



Office of the Attorney General

Washington, D.C. 20530

June 12, 2013

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *United States v. Yimmi Bellaizac-Hurtado et al.*, Nos. 11-14049, 11-14227, 11-14310, and 11-14311, 700 F.3d 1245 (11th Cir. Nov. 6, 2012)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I am writing to advise you that on May 30, 2013, the Department of Justice determined not to seek further review of the decision of the court of appeals in the above-referenced case. A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is enclosed.

The case arises out of a prosecution under the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 *et seq.*, which makes it a federal criminal offense to possess with intent to distribute a controlled substance on board a "vessel subject to the jurisdiction of the United States." 46 U.S.C. 70503(a)(1). As relevant here, the statute specifies that such vessels include "a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States." 46 U.S.C. 70502(e)(1)(E).

In this case, the defendants' stateless fishing boat was spotted by the U.S. Coast Guard in Panamanian waters and pursued by the Panamanian Navy. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1247-1248 (11th Cir. 2012). The defendants abandoned the boat near the shore, where it was found to contain 760 kilograms of cocaine, and the defendants were arrested on land, in Panama. *Ibid.* After an exchange of diplomatic notes, the Panamanian Foreign Ministry consented to the prosecution of the four defendants in the United States, and they were convicted, upon conditional guilty pleas, in the United States District Court for the Southern District of Florida. *Id.* at 1248. The district court rejected their contention that the MDLEA is unconstitutional as applied to their conduct in foreign territorial waters, and they appealed. *Ibid.*

The Eleventh Circuit reversed. It held that the MDLEA is unconstitutional as applied to drug trafficking on a non-U.S. vessel in foreign territorial waters, at least under Congress's power "[t]o define and punish ... Offenses against the Law of Nations," U.S. Const. art. I, § 8, Cl. 10. The court concluded that Congress's law-of-nations power extends only to violations of customary international law and that drug trafficking does not violate customary international law, notwithstanding the widespread ratification of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention). 700 F.3d at 1251-1258. The court specifically noted that the government had not advanced "any alternative ground upon which the Act could be sustained as constitutional." *Id.* at 1258. Judge Barkett

filed an opinion specially concurring in the judgment, in which she concluded that drug-trafficking is neither a violation of customary international law nor an offense subject to universal jurisdiction and that no other jurisdictional basis under international law would justify the United States' exercise of jurisdiction in the circumstances of the case. *Id.* at 1258-1262.

The government filed a petition for rehearing in which it advanced two alternative arguments in defense of the statute's constitutionality that had not been made before the panel. First, relying upon *Missouri v. Holland*, 252 U.S. 416 (1920), the government contended that the criminal prosecution of drug-trafficking committed by foreigners on a non-U.S. vessel in foreign territorial waters with the consent of the coastal state is a measure necessary and proper to the implementation of the 1988 Convention and its associated bilateral agreement between the United States and Panama (the coastal state here). Second, the government contended that the power to bring such a prosecution is necessary and proper to carry into execution Congress's power under Article I, Section 8, Clause 10 to "define and punish ... Felonies committed on the high Seas." The prohibited conduct occurs in waters immediately adjacent to the high seas, and it would jeopardize Congress's ability to punish felonies on the high seas if drug traffickers could evade U.S. enforcement efforts by skirting the high seas and moving up the coast, or between islands in the Caribbean, while remaining in the territorial waters of a series of foreign nations.

On March 4, 2013, the court of appeals denied the government's rehearing petition without addressing either of those arguments.

The Department has defended the constitutionality of 46 U.S.C. 70502(c)(1)(E) as applied in circumstances like those at issue in the Eleventh Circuit's decision, and it will continue to do so. The Department has, however, concluded that, based on a combination of factors, further review of that decision is not warranted at this time.

First, the Eleventh Circuit is the first federal court of appeals to resolve a challenge to the constitutionality of the MDLEA's application to a non-U.S. vessel in foreign territorial waters. There is accordingly not yet any disagreement in the courts of appeals on that issue.

Second, the Eleventh Circuit did not address — and no court has yet addressed — the two arguments that the government advanced in defense of the statute in its rehearing petition. That makes it less likely that the Supreme Court would consider those arguments in the first instance. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ours is a court of final review and not first view. Ordinarily, we do not decide in the first instance issues not decided below.") (internal citations and quotation marks omitted); *Turner v. Rogers*, 131 S. Ct. 2507, 2524-2525 (2011) ("It is the wise and settled general practice of this Court not to consider an issue in the first instance," and that is especially so "when the new issue is a constitutional matter"); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (declining to consider constitutional question on which the court of appeals "did not definitively rule"). That factor makes this case a poor vehicle for resolution of the MDLEA's constitutionality as applied.

Third, of the four defendants in this case, three completed their sentences before the court of appeals' decision, and the fourth served 37 months of his 90-month sentence before being transferred to the custody of U.S. Immigration and Customs Enforcement. Prospectively, the decision will not have detrimental effects unless the courts ultimately reject the alternative arguments that went unaddressed by the Eleventh Circuit and drug traffickers increasingly skirt the high seas and evade prosecution by using only foreign territorial waters.

A petition for a writ of certiorari would be due, after one 30-day extension, on July 3, 2013.

Please let me know if we can be of further assistance in this matter.

Sincerely,



Eric H. Holder, Jr.
Attorney General

Enclosure