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Treaties--Article 6 of the Convention on the High Seas Is Not Self-Executing

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*United States v. Postal**

I. Introduction

In *United States v. Postal,* the Court of Appeals for the Fifth Circuit was confronted with a complex question concerning the relationship between an international agreement and domestic law. The defendants in *Postal* were convicted[1] of conspiring to import marijuana into the United States[2] and of conspiring to possess marijuana with intent to distribute.[3] On appeal, the defendants claimed the district court lacked jurisdiction over them since they had been seized in a foreign vessel on the high seas, beyond the twelve-mile limit.[4] This claim was based upon article 6 of the Convention on the High Seas[5] (High Seas Convention) which reads in pertinent part: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas." The defendants argued that under this treaty provision they were subject only to the jurisdiction of their vessel's home nation, the Grand Cayman Islands,[6] at the time of their seizure.

The Fifth Circuit thus faced the question whether the United States can assert jurisdiction over persons arrested aboard a foreign vessel seized beyond the twelve-mile limit in violation of a treaty to which it and the vessel's home nation were parties.[7] This question concerning article 6 of the High Seas Convention arose as a case of first impression. The issue therefore became whether, by its ratification of that agreement, the United States intended to incorporate the treaty's language into its domestic law, and thereby preclude the exercise of jurisdiction in contravention of its terms. As the Fifth Circuit was presented with this question for the first time in the United States, the court's decision, if accepted, will have significant impact both domestically and internationally.

Article VI of the United States Constitution provides that, along with the

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* 589 F.2d 862 (5th Cir.), *cert. denied,* 48 U.S.L.W. 3218 (1979).

1 *Id.* at 865. The opinion of the United States district court was not reported.

2 21 U.S.C. § 963 (1976).

3 *Id.* § 846.

4 The "territorial sea" is an area of the sea that begins at a nation's coastline and extends outward a distance of not more than twelve miles. A nation's sovereignty extends over its territorial sea, and it may exercise exclusive jurisdiction therein. Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, art. 1, 15 U.S.T. 1606, 1608, T.I.A.S. No. 5639. While the United States recognizes the traditional distance of three miles from the coast as the outer boundary of the territorial sea, no international agreement on its precise size has been reached. Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished,* 52 AM. J. INT. L. 607, 610-16 (1958). The term "high seas" refers to the area beyond a nation's territorial sea. A nation may also exercise limited jurisdiction over an area of the high seas known as the "contiguous zone," which extends to a distance of twelve miles from the coast, hence, the twelve-mile limit. Convention on the Territorial Sea and the Contiguous Zone, art. 24, 15 U.S.T. at 1612.

5 *Opened for signature* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

6 The Grand Cayman Islands are a territory of the United Kingdom, and as such are subject to its treaty obligations. 589 F.2d at 868 n.8.

7 *Id.* at 865.

Constitution and laws enacted pursuant thereto, all treaties made under the authority of the United States "shall be the supreme Law of the Land."[8] In this clause, the framers adopted the principle that treaties are to be accepted as a binding part of this nation's domestic law after proper ratification.[9]

Although the constitutional language requires a presumption that a treaty be accepted as part of the supreme domestic law, in certain limited cases it is required that a treaty entered into by the United States be accompanied by implementing legislation prior to such acceptance.[10] Treaties which are immediately given effect as supreme law are said to be "self-executing" or "self-operative," while the others are termed "not self-executing" or "executory." Executory treaties require specific implementing legislation to be enforced under the authority of the Constitution.[11] If the High Seas Convention is to limit the jurisdiction of American courts, as was claimed by the *Postal* defendants, the court must therefore have found it to have been incorporated into our nation's domestic law, either by virtue of being self-executing, or through implementing legislation. There is no such implementing legislation for the High Seas Convention. Therefore the Fifth Circuit in *Postal* was faced with the task of interpreting that treaty to determine whether article 6 was self-executing.[12]

In its decision that article 6 is not self-executing, the Fifth Circuit based its analysis primarily upon interpretation of outside materials relating to the treaty and historical, governmental policies. The court's emphasis on these external considerations, however, combined with its lack of concern for other interpretive tools, yielded a determination of the question which does not stand up to close scrutiny.

