

Does the Johnson Act Inhibit Riverboat Gaming on the Great Lakes?

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Introduction

In the annals of federal-state relations, the Great Lakes are unique. Their waters variously constitute navigable waterways, state boundaries, an international boundary, and most important for our purposes, "the high seas."¹ The federal government and adjoining states assert concurrent criminal jurisdiction over offenses committed on Great Lakes waters².

As one might expect, the legal fiction of inland lakes as "the high seas" does not always fit. The Great Lakes' hybrid status has led to some interesting disputes.³

New questions arise from the advent of Midwestern riverboat gaming, heretofore limited to navigable rivers. In 1993, Indiana became the first state to authorize riverboat gaming on one of the Great Lakes⁴. Similar legislation has been proposed in Illinois, Ohio, Wisconsin, and Pennsylvania.

Among states that permit riverboat gaming, "cruising" requirements vary widely⁵. Boat operators cite factors such as adverse weather conditions, obstructions to navigation, and hazardous traffic conditions as reasons for keeping boats at the dock⁶. "The Wreck of the Edmund Fitzgerald" chronicles the Great Lakes' legendary inhospitality to winter navigation.

The latest tempest is legal. As Indiana prepares to authorize gaming vessels docked on its Lake Michigan shore, legislators and law-enforcement officials debate whether the Johnson Act⁷ constitutes another obstacle to Great Lakes riverboat gaming⁸. Section 1175 of Title 15, the argument goes, prohibits possession or use of gaming devices in the "special maritime and territorial jurisdiction of the United States." The special maritime and territorial jurisdiction includes "the high seas,"⁹ and the high seas, by tradition and by statute, include the Great Lakes¹⁰. Although the recognized boundary of every Great Lakes state includes the adjacent lake, concerns still arise that the Johnson Act might override state law.

It doesn't. This Comment will analyze the Johnson Act and the concept of "the special territorial and maritime jurisdiction of the United States," to demonstrate that (1) Congress intended to support, not supplant, state laws regulating gaming; and (2) in any event, "the high seas" status of the Great Lakes applies only to "open and unenclosed waters," not to waters within harbors or breakwaters. Well-drafted state legislation and administrative foresight will allow riverboat gaming on the Great Lakes without Johnson Act hindrance.

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I. The Johnson Act and the “Special Maritime and Territorial Jurisdiction”

A. Legislative History

By the end of World War II, every state but one outlawed casinos, yet the interstate traffic in gambling devices still flourished¹¹. Federal officials attributed this to the control of manufacture by organized crime interests, and to corrupt local law enforcement, which allegedly tolerated the devices and reaped a share of their illegal profits.¹²

No one viewed the Johnson Act as a nationwide ban of gambling devices. As conceived by the Department of Justice and as refined in committee, the bill closed the channels of interstate commerce to gambling devices, except for transport to jurisdictions where such devices were lawful. Congressional sponsors and Department of Justice representatives repeatedly avowed their intent to do no more than support state law.

The Johnson Act was likewise directed at gambling on ships operating outside the jurisdiction of the United States and of any state.

The primary purpose of this legislation is to support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such States. In addition the legislation prohibits the manufacture, sale and use of slot machines and similar devices in those parts of the United States which are under the jurisdiction of the Federal Government.¹³

The bill, drafted by the Justice Department,¹⁴ passed the Senate without public hearings and without debate¹⁵. Section 2 of the Senate version prohibited the transportation of gambling devices into a state, save where under state law “the use of such device is legal.”¹⁶ Section 5 of the Senate bill extended the prohibition to federal lands.

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess or use any gambling device in the District of Columbia, the territories and possessions of the United States, on any lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof¹⁷

During eight days of hearings before the House Committee on Interstate and Foreign Commerce, no one mentioned the Great Lakes. In fact, the only witness to discuss shipboard gaming was Mr. Alfred U. Krebs of the National Federation of

American Shipping, Inc., who sought an exemption for U.S.-flag vessels operating outside United States and state waters¹⁸. No doubt to his dismay, representatives expressed concerns over the proliferation of offshore gambling ships,¹⁹ and over the inconsistency of prohibiting the devices on federal lands while allowing them on American vessels²⁰. As things turned out, the hard-luck Mr. Krebs obtained the opposite result from the one he sought.

