



9-1-2013

“To Comply or Not To Comply?” An Argument in Favor of Increasing Investigation and Enforcement of MARPOL Annex I Violations

Katriel Statman
Washington and Lee University School of Law

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/jece>



Part of the [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Katriel Statman, *“To Comply or Not To Comply?” An Argument in Favor of Increasing Investigation and Enforcement of MARPOL Annex I Violations*, 5 Wash. & Lee J. Energy, Climate & Env’t. 251 (2014), <https://scholarlycommons.law.wlu.edu/jece/vol5/iss1/8>

This Note is brought to you for free and open access by the Journal of Energy, Climate, and the Environment at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Energy, Climate, and the Environment by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

“To Comply or Not To Comply?” An Argument in Favor of Increasing Investigation and Enforcement of MARPOL Annex I Violations

Katriel Statman*

Abstract

The 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) seek to protect the world’s oceans from environmental harms. Traditional maritime law, principles of international law, and difficulties in detecting violations of MARPOL 73/78 have made it difficult for nations to enforce the strict requirements regarding oil pollution under Annex I. In light of these difficulties, the United States authorities have used other means under United States law to prosecute these violations. This note argues that while the United States’ increased enforcement is controversial it is necessary in order to ensure that MARPOL 73/78 is effective and to protect the world’s oceans from environmental disaster.

Table of Contents

I. Introduction.....	252
II. Background.....	254
A. History of the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships...254	
B. Relevant Provisions of MARPOL 73/78 and the APPS	256
C. Process of Enforcement	258
D. Environmental Impact of Oil Bilge and Sewage Dumping in the World’s Oceans	261
E. How Have the Court’s Dealt with MARPOL/APPS Violations?	262
1. United States v. Royal Caribbean Cruises Ltd.	262

* 2014 J.D. Candidate, Washington and Lee University School of Law. I would like to thank Professor Sarah Wiant for her never-ending help, assistance, and feedback during this process, as well as Christopher Nolan for helping me find a topic in admiralty law. I would also like to thank my wife and family for their never-ending support.

United States v. Royal Caribbean Cruises Ltd	262
2. United States v. Petraia Maritime, Ltd.	264
3. United States v. Jho; United States v. Ionia Management; United States v. Pena.....	266
III. Discussion	270
A. Use of the Whistleblower Provision of the APP as a Tool in Enforcing MARPOL 73/78.....	270
B. Effect of Department of Justice Enforcement of ORB violations on Principles of International and Maritime Law	273
IV. What is the Correct Path Forward?	279
A. Practical Considerations and Realities of Large Multi-National Treaties.....	279
B. Who is the Proper Party to Prosecute?	281
C. The Whistleblower's Role in Increasing United States Enforcement	286
D. Arguments in Favor of Extra-Territorial Enforcement.....	288
E. Increasing MARPOL's Legitimacy as a Multi-National Treaty.....	290
F. Economic Practicalities of Consistent Enforcement	291
V. Conclusion.....	292

I. Introduction

When the words “oil,” “pollution,” and “ocean” are put together, an instant mental reaction is to think of the Deepwater Horizon events of 2010 or the Exxon-Valdez event of 1989.¹ Yet tremendous disasters such as these do not generate the majority of oil pollution in our world’s oceans today.² The vast majority of ocean oil pollution comes from discharges of oil and oily mixtures from shipping operations.³ Even though these discharges violate the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from ships (taken together, MARPOL),⁴ compliance with the provisions of the treaty is poor.⁵

1. See Andrew Griffin, *MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?*, 1 IND. J. GLOBAL LEGAL STUD. 489, 489–90 (1994) (discussing the accessibility and newsworthy nature of large disasters such as Exxon Valdez compared to operational discharges).

2. See David P. Kehoe, *United States v. Abrogar: Did the Third Circuit Miss the Boat?*, 39 ENVTL L. 1, 3 (Winter 2009) (comparing the volume of oil from the Exxon Valdez spill with the annual volume of oil discharged from daily operations).

3. See *id.* (explaining the vast amount of oil dumped in the ocean is from operation of large vessels).

4. See International Conference on Marine Pollution: Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319 [hereinafter MARPOL 73] (laying out operating requirements for shipping).

