



Marilyn Raia
San Francisco,
Shareholder

Direct Dial: 415.352.2721
Fax: 415.352.2701
Email Attorney

Maritime Piracy in US Courts

By Marilyn Raia

While Hollywood may have glamorized piracy, US courts have had to handle the real effects of the crime. The frequency of pirate attacks on commercial, military and pleasure vessels over the past few years has required US courts to consider issues not frequently considered over the past two centuries. This article reviews the history of US piracy law and a few noteworthy cases involving the criminal prosecution of pirates.

The Roots of US Piracy Law

Today's piracy law has its roots in the United States Constitution. Article I, Section 8, clause 10 gives Congress the power to "define and punish piracy and felonies on the high seas and offenses against the law of nations." With that power, in 1790, Congress enacted the first anti-piracy law. That statute defined piracy as murder or robbery on the high seas, or any other crime committed on the high seas that would be punishable by death under US law, if committed on land.

In an 1818 case, the United States Supreme Court held, among other things, that the 1790 statute did not authorize the courts to penalize persons committing piracy, if those persons were 1) not US citizens; 2) not sailing on a US flag vessel; or 3) not inflicting harm on US citizens. In 1819, Congress responded with a new anti-piracy law applicable not only to piracy with a nexus to the United States, but also to piracy with no nexus to the United States. Unlike the 1790 law, the 1819 law did not specify the acts constituting the crime of piracy. Instead, it referred to "the crime of piracy, as defined by the law of nations." In the 1819 statute, Congress also expanded the jurisdiction of the courts to hear cases involving non-US citizens who committed piracy on the high seas. The courts had jurisdiction if the accused were found in the United States or brought to the United States.

The punishment for piracy under the 1819 statute was death. In 1897, the penalty was changed to life imprisonment at hard labor. In 1909, the penalty was changed to life imprisonment. The piracy law enacted in 1909 has not been changed since. It is found at 18 U.S.C. §1651.

The First Constitutional Challenge

One year after the 1819 statute was passed, the United States Supreme Court considered a constitutional challenge to it. In *United States v Smith*, 18 US (Wheat) 153 (1820), a jury found the defendant Smith was a crewmember of a private armed vessel, **Creollo**, which had been commissioned by the government of the colony of Buenos Aires. Smith and fellow crewmembers mutinied and confined the **Creollo's** officer. They then set out on the **Creollo** and seized another private armed vessel, ironically named **Irresistible**. They set out to sea on the **Irresistible** without documents or a commission, and plundered and robbed a Spanish vessel.

The jury stated that if Smith's acts were considered piracy under US law, then he was guilty. But, if his acts were not piracy under US law, then he was not guilty. Unfortunately, the trial judge could not determine whether Smith's acts constituted piracy under the 1819 statute and certified the issue for decision by the United States Supreme Court.

Smith's lawyer argued the 1819 statute was unconstitutional because Congress had to define "piracy" and could not leave the definition of the crime to judicial interpretation. He argued that referring to "the law of nations" to define piracy was not constitutional because the defendant did not have advance notice of what acts might be considered criminal. The United States Supreme Court disagreed. It reasoned the Constitution gave Congress the power to define



piracy, but did not require Congress to define it in a particular way. Further, it held the crime of piracy was defined with reasonable certainty by the law of nations, commenting "whatever may be the diversity of definitions, in other respects all writers concur in holding robbery or forcible depredations upon the sea is piracy." It also stated:

"So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat piracy as an offense against the law of nations, and that its true definition by that law is robbery upon the sea."

Following its analysis of the statute, the United States Supreme Court certified to the trial court that Smith was indeed guilty of piracy.

The Second Constitutional Challenge

Since the Smith decision in 1820, the United States Supreme Court has not again directly addressed the definition of maritime piracy. In 2010 though, two piracy cases were brought in the federal court for the Eastern District of Virginia. The two judges hearing the cases interpreted the piracy statute differently. In 2012, the Fourth Circuit Court of Appeals resolved their differences.

The first case, *United States v. Said*, 757 F.Supp.2d 554 (E.D.Va. 2010), involved pirates who approached the **USS Ashland** in a small skiff in the Gulf of Aden. One pirate shot at the **USS Ashland** with a firearm. The crew of the **USS Ashland** returned fire, destroying the skiff and killing one passenger. The pirates did not board or even attempt to board the **USS Ashland**. They were taken into custody by the crew of the **USS Ashland** and brought to Virginia for criminal prosecution.

The pirates were indicted on multiple counts. They moved for dismissal of the count for violation of 18 U.S.C. § 1651 on the ground that what they did was not piracy because they did not board or take control of the **USS Ashland**. The district court granted the motion. It held due process considerations did not allow a construction of the piracy statute to include actions other than "robbery or forcible depredations upon the sea," the definition given to "piracy" by the United States Supreme Court in *Smith*, 190 years earlier.

The second case, *United States v. Hassan*, 747 F.Supp.2d 599 (2010) involved pirates who mistook a military vessel, the **USS Nicholas**, for a merchant ship. The pirates opened fire on the **USS Nicholas** and the crew of the **USS Nicholas** fired back. The pirates fled in their vessel but were captured and brought to the United States for prosecution. They too moved for dismissal of the count for violation of 18 U.S.C. § 1651. They argued the facts in the indictment were insufficient to establish the crime of piracy. The judge in their case took a different approach and denied the motion. After an exhaustive review of the development of piracy law in the United States as well as international conventions, customs, and law, the judge concluded piracy must be defined according to "contemporary customary international law". He further found contemporary customary international law may change over time and, in fact, had changed since 1820 when the United States Supreme Court decided the *Smith* case. The court then concluded contemporary customary international law does not require an actual robbery on the high seas as a prerequisite for a conviction for piracy under 18 U.S.C. § 1651.

The Fourth Circuit's Approach to Piracy

After being convicted by a jury and sentenced to life imprisonment, the defendants in *Hassan* appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit affirmed the conviction. It reviewed the authorities relied on by the district court and concluded that when Congress



enacted 18 U.S.C. § 1651 and provided for piracy to be defined by the "law of nations," Congress contemplated the definition of piracy would evolve as the law of nations evolved. The Fourth Circuit also recognized the international definition of piracy has, for decades, encompassed violent conduct on the high seas in addition to robbery. It reasoned that limiting the definition of piracy to robbery on the high seas would "render it incongruous with the modern law of nations and prevent [the federal courts] from exercising universal jurisdiction in piracy cases." In addition to affirming the jury convictions of the defendants in Hassan, the Fourth Circuit reversed the dismissal of the piracy count in Said and sent that case back the district court for further proceedings consistent with its holding that the crime of piracy within the meaning of 18 U.S.C. §1651 is not limited to robbery on the high seas.

The federal statute under which pirates are usually prosecuted, 18 U.S.C. § 1651, provides for piracy to be defined "under the law of nations." The first United States Supreme Court case limited the crime of piracy to robbery on the high seas. Since then, US courts have recognized a broader definition of piracy based on contemporary customary international law. Piracy now includes acts on the high seas other than robbery. In the US courts, it is likely a pirate who does not succeed in his attempt to rob a vessel on the high seas will face the same life imprisonment sentence as one who does.