On the floor of the House, Representative Heselton introduced a committee amendment which, for the first time, expanded the jurisdictional scope of section 5 to waters. Amended section 5 deleted the reference to lands, and substituted a prohibition against gambling devices "within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18 of the United States Code."²¹

Representative Heselton's remarks make it plain that the amendment was directed against ocean-going offshore casinos which could not be regulated by the states.

The question arose during the consideration of this bill as to whether or not United States shipping should be exempt, and a very able representative of the National Federation of American Shipping, Inc., Mr. Alfred U. Krebs, came before our committee and asked that our vessels, carrying our flag, should be exempted. . . . [I]t developed that in certain of our States, and specific mention was made of California, there are laws which prohibit the use of those machines within the territorial jurisdiction of the United States. Consequently, while they use them on the high seas, they have to put them away in special compartments and lock them up when they reach the point where the State jurisdiction comes into effect We prohibit the use of these one-armed bandits in the District and in the Territories and possessions Then we were asked to ignore the one other place that is American soil, and subject to the laws of the United States, and that is American shipping. If it is bad in one instance it is bad in all.²²

Congress had already prohibited the operation of "gaming establishments" on the high seas with the passage of the Gambling Ship Act in 1949²³. The Johnson Act was likewise directed at gambling on ships operating outside the jurisdiction of the United States and of any state²⁴. Representative Heselton's concerns could not have extended to the Great Lakes, whose U.S. waters are entirely within the jurisdiction of some state.

Following conference committee, the bill became law with amended section 5 (codified as 15 U.S.C. § 1175) essentially intact. Congress gave the subject little more attention from 1950 until the late 1970s, except for amendments in 1962 that broadened the definition of "gambling device" and imposed registration requirements for manufacturers²⁵. Then, after a couple of unsuccessful attempts, Congress revisited the Johnson Act in 1992.

The 1992 amendment finally vindicated Mr. Krebs, by allowing U.S.-flag cruise vessels to operate gambling devices "not within the boundaries of any state or possession of the United States."²⁶ The amendment was aimed at the competitiveness of the domestic cruise-ship industry, facing competition from foreign-flag vessels with on-board casinos.²⁷

Despite continued Congressional attention, the Great Lakes jurisdictional problem remained hidden. During the five sets of hearings on gaming issues between 1950 and 1991, the subject of the Great Lakes came up only once, and that in the context of the Gambling Ship Act, not the Johnson Act.²⁸

Representative Heselton and the committee may not have appreciated the broad reach of the "special maritime and territorial jurisdiction." To appreciate the issue Congress unwittingly created, we must consult that statute.

B. The Special Maritime and Territorial Jurisdiction of the United States

18 U.S.C. § 7 defines "special maritime and territorial jurisdiction of the United States" to include the following:

(1) the high seas, any other waters within the admiralty and jurisdiction of the United States and out of the jurisdiction of any particular state, and . . .

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the St. Lawrence River where the same constitutes the International Boundary Line.

A vessel "on a voyage on the waters" of the Great Lakes and connecting waterways clearly comes within clause (2). And thanks to a line of cases typified by *United States v. Rogers*,²⁹ the Great Lakes are themselves considered "the high seas" for clause (1) purposes, regardless of whether the vessel in question is on a voyage.³⁰

Unlike coastal waters, all of the domestic Great Lakes lie entirely within the jurisdiction of some state. Does section 5, applied to Great Lakes waters, unintentionally subvert the repeatedly-stated policy of deference to state law? The Department of Justice itself has never contended this, and in fact maintains quite the opposite view.