Over the past twenty years, the United States has increased enforcement of violations of MARPOL, as codified in the Act to Prevent Pollution from Ships (APPS).⁶ The United States has received criticism both for the practice of using whistleblowers as an investigatory tool and for aggressively prosecuting MARPOL violators.⁷ If oil pollution in the world's oceans is to be eradicated, the United States must increase enforcement against the companies that own, operate, and have direct control over shipping and transportation in the oceans.

This Note considers whether increased enforcement of MARPOL and APPS is effective and has been an effective tool in the attempt to eradicate or reduce oil pollution from our oceans. Part II addresses the history, background, and litigation surrounding MARPOL and the APPS in the United States. Part III asks whether a large whistleblower award is an effective tool, whether the United States is violating principles of international law, and which parties should prosecute MARPOL violations. The final part of this Note examines a number of different options regarding solutions to increase enforcement of MARPOL, and argues that an increased use of the whistleblower provisions, increased penalties for MARPOL violators, and mandatory whistleblower awards are necessary to further incentivize voluntary compliance and promote the goals of MARPOL.

5. See MAR. TRANSP. COMM., ORG. FOR ECON. CO-OPERATION & DEV., COST SAVINGS STEMMING FROM NON-COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL REGULATIONS IN THE MARITIME SECTOR 4 (2003) [hereinafter COST SAVINGS] available at <http://www.oecd.org/sti/transport/maritimetransport/2496757.pdf> (noting that “compliance with international environmental rules still leaves something to be desired”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

6. See Nicholas H. Berg, Note, *Bringing It All Back Home: The Fifth and Second Circuits Allow Domestic Prosecutions for Oil Record Book Violations on Foreign-Flagged Vessels*, 34 TUL. MAR. L.J. 253, 254 (2009) (explaining that the United States has increased MARPOL enforcement by focusing on the requirement that Oil Record Books are accurate); see also Michael G. Chalos & Wayne A. Parker, *The Criminalization of Maritime Accidents and MARPOL Violations in the United States*, 23 U.S.F. MAR. L.J. 206, 209–10 (2010–11) (explaining that the United States has increased prosecutions of crewmembers, vessel owners, and managers).

7. See Berg, *supra* note 6, at 254–55 (explaining that clients are being warned globally of the potential increases in liability exposure); see also Chalos & Parker, *supra* note 6, at 209–10 (explaining that the United States pursues an aggressive prosecutorial style for deliberate violations of environmental laws and regulations).

II. Background

A. History of the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships

In the 1950s, the British government was concerned with ocean oil pollution because it had started to encroach on the British coast.⁸ In 1954, the International Convention for the Prevention of Pollution in the Sea by Oil (OILPOL 54)⁹ was drafted and implemented by the thirty-two countries responsible for the majority of merchant shipping tonnage in the world.¹⁰ “[OILPOL 54] prohibited the discharge from any tanker of oil and oily mixtures of more than 100 parts per million, and established prohibition zones extending 50 miles from the shoreline in which intentional discharges were totally prohibited.”¹¹

In 1962 and 1969, OILPOL 54 underwent significant amendments due to poor enforcement and the lack of available technology required for compliance.¹² The 1962 amendments enlarged the prohibition zones and prohibited any vessel that was 20,000 tons or greater from discharging oil or “oily mixtures.”¹³ Due to a lack of incentives for ship owners to use the available technology to separate oil from bilge water and use on-shore reception facilities, the 1962 amendments failed to effectively increase compliance.¹⁴ The 1969 amendments allowed ships to use a load-on-top procedure to separate oil from bilge water.¹⁵ Because the load-on-top

8. See 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 209 (4th ed. 2004) (discussing the United Kingdom’s response to oil pollution by calling a convention in 1954).

9. International Convention for the Prevention of Pollution in the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3 [hereinafter OILPOL 54].

10. See COLIN DE LA RUE & CHARLES B. ANDERSON, SHIPPING AND THE ENVIRONMENT: LAW AND PRACTICE 759 (1998) (explaining the history of the international treaties governing oil pollution).

11. *Id.*

12. See *id.* at 760–61 (explaining that a poor record of enforcement and lack of available technology led to a conference to amend OILPOL 54).

13. See Andrew Schulkin, *Safe Harbors: Crafting an International Solution to Cruise Ship Pollution*, 15 GEO. INT’L ENVTL. L. REV. 105, 111 (2002) (“Oily bilge water is oil-contaminated water produced by a cruise ship’s engines, steam systems, evaporator dumps, and other components.”).