II. Statement of the Case

On September 15, 1976, officers of the United States Coast Guard cutter *Cape York* sighted the defendants' sailing vessel, the *La Rosa,* approximately eight and one-half nautical miles[13] from the Florida coast. The *La Rosa* lacked any readily apparent identification. The *Cape York* therefore approached the unmarked vessel and inquired as to its nationality. After a brief dialogue which failed to dispel his suspicion as to the *La Rosa's* identity or home port, the commanding officer of the *Cape York* requested permission to board. This request was initially denied. Defendant Postal later agreed to the boarding, but maneuvered erratically to make boarding more difficult, while jettisoning por-

8 U.S. CONST. art. VI., cl. 2.

9 This policy differs from that of many other nations, which require implementing legislation to incorporate treaty provisions into their domestic law. Aerovias Interamericanas De Panama, S.A. v. Board of County Comm'rs, 197 F. Supp. 230, 245 (S.D. Fla. 1961), *rev'd on other grounds sub nom.* Board of County Comm'rs v. Aerolineas Peruanasa, S.A., 307 F.2d 802 (5th Cir. 1962), *cert. denied,* 371 U.S. 961 (1963).

10 This doctrine was first stated in Foster and Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829), and has since been accepted virtually without question. An example of a treaty requiring implementing legislation is one which appropriates monies from the United States, a function given solely to the Congress by the Constitution. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141, Comment F (1965).

11 Whitney v. Robertson, 124 U.S. 190, 194 (1888).

12 589 F.2d at 876.

13 Nautical miles will be used throughout this comment.

tions of the ship's log and charts. The initial boarding was eventually made ten and one-half miles from the United States coast. Inspection of the ship's papers showed the *La Rosa* to be of Grand Cayman registry. After satisfying himself that the vessel's registration was in order, the boarding officer returned to the *Cape York*.

Circumstances accompanying the initial boarding raised the suspicion with the Coast Guard that the defendants were involved in illegal activities.[14] After extensive communication with its operations center in Miami, the crew of the *Cape York* received approval to make a second boarding of the *La Rosa* for further investigation. After the first boarding, the *La Rosa* had immediately changed course away from land, and thus, the second boarding occurred on the high seas, approximately sixteen miles from the United States coast. The government conceded that this boarding occurred beyond the twelve-mile limit.[15]

Immediately upon boarding, the officers read the defendants their *Miranda* rights. Thereupon the defendants voluntarily showed the officers the eight thousand pounds of marijuana stowed in the ship's hold. The defendants were subsequently placed in custody and removed to the *Cape York*. The *La Rosa* was then searched and towed into Miami.

III. Reaching the Issue

A. *The Treaty Violation*

Although several issues were raised on appeal,[16] the Fifth Circuit focused primarily on the question of jurisdiction over the defendants. Prior to deciding the jurisdictional issue, however, a preliminary analysis was necessary to determine if there had been a treaty violation, because the defendants' jurisdictional challenge was based upon such an alleged violation.

The Fifth Circuit held that because of the *La Rosa's* uncertain identity, the initial boarding was justified under article 22 of the High Seas Convention.[17] The second boarding, however, had occurred beyond the twelve-mile limit of the contiguous zone,[18] and was not authorized by any other treaty provisions.[19] The court, therefore, found that the seizure was made on the high seas in violation of article 6.

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14 Defendant Postal asked the Coast Guard officer, "Can you be bought?" shortly after he boarded the vessel. 589 F.2d at 866. Questions were also raised by the defendants' claim of Australian nationality and other statements they made. *Id.* at 866-67.

15 *Id.* at 867 n.6.

16 The Fifth Circuit relied on recent cases to negate the defendants' claims of *Miranda* violations, lack of jurisdiction over the crime, lack of statutory authority to make the seizure, fourth amendment abuses, insufficient evidence to show intent, and admission of hearsay statements in violation of Bruton v. United States, 391 U.S. 123 (1968). 589 F.2d at 884-91. All of these subsidiary issues were overshadowed by the treaty violation issue in the court's opinion. This comment, like the decision, will focus its attention on the question of the treaty violation.

17 23 U.S.T. at 2318. Article 22 allows boarding a foreign merchant ship on the high seas by a warship if there is reasonable ground for suspecting that the foreign ship is, in reality, of the same nationality as the warship. 589 F.2d at 870-72.

18 *See* note 4 *supra*.