C. The Evolution of the Department of Justice Position

Department of Justice representatives testified before Congressional committees on the Johnson Act at least four times since original passage. DOJ's position has been fairly consistent over the years: (1) until 1991, it opposed most attempts to liberalize the Johnson Act; and (2) it has reiterated that the Johnson Act supports, not supplants, state law on gaming devices.

The Department has never specifically addressed the application of the Johnson Act to the Great Lakes. However, the historical development of the Department's positions suggests that DOJ may now agree that the Johnson Act was not meant to apply to state waters. Here are a few highlights from various committee appearances.

In 1962, the Department sought legislation to broaden the Act's definition of a "gambling device." Attorney General Robert F. Kennedy observed that the Act "was designed to aid and assist the States in making the possession, sale, or use of gambling devices illegal."³¹

The 1962 amendments were the last ones to make the Johnson Act more restrictive. As the legal landscape for gaming changed in the 1970s and '80s, pressure mounted to liberalize the Act. One unsuccessful 1977 attempt, H.R. 3421 and

H.R. 6787, produced hearings. The Department opposed the committee's draft legislation, while holding to the view that the Act was consistent with state law. In a written submission to the Merchant Marine Subcommittee, Assistant Attorney General Patricia M. Wald observed: "Existing law, 15 U.S.C. 1171-78, prohibits the

More important, Keeney suggested in a written statement that the Johnson Act did not prohibit state-sanctioned gaming activities within state waters, even if these waters also constituted "the high seas."

knowing transportation of any mechanical gambling device . . . into any state or Federal possession, unless state law specifically exempts those states from the provisions of those sections."³²

The Department of Justice was represented at the subcommittee hearings by Marvin R. Loewy, Deputy Chief of the Organized Crime and Racketeering Section, who reiterated the Department's traditional view of the Act: "[T]he Federal policy toward gambling has always been to support State action and State desires along these lines."³³

The Department's opposition to amending the Act led to friction with subcommittee members from states which had legalized riverboat gaming. At a 1990 subcommittee hearing, during a heated exchange over its opposition to a cruise-ship amendment, Deputy Assistant Attorney General John C. Keeney again asserted: "The States are supreme, except where the Interstate Gambling Devices Act [the Johnson Act] does proscribe that sort of activity. They can't possess these type of gambling devices within the territorial waters of the United States not under State jurisdiction."³⁴

In 1991, for the first time, the Department relaxed its strict opposition to Johnson Act amendments. By this time, Mississippi-licensed riverboat gaming on vessels docked at its Gulf Coast ports was underway³⁵. These vessels operated within the waters of the state of Mississippi, yet were on "the high seas" as the Department of Justice viewed the phrase³⁶. Obviously the Department had done nothing to interfere.

The House Subcommittee on Merchant Marine again held hearings on Johnson Act amendatory legislation in October 1991. This time the Department of Justice, again speaking through Deputy Assistant Attorney General Keeney, offered no objection to exempting U.S.-flag vessels on port-to-port voyages, provided that "the principal purpose of the trip is not gambling."³⁷ More important, Keeney suggested in a written statement that the Johnson Act did not prohibit state-sanctioned gaming activities within state waters, even if these waters also constituted "the high seas."

15 U.S.C. § 1175 [Section 5 of the Johnson Act] operates to prevent the use of slot machines and roulette wheels on American registry cruise vessels when these ships are on the high seas. . . . *On the other hand, 15 U.S.C. § 1175 does not apply to ships operating in a State's territorial waters, since these waters are not part of the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7.* While the use or possession of slot machines and roulette wheels is illegal under the laws of many of the States, some States, such as Mississippi, have authorized their use in State territorial waters in certain situations.³⁸

If section 1175 "does not apply to ships operating in a State's territorial waters," there ought to be no Great Lakes problem at all. Was the Department using the term "territorial waters" to include the Gulf Coast, or was it referring only to inland waterways such as the Mississippi River, where gaming boats were also permitted?³⁹ In a later footnote, the Department made it clear that its reference to "territorial waters" included coastal waters.