14. See DE LA RUE & ANDERSON, *supra* note 10, at 760 (discussing the shortfalls of the 1962 amendments to OILPOL 54 and the need for more amendments).

15. See Griffin, *supra* note 1, at 492 (describing load-on-top as “a procedure in which operational waters are allowed to settle during the voyage back to the loading port,” giving oil and water time to separate so the water can be siphoned off, after which new cargo can be

procedure was too difficult to use and implement, it also failed to significantly reduce oil pollution.¹⁶

In 1973 an International Conference was held to bring OILPOL 54 in line with modern tanker practices and operations.¹⁷ This conference produced the International Convention for the Prevention of Pollution from Ships (MARPOL 73).¹⁸ MARPOL 73 was the first comprehensive regime that aimed to completely eradicate the intentional pollution of the oceans by oil and other harmful substances,¹⁹ including noxious liquid substances carried in bulk, harmful substances carried in package form, sewage, garbage, and air pollution.²⁰

In 1978 another convention was convened to address the high costs and mandatory requirements of MARPOL 73.²¹ The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL 78)²² was adopted and allowed any state that ratified MARPOL 78 to automatically ratify MARPOL 73.²³ MARPOL 78 included more stringent requirements for oil management and discharges during daily ship operations.²⁴

President Jimmy Carter signed MARPOL 73/78 in 1978, and the United States Senate ratified the treaty in 1980.²⁵ MARPOL 73/78 is not a

“‘loaded on top’ of the oily slop”); *see also* DE LA RUE & ANDERSON, *supra* note 10, at 760 (discussing the changes to OILPOL 54 required to promote compliance).

16. *See* DE LA RUE & ANDERSON, *supra* note 10, at 760–61 (discussing the difficulties that the 1969 amendments to OILPOL 54 faced); *see also* Griffin, *supra* note 1, at 492 (“The difficulty with LOT is that in order to be effective it requires a skilled and conscientious crew to follow the correct procedures. Also, since the separation process takes considerable time, LOT does not work well for short coastal voyages.”).

17. *See id.* (explaining the history of MARPOL 73).

18. *See id.* at 761–71 (summarizing the results of the 1973 Convention); *see generally* MARPOL 73, *supra* note 4 (laying out the agreement produced at the 1973 convention).

19. *See id.* at 760–61 (noting the importance of MARPOL 73 to international law).

20. *See* MARPOL 73, *supra* note 4, Annexes II–VI (governing these forms of pollution).

21. *See* DE LA RUE & ANDERSON, *supra* note 10, at 765–71 (discussing changes and additions to MARPOL 73).

22. *See* Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 17 I.L.M. 546 [hereinafter MARPOL 78] (revising the regulations provided by MARPOL 73).

23. *See id.* art. I(2) (incorporating MARPOL 73 and MARPOL 78 into a single instrument); *see also* DE LA RUE & ANDERSON, *supra*, note 10, at 765 (discussing the process for adoption of MARPOL 78).

24. *See* DE LA RUE & ANDERSON, *supra* note 10, at 765–71 (noting some of the changes that MARPOL 78 made to MARPOL 73).

25. *See* 126 CONG. REC. 18, 492–93 (July 2, 1980) (voting to ratify MARPOL 78); 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 240 (4th ed. 2004) (discussing the United States legislative history with respect to MARPOL 78).

self-executing treaty²⁶ and became part of United States law when the Act to Prevent Pollution from Ships (APPS) was enacted in 1980.²⁷ The APPS repealed the United States implementing legislation for OILPOL 54.²⁸ The treaty came into force in 1983 when, “twelve months after the date on which not less than fifteen states, the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world’s merchant shipping, have become parties to it in accordance with Article IV.”²⁹ MARPOL has been signed and ratified by 152 countries, representing ninety-nine percent of the world’s shipping tonnage.³⁰

B. Relevant Provisions of MARPOL 73/78 and the APPS

The APPS applies to ships that operate under the authority of the United States, and with respect to Annexes I and II, any ship within the navigable waters of the United States.³¹ Under Annex I, the United States has jurisdiction to enforce all violations of MARPOL/APPS within the navigable waters of the United States.³² The navigable waters of the United States for APPS are defined as the territorial waters of the United States, reaching out to twelve nautical miles.³³ The United States may prosecute any United States flagged ship for MARPOL violations.³⁴

26. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject.”).

