

SUSPECTED MARPOL VIOLATIONS IN THE US – THE HUMAN COST

It is well known throughout the global maritime industry that the U.S. Coast Guard has undertaken a comprehensive program of boarding foreign flag-state vessels calling U.S. ports. As a result of the new heightened security measures, there has been a significant increase in the scrutiny in which vessels, and its records/logs, are being inspected, and consequently, a rash of vessel and/or crew detentions. Similarly, it has been highly publicized that the U.S. Coast Guard has established a ‘Oily Water Separation Systems Task Force’ (OWSSTF), to investigate and prosecute suspected MARPOL violations. U.S. and International authorities have made it clear that they have, and will continue to, seek jail sentences for Masters, Chief Engineers and other crew members of ships found guilty of committing pollution offenses. Many times, even if no pollution incident has occurred, the Coast Guard and U.S. prosecutors will commence a Grand Jury investigation seeking to prosecute suspected illegal activities (i.e. *possible* Marpol violations, presentation of false records and/or obstruction of justice charges). The U.S. authorities have successfully prosecuted numerous commercial vessel operators, cruise line operators, captains, chief engineers and other engine room personnel of illegal by-passing of the oily water separation system and the presentation of an Oil Record Book containing “false entries.”

Even in matters where it is quickly acknowledged by the U.S. authorities that the suspected criminal conduct did not take place, the stress, strain and pressure on the vessel’s officers and crew is intense and, in plain English, immeasurable. There have been numerous cases where detained crew members have needed emergency medical attention for stress related ailments arising from their detention. The severity of the seafarer’s maladies have ranged from simple headaches, home sickness and indigestion to death. By way of example, we advise that there has been several reported deaths, including one (1) ship’s master who tragically past away as a result of a massive heart attack following his vessel having been detained in the U.S.. In that matter, the vessel was briefly detained due to the USCG’s mistaken suspicion that the vessel was involved in a pollution incident. Additionally, on that very same vessel, shortly before sailing, the Chief Engineer tumbled down the engine room stairs. Undoubtedly, this incident was also the result of overwhelming stress and fatigue caused by the US authorities’ detention and inspection.. We are pleased, however, to report that this particular Chief Engineer’s injuries were not fatal, as he merely broke numerous ribs and punctured a lung. Nevertheless, the individual needed to be air lifted from the vessel to the nearest trauma center for urgent emergency care. More recently, a Chief Engineer on a small bulk carrier calling the United States was not so fortunate. After being detained for several days by the US authorities due to suspected Marpol violations, the Bulgarian-national, without warning and/or explanation, hanged himself in his work-shop on the tween deck of the engine room. These are only a few illustrative examples of the resulting effects of the extreme stress, fear and intimidation felt by foreign seaman during the US authorities’ investigative process.

Knowledge is power!

During the U.S. authorities investigation of a suspected Marpol violation, officers, crewmembers, and various shoreside employees may be contacted by the US prosecution team, including but not limited to representatives of the U.S. Department of Justice, the Coast Guard, the FBI, the Environmental Protection Agency or other government agencies. It is imperative that all seafarer's and shoreside personnel involved in such a matter *know their rights under U.S. law!*

In the U.S every person has the right to representation by a lawyer. The most basic, yet essential, advice any lawyer can give to today's mariner is: seek the advice of counsel as soon as practical, and always be truthful and forthright in your dealings with the U.S. authorities. If U.S. authorities undertake any onboard investigation, which goes beyond the scope of the ordinary port state control inspection, the Owner and/or its' P&I Club should be immediately contacted and advised of the situation. Similarly, criminal counsel should be engaged immediately to protect the rights of the vessel officers and crew, as well as her owner, operator and/or manager. All of the individual crew members should invoke their Fifth Amendment privilege against self-incrimination until competent counsel is engaged and present. In short, once a criminal investigation has commenced and a mariner invokes his own Fifth Amendment privilege, he/she is not required to speak with the U.S. authorities and/or respond to any of their questions, which may lead to self-incrimination. As a wise, old mariner once said: "The only fish that get caught are the ones with their mouth open." "Knowledge" is, indeed, "power," and today's mariner must be aware of his Fifth Amendment privileges when calling U.S. ports.

The Fifth Amendment of the United States Constitution states that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Legally speaking, the Fifth Amendment Privilege against self-incrimination is not dependent upon the nature of the proceeding in which the testimony is sought. It is applicable wherever the answer might tend to subject one to criminal responsibility and applies in both civil and criminal proceedings. *Lowe's of Roanoke, Inc. vs. Jefferson Standard Life Ins. Co.*, 219 F. Supp. 181 (S.D.N.Y., 1963); *McCarthy vs. Arndstein*, 266 U.S. 34 (1924).¹

¹ The determination of whether or not there is justification for one's silence based upon the possibility that such question may be self-incriminating rests with the court. *Rogers vs. U.S.*, 340 U.S. 367 (1951). However, the waiver of Fifth Amendment privilege is limited to the particular proceeding in which the waiver occurs. *United States v.*

The privilege “reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for our accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,’” *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 55 (1964).

A seaman may also invoke his Fifth Amendment privileges even if there is no U.S. criminal investigation, but rather may subject the seamen to criminal liability outside of the U.S, so long as the seaman can show that the subject of the government's questions raises "a real danger of being compelled to disclose information that might incriminate him under foreign law," and second, that there is a "real and substantial fear of foreign prosecution." *Zicarelli v. N.J. Investigation Commission*, 406 U.S. 472, 478-80 (1972); See also *United States v. Yanagita*, 552 F.2d 940, 946 (2 Cir. 1977).² See also *Mishima v. U.S.*, 1981 AMC 1482, 507 F.Supp. 131 (D. AK. 1981).³

For more information regarding any specific inquiries you may have concerning U.S. investigations and prosecutions of suspected Marpol violations; the Fifth Amendment of the U.S. Constitution and/or other issues relating, please contact George M. Chalos, Esq. of the U.S. law firm of Chalos, O’Connor & Duffy, LLP (www.codus-law.com) at gchalos@codus-law.com or gmc@codus-law.com.

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Licavoli, 604 F.2d 613, 623 (9 Cir. 1979).

² In *Zicarelli* and in *Yanagita* the constitutional issue concerning the scope of the privilege was never reached because the petitioners failed to demonstrate any threat of prosecution. See also *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972) (the Fifth Amendment privilege applies as a protection against foreign prosecution).

³ In the District Court held that several Japanese seamen were permitted to invoke the Fifth Amendment protection in underlying Coast Guard proceedings under threat of prosecution in Japan. The court did not give blanket immunity, but rather extended protection only to specific questions which would tend to incriminate them in any Japanese prosecution.