Interestingly, the situation in Mississippi is almost exactly the reverse of that in most other States. Mississippi has, in effect, legalized casino gambling on ships underway in State waters *off its coast* and has enacted a regulatory scheme that bears at least some resemblance to those in Nevada and New Jersey for regulating casinos in those states. *Consequently, it is our understanding that all casino gambling on ships operating out of Mississippi ports takes place while these vessels are in State waters.*⁴⁰

To date, the Department has not incorporated this position in the *United States Attorneys Manual*. It should. As a matter of prosecutorial discretion, the Department often instructs its prosecutors to avoid extreme interpretations of statutes, to avoid absurd results and to conserve scarce prosecution resources⁴¹. The Department should expressly state that section 5 does not extend to state-sanctioned vessels operating within state waters, whether or not those waters also constitute "the high seas."

II. How Far do the High Seas Extend?

With respect to docked boats, the Johnson Act is inapplicable for another reason. The Department interprets “the high seas” for 18 U.S.C. § 7 purposes as limited to “open and unenclosed” waters. The *United States Attorneys Manual* provides:

Until recently the term “high seas” was always understood as intending the *open and unenclosed waters* of the sea beginning at the low-water mark. Although it has become common of late to use the term to describe waters beyond a marginal belt or “territorial sea” over which a nation claims special rights, *the classic definition, contemporaneous with this statute’s development, is the correct one.*⁴²

The term “open and unenclosed” clearly excludes natural enclosures such as bays and promontories. There is also some venerable authority that the term excludes waters within artificial structures, all consistent with Justice Field’s observation in *United States v. Rogers*:

The term “high seas” does not, in either case, indicate any separate and distinct body of water, but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast.⁴³

The leading decision is *Ex parte O’Hare*⁴⁴. O’Hare committed an assault on the steam vessel “John Mitchell,” then lying at anchor in Lake Erie, at a point

about 300 feet inside the old Buffalo breakwater. O’Hare was charged under sections 5356 and 5361-2 of the Revised Statutes, which then made criminal any assault committed “upon the high seas or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States,

and out of the jurisdiction of any particular state” Since the point at which the offense occurred was within the State of New York, the question “presented is whether the ‘John Mitchell’ was upon the high seas of Lake Erie [where there would be federal jurisdiction] or in a haven connected therewith [where federal jurisdiction would not attach].”⁴⁵

Writing for the Court, Circuit Judge Lacombe noted that “[t]here does not seem to be any distinction between original upland and man-made land” in determining what constituted a “haven.”

The Department of Justice should recognize as policy what it already recognizes in legislative advocacy, that the Johnson Act does not apply to riverboat gaming on the Great Lakes.

Why a harbor or haven may not be so improved by artificial structures as to enlarge its capacity and increase its security without losing its character we do not see. The waters inclosed by the breakwaters and forming a continuation of the interior harbor, southeasterly along the shore to the city line, constitute a "haven" within the ordinary meaning of that word as given in the standard dictionaries. It is difficult to see why the circumstances that the federal government constructed the breakwaters and that unless they are kept in repair they would probably be washed away should change the meaning of the word.⁴⁶

Older federal decisions reach consistent results,⁴⁷ as does a more recent one⁴⁸. Similarly, the U.S. Coast Guard interprets "the high seas" in 18 U.S.C. § 7 as excluding "waters within harbors" without distinction between natural and artificial ones.⁴⁹

What if the vessel leaves the dock but remains within the harbor or behind the breakwater? Is it "on a voyage upon the waters of any of the Great Lakes"?⁵⁰ Just as the breakwater constituted a "haven" in *O'Hare*, separate and distinct from "the high seas of Lake Erie," it seems equally clear that a vessel does not voyage "on the waters of the Great Lakes" until it leaves the protected area.