27. See Act to Prevent Pollution from Ships, 33 U.S.C. § 1907(a) (2011) (declaring violations of MARPOL unlawful).

28. See DE LA RUE & ANDERSON, *supra* note 10, at 781 n.58 (stating that APPS repealed OILPOL 54 in the United States).

29. MARPOL 78, *supra* note 22, art. V.

30. See INT’L MAR. ORG., STATUS OF MULTILATERAL CONVENTIONS AND INSTRUMENTS IN RESPECT OF WHICH THE INTERNATIONAL MARITIME ORGANIZATION OR ITS SECRETARY-GENERAL PERFORMS DEPOSITARY OR OTHER FUNCTIONS 108-12 (2013) [hereinafter STATUS OF MULTILATERAL CONVENTIONS], available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf> (listing each nation that has signed and ratified MARPOL 78 and the number and percentage of nations that are a party to MARPOL 78) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

31. See 33 U.S.C. § 1902 (providing the jurisdictional requirements of the APPS).

32. See MARPOL 78, *supra* note 22 (providing each nation with the authority to prosecute MARPOL violations that occur within their own territorial waters).

33. See 33 U.S.C. § 1901(a)(7) (defining “navigable waters” as defined in Presidential Proclamation 5928 of December 27, 1988); Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (defining the territorial sea as extending out to twelve nautical miles).

34. See 33 U.S.C. § 1902(a)(1) (providing jurisdiction for prosecutions of all United States flagged ships “wherever located”).

The Secretary of Defense is authorized to inspect the discharge of a harmful substance in violation of MARPOL by any ship that is at a port or terminal within United States control.³⁵ Any prosecution for an illegal discharge by a foreign or United States flagged ship within the United States territory is subject to principles of comity, international law, and maritime law.³⁶

[I]f the violation is by a ship registered in or of the nationality of a country party to the MARPOL protocol . . . or one operated under the authority of a country party to the MARPOL protocol, . . . the Administrator . . . *may* refer the matter to the government of the country of the ship's registry or nationality, or under whose authority the ship is operating for appropriate action.³⁷

Taken together, these provisions give the United States both discretionary enforcement powers and an obligation to abide by international law.

A discharge must meet specific requirements to avoid violating MARPOL/APPS.³⁸ An oil tanker may not discharge oil or oily mixtures within fifty nautical miles of the nearest land from a cargo bilge unless the discharge does not exceed fifteen ppm.³⁹ In general discharges may not exceed fifteen ppm under MARPOL Regulations 12–16.⁴⁰

To combat the difficulty of monitoring discharges on the high seas, Regulation 20 requires maintenances of an Oil Record Book (ORB).⁴¹ The

35. See § 1903 (providing the authority to promulgate regulations under APPS); § 1904(c)(2) (subjecting such ships to inspection while under US jurisdiction).

36. See § 1912 (requiring any application of APPS to comply with international law); § 1902(i) (including savings clause resolving inconsistencies with maritime or customary international law).

37. 33 U.S.C. § 1908(f) (emphasis added).

38. See MARPOL 73, *supra* note 4, Annex I, Regulation 15 (providing the specific discharge requirements of MARPOL); MARPOL 78, *supra* note 22, Annex I, Regulation 15 (leaving unchanged the corresponding regulation from MARPOL 73); see also DE LA RUE & ANDERSON, *supra* note 10, at 760–63 (discussing MARPOL restrictions on vessel discharges in operation).

39. See MARPOL 73, *supra* note 4, Annex I, Regulation 34 (providing the specific discharge requirements of MARPOL); MARPOL 78, *supra* note 22, Annex I, Regulation 34 (leaving unchanged the corresponding regulation from MARPOL 73).

40. See MARPOL 78, *supra* note 22, Annex I, Regulations 12–16 (prohibiting any discharge that exceeds fifteen parts per million); see also Michael G. Chalos & Wayne A. Parker, *The Criminalization of Maritime Accidents and MARPOL Violations in the United States*, 23 U.S.F. MAR. L.J. 206, 212–13 (2010–11) (discussing oil discharge requirements under MARPOL, APPS, and United States regulations).

41. See MARPOL 78, *supra* note 4, Annex I, Regulations 17, 36 (requiring that all discharges by ships are accurately recorded in an ORB).