19 The Fifth Circuit disposed of the contention that the seizure was authorized under article 23 of the High Seas Convention, 13 U.S.T. at 2318-19, as being made in "hot pursuit." 589 F.2d at 872. The decision also declares that the boarding was not justified by the "right of approach" under article 22 of the same treaty. *Id.* at 873.

B. *Relevance of the* Ker-Frisbie *Rule*

After determining that the High Seas Convention had been violated, the court was confronted with the *Ker-Frisbie* rule. This rule provides that a court will not be deprived of jurisdiction over a defendant merely because the person is arrested and brought before the court in an unlawful manner.[20] Upon initial analysis the *Ker-Frisbie* doctrine would seem to validate the court's jurisdiction over the defendants in *Postal,* as the essence of their jurisdictional challenge was illegal seizure.

The *Postal* situation does not fall within the scope of *Ker-Frisbie,* however, because of a contrary doctrine which arose through judicial interpretation of the Convention for Prevention of Smuggling of Intoxicating Liquors between the United States and Great Britain.[21] This treaty, like the High Seas Convention, limits the power of the United States to seize foreign vessels on the high seas. A line of cases from the Prohibition era, most importantly *Cook v. United States,*[22] holds that seizure in contravention of the jurisdictional limitations of this treaty will prevent United States courts from exercising jurisdiction over the persons seized.[23] In *Cook,* the Supreme Court stated that in *Ker v. Illinois*[24] and similar cases, courts had jurisdiction since the only objection to the seizures therein was that the United States had not conferred authority on the person making the seizure to do so at the place where it was made. In cases such as *Cook,* however, the seizure was illegal and jurisdiction invalid because through the treaty, which was adopted into domestic law, the government had "imposed a territorial limitation upon its own authority. . . . Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws."[25] Applying the principle of *Cook* to the case at bar, the Fifth Circuit held that if article 6 of the High Seas Convention were self-executing, and therefore adopted into domestic law, the United States would be deprived of authority to assume jurisdiction over a foreign vessel and its passengers seized on the high seas.[26] This conclusion required the *Postal* court to decide whether article 6 is self-executing.

IV. Is Article 6 of the Convention on the High Seas Self-Executing?

A. *Criteria for Deciding Whether a Treaty Is Self-Executing*

The question of whether a treaty is self-executing is to be answered by the

20 Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886).

21 *Signed* January 23, 1924, 43 Stat. 1761, T.S. No. 685. This treaty was adopted to ease tension between the two nations resulting from the United States' seizure of British vessels to enforce Prohibition. The treaty allowed seizure of vessels carrying liquor that were within one hour's reach of the American coast.

22 288 U.S. 102 (1933).

23 Cook v. United States, 288 U.S. 102 (1933); United States v. Ferris, 19 F.2d 925 (N.D. Cal. 1927); United States v. Schouweiler, 19 F.2d 387 (S.D. Cal. 1927). These cases were spawned by Ford v. United States, 273 U.S. 593 (1927).

24 119 U.S. 436 (1886).

25 288 U.S. at 121. The treaty in *Cook* was adopted into domestic law by virtue of being self-executing. *Id.* at 119.

26 589 F.2d at 875-76.

courts if it arises in litigation.[27] In resolving this issue, the primary criterion for a court is whether it was the intent of the parties that the treaty would become binding without any implementing legislation.[28] This intent is seldom, if ever, specifically stated within the treaty itself. It is therefore necessary to identify methods of ascertaining the hidden intent of the parties. Although many cases have examined treaties to determine whether they are self-executing, the individual nature of each document militates against devising a uniform systematic procedure. The only guidance available is that which can be gleaned from individual judicial opinions.

1. Express Language of the Treaty

A treaty is essentially a contract between two nations. As with any contract, it is generally agreed that the most important factor for determining intent is the language embodied in the document itself.[29] Reference to the express language does not guarantee a simple answer, but does provide a starting point on which to place primary emphasis in the interpretive process.

Several principles have been asserted to determine from the language of a treaty whether the parties intended it to be self-executing. One such rule provides that treaty provisions which are clear enough to be effectuated by the courts without implementing legislation were intended to be self-executing.[30] Although this appears merely to restate whether the treaty is self-executing, it does indicate a judicial preference for finding a treaty to be self-operative if reasonably possible within the scope of its language. This preference is supported by the well-accepted principle that a treaty is to be liberally construed to protect the rights guaranteed therein.[31]

A second principle of textual interpretation used by the courts provides that a treaty is the supreme law of the land, as is a congressional act, "whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."[32] When the treaty rights accorded a private citizen are enforceable in a court of law, that court must look to the treaty for its decision as it would look to a statute in other cases.[33]

A final criterion for language interpretation is found in the decision of one court to view as self-executing treaty provisions which declare, by negative stipulation, that something shall not be done.[34] The "negative stipulation" test is closely related to the first textual criterion, because a treaty provision which stipulates that a certain act shall not be done would almost certainly be clear

27 *Id.* at 876; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154(1) (1965).

