 fathoms, some 200 meters (109.36 fathoms). Chili, Peru, and Costa Rica claim the coast out to 200 miles, into very deep water, and regardless of depth. Argentine and Chile fix their southern limits at the South Pole, thus claiming deep water.

As to "kind," there are varying combinations of appropriations; *e.g.*, of ocean bottom, subsoil, fishery waters, surface water, and in the case of Argentina and Chile, above surface arctic ice and land areas.

There was some justification and legal precedent for the United States fisheries Proclamation. The *need* was a *present* one, and took into consideration the rights of other nations. But it is submitted that the subsoil Proclamation is open to the question as to whether it might not be unnecessary, and most unwise. It marked a glaring and un-

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after treaty rights are suspended or abrogated, or over portions of Antarctic or Arctic land areas where individual sovereignty is not recognized by the U.S.? In this connection it may be noted that the theory of "exclusive sovereignty in airspaces" is by no means wholly undisputed. Within the present day limitations of aircraft, it has been accepted for treaty purposes of the moment, to satisfy the desire for protection of the land masses below. However, as heights of flight, with new types of aircraft, increase in the future, the subject of freedom of flight at very high altitudes everywhere may well require reopening.

Q. 2. Since under the American system of Jurisprudence, dual jurisdictional matters are now successfully handled in many other legal fields, both in Domestic and International Law, why not have statutory authority broad enough to confer extraterritorial U.S. jurisdiction on every U.S. plane, while anywhere abroad, and thus insure that no offense will go unpunished if the foreign sovereign does not, or should not, hear the case, and if a U.S. court sees fit to take jurisdiction? If necessary, the enabling statute could confer jurisdiction "subject to U.S. treaty obligations." Under the theory of the FLORES and WILDENHUS cases, jurisdiction over acts committed on U.S. VESSELS on all waters appears to be covered, even within recognized foreign territorial waters. This view is justified both on the "dual jurisdiction" and the "extraterritoriality" theories. The McCarran bill clarifies the status of AIRCRAFT over "water" but does the status over foreign "lands" also require clarification to provide for future contingencies?

<sup>14</sup> A start in this direction has been made by the International Law Commission of the United Nations when a draft proposal of Continental Shelf questions was considered during the summers of 1950 and 1951. See JOURNAL AMERICAN SOCIETY OF INTERNATIONAL LAW, Supplement Vol. 45, pp. 139-147 for Text; also *Ibid.* Vol. 46 pp. 123-128; *Ibid.* Supp. Vol. 44, p. 147.

<sup>15</sup> An "International Committee on Nomenclature of the Ocean Bottom Features" is now working on definitions of ocean bottom terms and "Continental Shelf" appears to lie with outer edge somewhere between 20 and 300 fathoms, with the conventional depth viewed at 100 fathoms. The latter is the U.S. view. See Vol. 45 A.J.I.L., p. 245.

worthy reversal of our traditional role as a leader of the cause of freedom in world affairs. Since it is *extensive* in scope, and its application is mostly for the *future* rather than for the *present*, it is of questionable international legality.<sup>16</sup> Without going into lengthy details of available proof, it may be stated that an analysis of the precedents urged by some writers in an effort to justify the Proclamation are either inapplicable or are mere individual claims which lack approval of the world community and therefore are not International Law. It is further submitted that the U.S. example has opened a Pandora's box of ills which, like the struggle for Freedom of the Seas, may take generations to overcome. The United States has already found it necessary to send protests "to reserve" our "rights and interests" in sea areas recently claimed to be under the sovereign jurisdiction of four nations, *i.e.*, letters on July 2, 1948 to Chile, Peru and Argentina, and on Dec. 19, 1949 to Saudi Arabia.

An adequate *solution* of the *Airspace* phase of this new territorial Seas problem does, however, appear practicable. As already stated, sovereignty of surface water carries with it sovereign jurisdiction of the superimposed airspace. Whereas for a ship, in International Law, there is a "*right of innocent passage*" through an otherwise sovereign maritime coastal belt, in the International Law of the Air no such doctrine of "innocent passage" for an airplane is, as yet, recognized. To continue the present right of free transit over newly established territorial seas, the problem would be solved by allowing all planes to continue to fly freely through these areas and maintain that this right is in the nature of a *right of innocent passage of aircraft*. The creation of such a new right, under these conditions, will thus maintain the status quo for the aircraft and not conflict with any new claim of sovereignty of the sea area.

#### CONCLUSION

With the underlying principle of the Supreme Court rule in the *Holmes* case as a guide, and without additional legislation, the *Cordova* decision should have held that Federal Courts now possess jurisdiction to try crimes committed on air craft while flying over the High Seas. The broad original statute underlying Title 18, U.S.C. Sec. 7 must have been intended to be all inclusive as regards the *High Seas*, since there is nothing new about the air above, and the water below. As in so many other branches of the law, our Founding Fathers provided for expanding future developments. They were not cognizant of aircraft transportation, but they did know that in their own times transportation had advanced, and that it could be expected to continue to change. Thus the airplane is one of the "future developments" for which the basic law provided. It is only necessary to acknowledge this fact. Such judicial recognition may be viewed as the natural and healthy growth of our law, and another example of the foresight and value of the Constitution of the United States.

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<sup>16</sup> See C. C. Hyde, *Ibid.*, Sec. 145,