ORB must be maintained accurately and kept for three years.⁴² It must have a record of any discharge of oil or oily mixtures as permitted under Regulation 11 or any accidental or exceptional discharge of oil or oily mixtures that is not covered by a Regulation 11 exception.⁴³ Failure to maintain an ORB is a violation of MARPOL.⁴⁴ Under MARPOL and the APPS the failure to maintain an accurate ORB can lead to a criminal penalty.⁴⁵ If the inspection and the investigation of the supposed discharge of harmful substances leads to a criminal penalty, up to one half of the fine may be awarded to the person who gave information that led to the conviction.⁴⁶

C. Process of Enforcement

While all investigations and violations have their own natures, the Fifth Circuit in *United States v. Jho* described how MARPOL investigations often occur.⁴⁷ In *Jho*, the U.S. Coast Guard searched the *M/T Pacific Ruby* while the ship was in Port Neches, Texas.⁴⁸ Based on a tip from one of the *Pacific Ruby*'s engineers, the Coast Guard investigated both an unlawful discharge of oil and the manipulation of pollution detection equipment by Chief Engineer Jho.⁴⁹

The Coast Guard has the statutory authority to:

[M]ake inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over

42. See MARPOL 73, *supra* note 4, Annex I, Regulation 17 (specifying prompt recording and retention requirements); MARPOL 78, *supra* note 22, at Annex I, Regulation 17 (adopting the corresponding regulation from MARPOL 73 with a technical amendment).

43. See MARPOL 73, *supra* note 4, Annex I, Regulation 17 (describing each type of discharge that must be recorded in the ORB); MARPOL 78, *supra* note 22, at Annex I, Regulation 17 (adopting the corresponding regulation from MARPOL 73 with a technical amendment).

44. See MARPOL 73, *supra* note 4, Annex I, Regulation 17 (imposing the bookkeeping requirement); *id.* Art. 4 (deeming noncompliance a violation and providing for penalties); MARPOL 78, *supra* note 22, Art. I (incorporating the operative provisions of MARPOL 73).

45. See Act to Prevent Pollution from Ships, 33 U.S.C. § 1908(a) (2012) (making a knowing violation of MARPOL to be a class D felony).

46. See *id.* at § 1908(b)(2) (allowing a whistleblower to collect an award from the damages awarded against the MARPOL violator).

47. See *generally* *United States v. Jho*, 534 F.3d 398 (5th Cir. 2008) (holding that Jho could be held liable for failure to maintain an accurate ORB even though the discharge at issue did not occur in the United States' navigable waters).

48. See *id.* at 400 (discussing the events that led to Jho's prosecution).

49. See *id.* (discussing the Coast Guard's reasons for investigating Jho and the *M/T Pacific Ruby*).

which the United States has jurisdiction, for the prevention, detection, and suppression of violations of the laws of the United States. For such purposes, commissioned, warrant, and petty officers *may at any time go on board of any vessel* subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, *examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.*⁵⁰

The Coast Guard needs to show only a reasonable suspicion of criminal activity to survive a Fourth Amendment challenge for unwarranted search and seizure.⁵¹

During the investigation the Coast Guard discussed the ORB entries with both Jho and the ship's captain.⁵² Initially the Coast Guard determined that there was no violation; however, they later obtained corroborating evidence of MARPOL violations.⁵³ The government eventually brought charges against Jho for eight counts of knowing failure to maintain an oil record book as required by 33 U.S.C. § 1908(a) and 33 C.F.R. § 151.25.⁵⁴

If a ship is either liable for a fine or a civil liability or if there is reasonable cause to believe that a ship, its owner, operator, chief engineer, or someone in charge is subject to such liability, the Secretary of the Treasury, on request of the Secretary of Defense, may keep the ship in port by revoking the ship's clearance to leave.⁵⁵ In such cases, the ship is often retained in the port where the violation was found pending court proceedings.⁵⁶

50. 14 U.S.C. § 89(a) (emphasis added).

51. *See* United States v. Varlack Ventures, Inc., 149 F.3d 212, 216–17 (3d Cir. 1998) (discussing the requirements that the Coast Guard must fulfill in order to search a vessel without a warrant).

52. *See Jho*, 534 F.3d at 400 (discussing the Coast Guard's investigation of the *MT Pacific Ruby*).

53. *See id.* at 400–01 (discussing the Coast Guard's actions after the initial investigation).