28 Jones v. Meehan, 175 U.S. 1, 10 (1899). *See also* Henry, *When Is a Treaty Self-Executing,* 27 MICH. L. REV. 776 (1929); Note, *Self-Execution of United Nations Security Council Resolutions Under United States Law,* 24 U.C.L.A. L. REV. 387, 390-91 (1976).

29 Maiorano v. Baltimore & Ohio R.R., 213 U.S. 268, 273 (1909); Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976); Comment, 1968 U. ILL. L.F. 238, 241.

30 *See* Comment, *supra* note 29, at 239. For expression of related principles, see Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Henry, *supra* note 28, at 779-80.

31 Geofroy v. Riggs, 133 U.S. 258, 271 (1890); *Aerovias,* 197 F. Supp. at 240.

32 Head Money Cases, 112 U.S. 580, 598-99 (1884).

33 *Id.*

34 Commonwealth v. Hawes, 76 Ky. 697 (1878).

enough to be effectuated by the judiciary without implementing legislation. The "negative stipulation" test provides a more objective rule to apply than does the first textual principle, however.

2. Outside Materials

In some cases, a thorough examination of the language of a treaty is insufficient to enable the court to ascertain whether the agreement was intended to be self-operative. The court must then turn to materials outside the document. Such external materials, however, should be utilized only as a secondary source of interpretation.[35]

When looking to outside sources, it is necessary to examine a broad range of materials, as different sources may indicate conflicting intentions. The history and circumstances surrounding the negotiations, supplemental reports, congressional testimony, executive statements, subsequent practice under the agreement, and many other factors have been found to be relevant.[36]

More than any other external factor, the construction given by the executive branch, though not conclusive, is accorded great deference by the courts in deciding whether a treaty is self-executing.[37] This approach is well advised, as it reflects the interpretation of the formulator of the treaty. Frequently, however, the executive branch does not express an opinion whether a treaty is self-executing, leaving its intent to be determined from indirect and tangentially related statements. For such situations, it has been proposed that the treaty must be presumed to be self-executing if the President did not request implementing legislation when it was sent for ratification. The underlying rationale for this test is that it would be absurd to assume the President would enter into an international agreement without intending that it be given full domestic effect.[38] This test, however, has only been stated in one decision,[39] and therefore cannot be accepted as dispositive.

B. *Application of the Interpretive Criteria to Article 6 of the High Seas Convention*

In *Postal,* the Fifth Circuit did an extensive analysis of many external factors and decided article 6 is not self-executing. Consequently, it is not incorporated into domestic law. As a result, the court found that article 6 did not preclude exercising jurisdiction over the defendants and upheld their convictions. However, the court's emphasis on outside materials rather than extensive textual analysis, coupled with an often questionable interpretation of the

35 Diggs v. Richardson, 555 F.2d at 851; Note, *supra* note 28, at 395-96. While there might conceivably be instances in which outside materials could override the language of the treaty, they would be rare.

36 589 F.2d at 877.

37 *Aerovias,* 197 F. Supp. at 247; Comment, *supra* note 29, at 243.

38 *Aerovias,* 197 F. Supp. at 248. If a treaty were executory and no implementing legislation were requested, the result would be that the treaty would not be given full domestic effect. For further information concerning the President's duty to seek implementing legislation for an executory treaty provision, see RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 140, Comment b, Illustration 4 (1965); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 158-59 n.*** (1972).

39 *Aerovias,* 197 F. Supp. at 248.

materials examined, produced a decision contrary to the intent of the treaty as reflected in its language. An analysis of article 6 in accordance with the criteria discussed above suggests that it should be interpreted as self-executing.