Conclusion

No one has been prosecuted under the Johnson Act for engaging in state-sanctioned gaming. Given the Mississippi experience, it is obvious that no one is going to be. Yet the debate over the Act continues. State gaming regulators, state legislators, licensees, the investment community, and the general public deserve greater certainty that their state laws will be respected than the Department's current "hands off" policy gives them.

Of course, the unique federal interest in enclaves such as military bases should be preserved. The Great Lakes present a different situation, at least where no ongoing federal regulatory scheme (such as the authority of the Coast Guard over vessels⁵¹) is affected. The Department of Justice should recognize as policy what it already recognizes in legislative advocacy, that the Johnson Act does not apply to riverboat gaming on the Great Lakes.

References

As this article went to press, the House and Senate had passed differing amendments to the Johnson Act. The House version, H.R. 1361, creates an express exemption for gaming excursions departing from and returning to Indiana ports. S. 1004 does not include the Indiana-only exemption, but makes other changes applicable to cruises originating in California. At present, a comprehensive Johnson Act revision appears unlikely.

Endnotes

¹See generally *United States v. Rogers*, 150 U.S. 249, 286 (1893) ("The Great Lakes possess every essential characteristic of seas.").

²THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 3-12, at 125 (1994). See *Hoopingarner v. United States*, 270 F.2d 465 (6th Cir. 1959) (no double jeopardy bar against successive state and federal prosecutions arising out of incident occurring on Lake St. Clair).

³*Lake Factor May Thwart Bid*, *NEW YORK TIMES*, Feb. 12, 1984, § 5, at 8, describing the ultimately successful efforts of the Chicago Yacht Club to obtain "arm of the sea" designation for Lake Michigan, in order to qualify the club to enter an America's Cup challenger.

⁴IND. CODE §§ 4-33-1-1 *et seq.* (1994 supp.).

⁵Mississippi requires no cruising at all; licensed boats may conduct gaming operations dockside with no restrictions on passenger ingress and egress. MISS. CODE § 75-76-33 (1994). Illinois, Missouri and Louisiana require boats to cruise, but allow their gaming regulators to waive the requirement in particular cases. ILL. REV. STAT. ch. 230, para. 10/11(b) (1994); LA. REV. STAT. ANN. § 4-9-525(B)(1)(a) (1994); MO. REV. STAT. § 21-313.812 (1994). Iowa requires licensed riverboats to cruise only once per day, and that during the summer season. IOWA CODE ANN. § 3-4-99F.4(17) (1994). For a general discussion of the varying requirements see Plume, *Should Riverboats Sail?*, 8 *CASINO JOURNAL* 44 (Feb. 1995).

Currently, Indiana law provides that "gambling may not be conducted while a riverboat is docked", except in cases of adverse weather or water conditions, or as prescribed by rule of the Gaming Commission. IND. CODE § 4-33-9-2 (1994 Supp.). 1995 amendments to this statute restrict the Gaming Commission's authority to waive the cruising requirement.

⁶CASINO JOURNAL, *supra* note 5, at 44-45.

⁷Act of January 2, 1951, 81st Cong., 2d Sess., 64 Stat. 1134, 15 U.S.C. §§ 1171-1178, as amended. The Act, named for Senator Lyndon B. Johnson, is also known as the Gambling Devices Act, and by other variations.

⁸See, e.g., *Indiana's Lake Casinos May be Kept in Port by U.S. Law*, *CHICAGO TRIBUNE*, December 14, 1994, at A-5.

⁹18 U.S.C. § 7 (1994).

¹⁰*Id.*; *United States v. Rogers*, 150 U.S. 249 (1893).

¹¹The State of Nevada has legalized gambling of all types. Washington and Montana permit slot machines in private clubs, and Maryland legalized machines in two counties. Elsewhere in the United States they are illegal, but yet they operate in every State of the Union.

Gambling Devices, Hearings on S. 3357 and H.R. 6736 Before the House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 11 (1950) [hereinafter *GAMBLING DEVICE HEARINGS*] (statement of Representative Preston). All of the ten large manufacturers of slot machines were then located in Illinois. *Id.* at 10.