54. *See id.* at 401 (describing the charges that were brought against Jho for his failure to properly maintain an accurate ORB).

55. *See* 46 U.S.C. § 60105 (2011) (requiring vessels to receive permission from the Secretary of Homeland Security before leaving a United States Port); *see also* 33 U.S.C. § 1908(e) (2008) (allowing the Secretary of the Treasury to revoke the clearance required under 46 U.S.C. § 60105 for a ship to leave a United States port if under investigation or suspicion of a MARPOL violation).

56. *See generally* Giuseppe Bottiglieri Shipping Co. S.P.A. v. United States, 843 F. Supp. 2d 1241, 1244–45 (S.D. Ala. 2012) (discussing the retention of plaintiff's vessel in port pending the proceedings for APPS violations and the failure of the Coast Guard to

When the Coast Guard receives information from a whistleblower, the court will provide the whistleblower with an attorney to represent the whistleblower's interests in the proceeding against the violator.⁵⁷ The whistleblower is sequestered from the rest of the ship's crew at the expense of the ship-owner or lessor pending proceedings.⁵⁸

A whistleblower may recover up to one half of the award against the MARPOL violator in both civil and criminal proceedings.⁵⁹ If the penalty imposed against the violator is a criminal penalty, then the whistleblower award is granted at the court's discretion.⁶⁰ If the penalty is a civil penalty, then the whistleblower award is granted at the discretion of the Secretary of Defense or the Administrator of the Environmental Protection Agency depending on whether the Secretary or the Administrator has found that a party violated MARPOL.⁶¹

If the whistleblower award arises out of a criminal prosecution and is a matter of the court's discretion, then the whistleblower will be required to petition the court separately to receive the statutorily permitted award.⁶² Whistleblowers will often be required to retain counsel to petition for their award.⁶³ Moreover, mere judgment against a MARPOL violator does not guarantee that the whistleblower will receive any part of the penalty assessed.⁶⁴ This places the whistleblower in a difficult position: The whistleblower has not worked since the proceeding began, has likely lost

negotiate for Giuseppe to have permission to leave); *see also* Benedict S. Gullo, *The Illegal Discharge of Oil on the High Seas: The U.S. Coast Guard's Ongoing Battle Against Vessel Polluters and a New Approach Towards Establishing Environmental Compliance*, 209 MIL. L. REV. 122, 158 (discussing the procedures for investigations into APPS violations).

57. *See* *United States v. Overseas Shipholding Grp., Inc.*, 625 F.3d 1, 4 (1st Cir. 2010) (describing that when the grand jury proceedings against Overseas Shipholding Group had begun, the magistrate judge appointed an attorney to Barroso, the whistleblower, to represent Barroso's interests in the proceedings against Overseas Shipholding Group).

58. *See* *Chalos & Parker*, *supra* note 6, at 234–35 (criticizing the Coast Guard's aggressive use of 33 U.S.C. § 1908(e) to detain ships and 18 U.S.C. § 3144 authorizing the government to temporarily detain material witnesses at their employers expense).

59. *See generally* 33 U.S.C. § 1908(a)–(b) (2011) (allowing whistleblowers to recover at the discretion of the court, the Secretary of Defense, or the Administrator of the EPA up to one half of the award issued against the MARPOL violator).

60. *See id.* § 1908(a) (establishing that the court has discretion to provide the whistleblower with an award when the case is criminal).

61. *See id.* § 1908(b) (establishing that the Secretary of Defense or the Administrator of the EPA has discretion to grant a whistleblower award in civil cases).

62. *See Overseas Shipholding Grp., Inc.*, 625 F.3d at 5 (discussing the potential difficulty that Barroso would face in securing his right to the whistleblower award).

63. *See, e.g., id.* (discussing Barroso's retention of counsel).