1. Language of the Treaty

As previously asserted, the single most important criterion for discerning the intent of the parties is an examination of the language of the treaty itself. In *Postal,* however, the court, quoting *Choctaw Nation of Indians v. United States,*[40] said that "[i]n carrying out our interpretive task, 'we may look beyond the written words . . .' "[41] and launched immediately into a lengthy examination of outside materials. The court virtually ignored the express language of article 6 with only the casual statement that "[o]n its face, this language would bear a self-executing construction . . . ."[42] The court's reliance on *Choctaw Nation* is questionable, however, because later, in the same paragraph from which the Fifth Circuit quoted, the Supreme Court stated, "But even Indian treaties cannot be rewritten or expanded *beyond their clear terms* . . . to achieve the *asserted* understanding of the parties."[43] Further, the Court in *Choctaw Nation* said there was no finding of fact that the two tribes intended to agree on something different than what appeared on the face of the treaty, and "[w]ithout such a finding the agreement must be interpreted according to its unambiguous language."[44] In *Postal* there was no finding of intention contrary to the express language of the treaty. *Choctaw Nation* would therefore seem to require a rigorous scrutiny of the language of article 6, rather than to authorize looking beyond the language to outside materials.

As noted above, the language of article 6 does indicate a self-executing intent. Application of the language interpretation tests previously discussed further emphasizes this intent.

The first language test is whether the treaty provisions are clear enough to be given effect by the courts without implementing legislation. Article 6 appears to pass this test by unambiguously stating that in the absence of some other treaty provision a ship is subject to the exclusive jurisdiction of its home nation while on the high seas.[45]

The other criteria of language interpretation also suggest that article 6 is self-executing. The *Postal* defendants claimed, in consonance with the rules of international law stated in article 6 of the High Seas Convention, the right to be free from United States jurisdiction while sailing on the high seas beyond the twelve-mile limit. That right, which is clearly specified, certainly is the

40 318 U.S. 423, 431-32 (1943).

41 589 F.2d at 877. The interpretation in *Choctaw Nation* was not to determine if the treaty were self-executing, but to determine the meaning of the contents of the agreement. While the case is therefore not directly on point, the language referred to in *Postal* and this comment would seem to be equally applicable to a determination of whether a treaty is self-executing.

42 *Id.*

43 318 U.S. at 432 (emphasis added).

44 *Id.*

45 The defendants' vessel, of Grand Cayman registry, was seized on the high seas. There are no other treaty provisions to give the United States jurisdiction over the vessel. *See* note 19 *supra.*

right of a "private citizen or subject," and therefore article 6 would be self-operative by the second principle of textual interpretation.[46]

The final textual principle also supports the proposition that the treaty provision in question is self-executing. The "exclusive jurisdiction" language used in article 6 necessarily carries with it an implicit "negative stipulation" that no nation except the vessel's home state may exercise jurisdiction over it.

Two further points concerning the language of article 6 reinforce the interpretation that it is self-executing. In *Hennebique Const. Co. v. Myers,*[47] the Third Circuit considered the Convention for the Protection of Industrial Property of 1883[48] and the supplemental Additional Act of 1900.[49] On a point with which the majority opinion agreed,[50] the concurring opinion of Judge Archibald stated that any doubt as to whether the treaty in question was self-executing was disposed of by article 18 therein, which provided that the treaty should go into effect within a month after the exchange of ratifications.[51] Article 34 of the High Seas Convention contains an essentially identical provision, adding credence to a self-executing interpretation of that treaty under the *Hennebique* rationale.[52]

Finally, as noted in *Postal,*[53] if a treaty expressly provides for future legislative action, it is uniformly regarded as executory. Articles 27, 28, and 29 of the High Seas Convention specifically provide for such legislative action for matters unrelated to the jurisdiction issue in *Postal.*[54] Although those provisions are not self-executing, it does not follow that article 6 is also executory. It is accepted that some portions of a treaty may be self-executing and other portions executory.[55] The High Seas Convention was the skillfully drafted product of an extremely competent international conference.[56] It seems highly likely, therefore, that articles 27 through 29 were purposely drafted to be executory and thus reserve the implementation of those provisions to the discretion of the individual nations. Had the draftsmen intended the other articles to be executory, it seems likely that it would have been made apparent. However, no

46 *See* note 32 *supra* and accompanying text. It is noteworthy that treaties often guarantee certain private rights in a "positive" fashion, such as the right of foreign citizens to do business in the United States. Asakura v. City of Seattle, 265 U.S. 332 (1924). In such cases it is evident that the treaty in question prescribes a rule for the rights of private citizens. In *Postal* and article 6 of the High Seas Convention, a more negatively defined right is at issue. It is the right not to be interfered with by a nation other than the vessel's home nation. While the "negative right" of article 6 assumes a different posture than the "positive rights" which are often at issue, it nonetheless clearly concerns a right of a private citizen, and therefore falls within the scope of the second principle of language interpretation.

