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Signed confessions - redux

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Some years ago, I wrote an article lamenting the fraudulent entries made in many oil record books and the increasing use of those entries as signed confessions in the prosecution of ship owners and operators and senior shipboard personnel (particularly chief engineers) for making false statements to the US Coast Guard. Oil record books are required records on commercial vessels and must be presented to Coast Guard boarding officers on demand. The presentation of an oil record book with known false entries for the purpose of misleading the federal official into believing that the vessel is in compliance with applicable requirements can subject the ship owner, operator, and senior shipboard personnel to significant penalties. Contrary to my expectations, the number of violations continues at a high rate, despite the prevalence of high-visibility convictions and imposition of severe penalties.

Gradually, the prosecutions for making false statements have expanded beyond the oil record book scenario. Convictions have been obtained for false entries in garbage record books and ballast water management records. It is only a matter of time before we see convictions for false entries in air emission, hull husbandry (biofouling), and sewage management records.

For some unknown reason, neither the ship owners/operators nor senior shipboard personnel seem to get it. The United States government is serious about the accuracy of required shipping records and will not tolerate the presentment of knowing false entries. Prosecution for presentment of false records is a well-understood crime. It consists of five elements: (1) making a statement orally or in writing; (2) when the statement is false or misleading; (3) the false or misleading information is material; (4) the statement or concealment was made knowingly; and (5) the statement was made or presented to a federal official engaged in performance of his or her duty.

Recently, though, the US government (particularly the Department of Justice and the US Coast Guard) may have overstepped the line. They are now sometimes charging ship owners, operators, and senior shipboard personnel with failure to maintain proper records. The major difference between this new crime and the older crime of making or presenting a false statement to a federal official is that the written statement no longer need be made or presented to a federal official. Thus, a false entry in a ship's oil record book made two years previously involving a voyage in a far part of the world may subject the owner, operator, and senior shipboard personnel to criminal prosecution in the United States for each time the ship enters US waters without

regard for whether a Coast Guard boarding officer ever examines the oil record book. No evidence that the fraudulent oil record book entry adversely impacted (or could possibly have adversely impacted) the United States is required. In addition, one fraudulent oil record book entry could result in multiple violations of US law – one violation for each port call while the errant oil record book is on board the ship, even where there has been no USCG boarding.

The use of shipboard records as signed confessions even when unread by federal authorities now potentially extends beyond the oil record book. Close examination of the Code of Federal Regulations (CFR) reveals that similar language requiring the maintenance of records is used in regulations relating to ballast water management and garbage management. The Environmental Protection Agency (EPA), in its regulations relating to control of air emissions from marine engines, uses the word “keep” rather than the word “maintain”. The impact may be the same.

This raises the issue of semantics and original intent. The oil record book provision in Annex I to the International Convention for the Prevention of Pollution from Ships (MARPOL Convention) provides that an entry shall be made in the oil record book on each of certain operations, including the discharge overboard of bilge water. It further provides that the oil record book shall be “kept in such a place” on board as to be readily available for inspection.

In the United States, the MARPOL Convention is implemented and enforced via the Act to Prevention Pollution from Ships (APPS). The US Coast Guard (and for air emissions, the EPA) has promulgated regulations regarding various provisions in the MARPOL Convention, including the oil record book provision.

The initial USCG regulations promulgated under APPS appeared in 1983. They provided, in pertinent part, that each covered ship “shall maintain” an oil record book. No one at the time envisioned that the Coast Guard regulation had any different meaning than the related MARPOL provision. In fact, the preamble to the rulemaking stated that its purpose was “to implement the provisions of MARPOL”. The regulations in this regard have not been amended since their original promulgation. In other words, the MARPOL requirement to “keep on board” and the USCG requirement to “maintain” the oil record book were synonymous.

Neither the Coast Guard nor the Department of Justice interpreted the USCG regulation as more expansive than the MARPOL provision until 2006. That year, the United States Attorney for the Eastern District of Texas charged the chief engineer and the owner of the tanker Pacific Ruby with criminal violations of US law by failing to properly maintain the ship’s oil record book. One count of the violation was charged for each time the tanker had entered a US port with the oil record book containing the allegedly fraudulent entries (for a total of eight), even though the Coast Guard had not boarded the tanker nor examined the oil record book until the last time, when the fraudulent entries were first discovered. The federal district court dismissed the charges relating to failure to maintain, but sustained the remaining charges. The government appealed. The US Court of Appeals for the Fifth Circuit reversed the dismissal, holding that, if the oil record book did not have to be “maintained” while in in port, then a

polluter could avoid application of the record book requirements simply by falsifying the entries prior to entry into port. This holding defies experience and long-standing precedence. The Coast Guard and the Department of Justice have been successfully prosecuting ship owners, operators, and senior shipboard personnel for years under the false official statement statute. In fact, that was the initial charge in the Pacific Ruby case. It was only later, but before trial, that the “failure to maintain” counts were added.

The appellate court, in allowing the failure to maintain charges to be reinstated, never addressed the implications of its action. While the potential penalties for violation of the false official statement provision and for violation of the failure to maintain provision are roughly similar, there are two important differences. First, as shown in the Pacific Ruby case, there would be only one violation of the false official statement offence – the presentation of the oil record book to the Coast Guard boarding officer. There would be potentially multiple violations of the failure to maintain offense – one for each time the foreign vessel came into port (in the case of the Pacific Ruby, there were eight port calls). This difference drastically increases the stakes for the ship owner, ship operator, and senior shipboard personnel and makes them more amenable to entering into a plea bargain. Secondly, APPS includes a provision allowing for payment of rewards for information leading to conviction. The false official statement offense does not include such a provision.

The failure to maintain offense is now frequently charged, but the propriety of such action by the Coast Guard and the Department of Justice has not been re-examined by a court since the Pacific Ruby case.

I contend that multiple use of the “failure to maintain” charge amounts to unjust piling on. If this were football, a penalty would be called against the government.

Until that happens, ship owners and operators and senior shipboard personnel must redouble efforts to ensure that entries made in required shipboard records are as accurate as possible so as to avoid handing the government any more signed confessions. That should be done regardless of the federal government’s awkward stance on this issue, but especially so now.