¹²*Id.* at 10; 96 CONG. REC. 13638 (Aug. 28, 1950) (remarks of Rep. Preston).

¹³H. REP. NO. 2769, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. CODE CONG. & ADMIN. NEWS, at 4240. The Department of Justice was equally blunt.

The only thing that the Federal Government is being asked to do under this bill is to stop, in the channels of interstate commerce, the shipment of these machines which the states are powerless to keep out of the channels of interstate commerce. Actually enforcement against those people who gamble or use these machines wrongfully in the States is left with the States, and with the local officials, and there is absolutely no intention on the part of the Federal government, express or otherwise . . . to get us into a prohibition era.

Id. at 4244.

¹⁴S. 3357; see GAMBLING DEVICE HEARINGS, *supra* note 11, at 24, 36.

¹⁵*Id.* at 4243.

¹⁶96 CONG. REC. 13649 (Aug. 28, 1950).

¹⁷*Id.* at 13650.

¹⁸See GAMBLING DEVICE HEARINGS, *supra* note 11, at 243-52 (testimony of Alfred U. Krebs, Counsel for the National Federation of American Shipping, Inc.). Mr. Krebs sought an amendment to expressly exempt U.S.-flag passenger ships which operated casinos while the vessel was outside U.S. territorial waters. *Id.* at 245. As matters then stood, "the paragraph dealing with maritime jurisdiction was left out of the [Senate-passed] bill, and only that portion of the section relating to territorial jurisdiction was incorporated." *Id.* at 247.

¹⁹The Gambling Ship Act of 1949, 18 U.S.C. § 1081-83, prohibits the presence of a gambling establishment on vessels "on the high seas . . . and . . . not within the jurisdiction of any state." 18 U.S.C. § 1082(a). 18 U.S.C. § 7 is not limited to areas outside the jurisdiction of a state.

²⁰GAMBLING DEVICE HEARINGS, *supra* note 11, at 246.

²¹96 CONG. REC. 13650 (Aug. 28, 1950).

²²*Id.* at 13651.

²³See n.19 *supra*.

²⁴The U.S.-flag casino vessels prohibited by the amendment operated only on the high seas, outside the jurisdiction of the United States and of states. GAMBLING DEVICE HEARINGS, *supra* note 11, at 244 (testimony of Alfred U. Krebs).

²⁵Pub. L. No. 87-840, 76 Stat. 1075.

²⁶Pub. L. No. 102-251, Title II, §202(b), 106 Stat. 61.

²⁷*U.S. Flag Cruise Ship Competitiveness Act of 1991, Hearing Before the Subcommittee on Merchant Marine, House Committee on Merchant Marine and Fisheries*, 102d Cong., 1st Sess. 1-2 (1991) (statement of the chairman).

²⁸*Id.* at 122 (letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, responding to inquiry concerning the application of a proposed amendment to the Gambling Ship Act on the Great Lakes).

²⁹150 U.S. 249 (1893).

³⁰The Department of Justice interprets the limiting phrase "and out of the jurisdiction of any particular state" in § 7(1) as qualifying only the "any other waters" clause, and not "the high seas." 7 DEPARTMENT OF JUSTICE MANUAL § 9-20.120, at 9-429 (1989 Supp.).

³¹*Gambling Devices, Hearings on H.R. 3024, H.R. 8410 and S. 1658 Before the House Committee on Interstate and Foreign Commerce*, 87th Cong. 2d Sess. 10 (1962).

³²*Merchant Marine Miscellaneous--Part 2, Hearings on H.R. 3421 and H.R. 6787 Before the Subcommittee on Merchant Marine, House Committee on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 124 (1977).

³³*Id.* at 136 (1977).

³⁴*Gambling on Vessels, Hearing on H.R. 5533 and H.R. 5534 Before the Subcommittee on Merchant Marine, House Committee on Merchant Marine and Fisheries*, 101st Cong., 2d Sess. 13 (1991).