47 172 F. 869 (3d Cir. 1909).

48 *Exchange of ratifications* June 6, 1884, 25 Stat. 1372.

49 *Signed* December 14, 1900, 32 Stat. 1936.

50 172 F. at 873-74.

51 *Id.* at 888.

52 For comparison, the pertinent portions of the two treaties follow.

Convention for the Protection of Industrial Property, art. XVIII, 25 Stat. at 1379, provides: "The present Convention shall be put into execution within a month after exchange of ratifications, and shall remain in force . . . until the expiration of one year from the day upon which the denunciation shall be made." Convention on the High Seas, art. 34, 13 U.S.T. at 2320-21, provides: "1. This Convention shall come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification . . . ."

53 589 F.2d at 876-77.

54 13 U.S.T. at 2320. These articles being executory may seem to contradict the inference drawn from article 34 of the High Seas Convention and *Hennebique. See* notes 50-51 *supra* and accompanying text. This is not necessarily so, however, as the remainder of the treaty could be effective without the legislation required by those three articles being enacted.

55 Note, 10 TEX. INT. L.J. 138, 146 (1975).

56 Jessup, *The United Nations Conference on the Law of the Sea,* 59 COLUM. L. REV. 234 (1959).

such language is used concerning article 6, allowing an inference that it was intended to be self-executing.

2. Outside Materials

As a result of the foregoing language interpretation, a reasonable presumption arises that article 6 was intended to be self-executing. As previously mentioned, a treaty's language is of primary importance for deciding whether it is self-executing. Additionally, an examination of outside materials gives further support to the presumption that article 6 is self-executing.

The opinion of the executive branch, though not conclusive, is given great weight in deciding whether a treaty is self-operative.[57] There has not been a specific executive statement, however, as to whether article 6 of the High Seas Convention is self-executing. The court in *Postal* looked to testimony by the chairman of the United States delegation to the treaty conference before the Senate Foreign Relations Committee, and concluded that although the testimony was "not wholly unequivocal," it did indicate the treaty was not intended to be self-executing.[58] The Fifth Circuit also placed much emphasis on a State Department statement that some supplementary and new implementing legislation might be necessary.[59] If implementing legislation were necessary, the treaty would be executory by definition. The court failed to mention, however, that the State Department subsequently supplemented that statement, and informed the committee that in its opinion "no implementing legislation would be necessary,"[60] thereby adding credence to the view that the treaty was self-executing.[61]

In addition to the above statements, it is significant to note that the President sought no implementing legislation for the High Seas Convention when it was sent for ratification. As mentioned earlier, one court has stated that it would be absurd to think that a president did not intend to give full effect to a treaty he entered into, and therefore this failure to request legislation supports

57 *See* note 37 *supra* and accompanying text.

58 589 F.2d at 881-82.

59 *Id.* at 882. The question and answer alluded to by the Fifth Circuit follow.

> 28. Question. Would you point out and explain any article of these conventions which has the effect of superseding domestic legislation in the United States, either federal or state legislation? Would you also point out any articles which will require new federal legislation?
>
> Answer. It does not appear that any of the convention provisions conflict with existing legislation. It does appear, however, that some supplementary and new implementing legislation may be necessary or desirable. (A detailed answer on this aspect will be furnished shortly.)

Conventions on the Law of the Sea: Hearings on Executives J,K,L,M,N Before the Comm. on Foreign Relations, 86th Cong., 2d Sess. 92 (1960) (hereinafter cited as *Senate Hearings*).

60 *Senate Hearings, supra* note 59, at 92. This supplementary statement was not declared to be permanently conclusive, and the State Department said it would continue holding the matter under advisement. *Id.* As far as this commentator could discover, however, that "temporary" supplementary statement has never been changed.