³⁵The coastal boundary of a Gulf Coast state extends three marine leagues into the Gulf of Mexico. 43 U.S.C. § 1301(b) (1994).

³⁶"Until recently the term 'high seas' was always understood as intending the open and unenclosed waters of the sea beginning at the low-water mark. . . . [This] classic definition, contemporaneous with this statute's development, is the correct one." 6 DEPARTMENT OF JUSTICE MANUAL § 9-20.120, at p. 9-429 (1989-2 Supp.) (citations omitted).

³⁷*U.S. Flag Cruise Ship Competitiveness Act of 1991, Hearing on H.R. 3282 Before the Subcommittee on Merchant Marine, House Committee on Merchant Marine and Fisheries*, 102d Cong., 1st Sess. 11 (1991).

³⁸*Id.* at 69.

³⁹See 1 SCHOENBAUM, *supra* note 2, §§ 2-13, -14, at 31, for a discussion of the distinction between "internal waters" and "territorial seas". See also 33 C.F.R. § 2.05-5 (1994) (Coast Guard regulatory definition of "territorial seas"). The author of this article makes no attempt to delve into the fine points of admiralty law, which has never figured in the Johnson Act debates at all. The point is that the federal government has at least the same authority over Gulf Coast waters within three marine leagues from shore as it has over Lake Michigan.

⁴⁰*Id.* at 70 n.2 (emphasis supplied).

⁴¹For example, the Mann Act, 18 U.S.C. § 2421 *et seq.*, prohibits interstate transportation of individuals for the purpose of prostitution or sexual activity which is a criminal offense under federal or state

law. Despite the broad reach of the statute, the Department generally limits prosecutions to persons engaged in commercial prostitution, "even though commerciality is not an element of the offense." 6A DEPARTMENT OF JUSTICE MANUAL § 9-79.100(B), at 9-1623 (1989-2 Supp.).

⁴²*Id.* § 9-20.120, at 9-429 (citations omitted; emphasis supplied).

⁴³150 U.S. 249, 254-55 (1893).

⁴⁴179 Fed. 662 (2d Cir. 1910).

⁴⁵*Id.* at 664.

⁴⁶*Id.* at 666.

⁴⁷*See* United States v. Smith, Fed. Cas. No. 16,337 (C.C. Mass. 1816) (vessel lying outside the harbor was on the high seas); United States v. Seagrist, Fed. Cas. No. 16,245 (C.C.N.Y. 1860) (a vessel lying in a harbor at a distance from shore, communicating with the land by her boats, and not within any enclosed dock, nor at a pier or wharf, is on the high seas); United States v. Robinson, Fed. Cas. No. 16,176 (D.R.I. 1826) (landlocked bay in Bermuda outside the high seas); United States v. Hamilton, Fed. Cas. No. 15,290 (D. Mass. 1816) (larceny occurring on a boat in an enclosed dock not on the high seas); United States v. Grush, Fed. Cas. No. 15,268 (D. Mass. 1829) (assault on ship lying within Boston Harbor not on the high seas). Of these, only *Seagrist* is less than perfectly congruent, and there it appears that the large area of the harbor and the lack of physical connection with a dock proved dispositive.

⁴⁸United States v. Tanner, 471 F.2d 128 (7th Cir. 1972) (Chicago's Calumet Harbor not "the high seas" in a criminal prosecution involving an explosion on a vessel docked in the harbor).

⁴⁹33 C.F.R. § 2.05-1(b) (1994).

⁵⁰18 U.S.C. § 7(2) (1994).

⁵¹The Coast Guard recognizes that the interpretation of a criminal statute does not affect its ability to carry out its regulatory mission. "A clear distinction should be maintained between the Coast Guard's authority under 14 U.S.C. 89 and the jurisdictional base of the criminal laws which apply to the special maritime and territorial jurisdiction." 33 C.F.R. § 2.05-1(b) n.1 (1994).