61 Articles 27-29 of the High Seas Convention, 13 U.S.T. at 2320, specifically call for each party to the treaty to take legislative measures regarding areas of maritime law unrelated to the jurisdiction issue in *Postal. See* note 54 *supra* and accompanying text. It is probable that the legislation called for in these articles was not the "implementing" legislation referred to in the above-cited question and answer. Since the treaty specifically requires such legislation, the United States Senate would not need a State Department opinion on the question of its necessity. Rather, it seems safe to assume that the legislation referred to was a broader legislative pronouncement putting the entire treaty into execution.

the presumption that article 6 is self-executing.[62] In addition, the President's proclamation of the treaty's entry into force also supports the opinion that it was intended to be self-executing.[63]

The Fifth Circuit relied heavily on past American policies of asserting jurisdiction over vessels on the high seas, and stated that it was unlikely article 6 was intended to be self-executing because it would be "wholly inconsonant with the historical policy of the United States."[64] Basing a determination of whether a treaty is self-executing upon its effect on historical practice or existing legislation is a questionable method of treaty interpretation, however, because one of the primary characteristics of a self-executing treaty is that it supersedes existing practice and legislation.[65] Deciding that a treaty is executory because it is contrary to tradition or existing legislation therefore effectively and unacceptably nullifies a critical element of the definition of a self-executing treaty.

If consideration is given to historical American policy, however, the High Seas Convention does not represent a major reversal. The United States has not regularly seized foreign vessels on the high seas in the absence of treaty provisions allowing such seizure.[66] Those seizures which have been made have generally been within the twelve-mile limit, a zone over which jurisdiction was expressly retained by treaty,[67] after adoption of the High Seas Convention. Based upon the foregoing, the Fifth Circuit's emphasis upon historical interpretation appears unwarranted.

Finally, in examining outside material, it is necessary to look at interpretations of the treaty by other courts. As previously stated, there have been no other cases specifically deciding the question of whether article 6 is self-executing. Dicta in two cases, however, strongly suggest that the courts assumed the High Seas Convention was self-executing. In *United States v. Cadena,*[68] a different panel of the Fifth Circuit stated, "The Convention [on the High Seas], if applicable, supersedes prior domestic law to the contrary . . . including the authority provided by 14 U.S.C. § 89(a)."[69] The *Postal* defendants were arrested under the authority of section 89(a).[70]

In *United States v. One (1) 43 Foot Sailing Vessel,*[71] the court stated that "[o]n the high seas, only the vessels of the United States Government may exercise

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62 *See* note 38 *supra* and accompanying text.

63 NOW, THEREFORE, be it known that I, John F. Kennedy, President of the United States of America, do hereby proclaim and make public the said Convention to the end that the same and every article and clause thereof shall be observed and fulfilled with good faith, on and after September 30, 1962, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

13 U.S.T. at 2387. This would certainly seem to include enforcement of the treaty by the nation's courts.

64 589 F.2d at 880.

65 *Cook,* 288 U.S. at 118; RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(1) (1965).

66 Until 1922, seizure of foreign vessels beyond the three-mile territorial sea was only allowed for inbound vessels. When, in 1922, the United States began exercising jurisdiction over non-inbound vessels beyond its territorial sea, it caused such an international protest that the Convention for the Prevention of Smuggling of Intoxicating Liquors (*see* note 21 *supra* and accompanying text) was drafted to limit American jurisdiction on the high seas in direct reaction to the seizures. *Cook,* 288 U.S. at 112-19.

67 *See* note 4 *supra.*

68 585 F.2d 1252 (5th Cir. 1978).

69 *Id.* at 1260.

70 14 U.S.C. § 89(a) (1976).

71 405 F. Supp. 879 (S.D. Fla. 1975), *aff'd per curiam,* 538 F.2d 694 (5th Cir. 1976).

jurisdiction over United States flag vessels," and cited article 6 of the High Seas Convention as authority.[72] In other cases where the treaty is referred to, although the self-executing issue is not raised, there is no indication by the courts that it is viewed as being executory.[73]

3. Broader Concerns

In *Postal,* the court did not give any consideration to broader, more all-encompassing factors when deciding if article 6 is self-executing. While such considerations certainly should not be conclusive, they are relevant in determining the perspective from which the question of whether a treaty is self-executing should be approached.

Initially, the importance of treaty obligations should militate against undue haste in declaring the treaty to be executory, and therefore unenforceable by the courts without special legislation. It has been said that "the most fundamental rule of international law is that of the sanctity of treaty obligations."[74] Although the question of whether a treaty is self-executing is to be decided by domestic tribunals, the international obligation of the United States to enforce and abide by its treaties cannot be ignored.

Closely related to international obligations is the consideration that the honor of the United States is involved each time the courts decide the question of whether or not a treaty is self-executing.[75] This factor deserves special emphasis at the present time when the world community is increasingly seeking to maintain order by international agreement; in the final analysis, the only reasonable and truly effective means of treaty enforcement is the self-enforcement of each nation. Failure to abide by international agreements is an affront to world order which brings opprobrium to the guilty nation. The prestige and honor of the United States as a leader of the world community should not be risked through a breach of treaty provisions unless the situation clearly requires it. *Postal* does not represent such a situation.

All of these broader considerations favor approaching the question of whether a treaty is self-executing from the perspective that it should be interpreted as self-executing if at all possible within the scope of its language.

V. Conclusion

From the foregoing analysis, it is apparent that the Fifth Circuit has departed from the rule that an agreement within the constitutional limitations of treaty-making power is, by virtue of article VI of the Constitution, the "supreme Law of the Land." As stated by the Supreme Court, a treaty within those limits must be enforced by the courts in litigation of private rights.[76] Instead of following the presumption that a treaty is self-executing unless clearly

72 405 F. Supp. at 882.

73 *See, e.g.,* United States v. Petrulla, 457 F. Supp. 1367 (M.D. Fla. 1978); United States v. F/V Taiyo Maru, Number 28, SOI600, 395 F. Supp. 413 (D. Maine 1975).

74 C. FENWICK, INTERNATIONAL LAW 517 (4th ed. 1965).

75 Chew Heong v. United States, 112 U.S. 536, 540 (1884).

76 *Maiorano,* 213 U.S. at 272-73. It is unquestioned that the High Seas Convention is within the President's treaty-making power.

proved to the contrary,[77] the Fifth Circuit has reversed it, and effectively ruled that a treaty is to be deemed executory unless outside materials show a contrary intent.

The *Postal* decision is of great precedential value since it is the first judicial opinion on whether article 6 is self-executing. Aside from this, however, the decision may have other immediate and practical effects.

First, the decision may effectively expand Coast Guard authority over vessels on the high seas. Presently, Coast Guard regulations preclude boarding a foreign vessel on the high seas in contravention of any treaty.[78] After *Postal,* violation of this regulation will lose the effective check provided by the *Cook-Ford* principle.[79] With the rise of Miami as a center of illicit drug traffic,[80] the protective cloak of *Postal* is likely to encourage violations of international law,[81] treaty commitments, and federal regulations, by allowing courts to exercise jurisdiction over drug smugglers seized beyond the twelve-mile limit.[82] Although sanctions against narcotics smugglers should not be relaxed, it is imperative to utilize methods of effectively controlling that traffic which fall more circumspectly within the bounds of the law.

The Fifth Circuit's decision could also affect future judicial treaty interpretation. *Postal*'s emphasis on outside materials, with only cursory consideration of the document's express language, is a significant departure from more traditional treaty interpretation. If the decision is widely followed, it could serve to shift the focus in future decisions from rigorous textual analysis to determinations based upon extrinsic materials. Such a shift is unacceptable. With ratification, a nation assents to a treaty's language, not to the asserted meaning shown in any related external materials. Failure to strictly abide by that language will unnecessarily weaken not only the rights sought to be assured in those agreements, but also the rational international order sought to be maintained through their use.

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77 Comment, *supra* note 29, at 248.

78 19 C.F.R. § 162.3(a) (1979). This did not deny jurisdiction over the defendants because of the *Ker-Frisbie* doctrine. 589 F.2d at 885.

79 *See* text accompanying notes 21-26 *supra.*

80 Ficken, *The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law,* 29 U. MIAMI L. REV. 700 (1975).

81 The preamble to the Convention on the High Seas declares it to be a codification of international law. 13 U.S.T. at 2314.

82 Seizure of narcotics smugglers on the high seas is unlikely to cause the international protest like that engendered by seizure of liquor smugglers during Prohibition. This is because narcotics smuggling receives almost universal opprobrium, but the liquor trade was a well-respected institution in virtually every nation except the United States during Prohibition. Protest of a treaty violation by an individual's home nation is not a prerequisite to enforcement of treaty rights by American courts. Head Money Cases, 112 U.S. at 597. It would, however, certainly encourage closer adherence to treaty provisons.