64. *See* *Anderson v. United States*, 2012 WL 6087283, *5 (N.D. Cal. 2012) (“Even if the Court had subject matter jurisdiction, Plaintiff has failed to state a claim for violation of his due process rights. Plaintiff has not shown that he has a property right in the portion of the penalty that he seeks because the award is discretionary.”).

his or her job, and may find it difficult to attain new work in the maritime industry.⁶⁵ Therefore, while a whistleblower may receive a windfall, a whistleblower also faces substantial risks.⁶⁶

D. Environmental Impact of Oil Bilge and Sewage Dumping in the World's Oceans

The issue of ocean oil pollution was largely ignored until OILPOL 54 sixty years ago.⁶⁷ The majority of ocean oil pollution is the result of daily operational ship discharges.⁶⁸ Yet, public reaction and contempt for oil pollution is generally not voiced until major catastrophic events like the recent catastrophe in the Gulf of Mexico at the Macondo well.⁶⁹

Coast Guard Lieutenant Benedict Gullo noted the vastness of the oil pollution problem in our oceans:

Each year up to 810,000 tons of oil waste are intentionally and illegally dumped into the world's oceans by commercial vessels. As a consequence, seabird populations are reduced, the habitats for slow-moving shellfish such as clams, oysters, and mussels are poisoned, and fish—if not killed by harmful toxins of the oil—lose the ability to reproduce, reproduce deformed offspring, or upon ingestion of the oil create even more toxic substances.⁷⁰

Oil pollution harms the whole ocean environment, but is particularly harmful to seabirds.⁷¹ The oil from ship discharges damages the water

65. See *id.* at *1 (discussing Anderson's statements to United States authorities that he was putting his job at risk merely by talking to them); see also *Overseas Shipholding Grp., Inc.*, 625 F.3d at 9 (arguing that the reason for the whistleblower award is to create incentives when there is a risk of retaliation from the whistleblower's employer).

66. See *Anderson*, 2012 WL 6087283 at *5 (stating that Anderson does not have a right to the whistleblower award because it is merely discretionary, notwithstanding the risk to his job from reporting the violation).

67. See DE LA RUE & ANDERSON, *supra* note 10, at 760–62 (discussing the history and background of MARPOL 73/78).

68. See Gullo, *supra* note 56, at 210 (discussing the principal sources of ocean oil pollution); see also Kehoe, *supra* note 2, at 3 (comparing estimates of discharge-related ocean oil pollution to the Exxon-Valdez catastrophe from 1989).

69. See Andrew Griffin, *MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Empty?*, 1 IND.J. GLOBAL LEGAL STUD. 489, 489–90 (1994) (discussing the attention that large events like Exxon-Valdez receive by the public and legislatures unlike the more disastrous daily discharges when considered in their aggregate).

70. Gullo, *supra* note 56, at 122–23.

71. See Schulkin, *supra* note 13, at 112 (2002) (discussing all types of cruise ship pollution and the effect that these pollutants have on the marine environment).

repellent and body temperature maintenance properties of seabirds' feathers, causing them to die from exhaustion or drowning.⁷² Oil ingested during preening also has a significant impact on their digestive and reproductive processes.⁷³

The primary cause of ocean oil pollution is from ships' daily operational discharges in violation of MARPOL, rather than large accidental discharges.⁷⁴ The Exxon-Valdez released 37,000 tons of oil into Prince William Sound off the coast of Alaska in 1989.⁷⁵ The world witnessed the worst ocean oil spill in history in 2010 when an explosion occurred at the Macondo well in the Gulf of Mexico.⁷⁶ This spill should not be ignored as an extreme environmental catastrophe, nor should questions regarding the safety and procedures of deep-sea resource extraction be ignored. Nonetheless, the explosion and subsequent release of oil yielded only approximately 660,877 tons of oil.⁷⁷ Therefore, the crux of the ocean oil pollution problem is from daily ship discharges in violation of MARPOL.

E. How Have the Court's Dealt with MARPOL/APPS Violations?

*1. United States v. Royal Caribbean Cruises Ltd.*⁷⁸

United States v. Royal Caribbean Cruises Ltd. was one of the first cases that the Department of Justice and the Coast Guard vigorously

72. *See id.* (discussing the effects of ocean oil pollution on birds ability to repel water and control body temperature)

73. *See id.* (discussing the effects of ocean oil pollution on birds' digestive and reproductive systems).

74. *See* Kehoe, *supra* note 2, at 3 (critiquing the lack of attention paid to discharge based oil pollution compared with accident based oil pollution); *see also* Gullo, *supra* note 56, at 124–25 (discussing the ongoing battle with the illegal discharge of oil on the high seas).

75. *See* Kehoe, *supra* note 2, at 3 (“Arguably the worst ecological disaster in U.S. history, the grounding of the Exxon Valdez oil tanker spilled approximately 37,000 tons of crude oil into Prince William Sound, Alaska on March 24, 1989.”).

76. *See* *BP Leak the World's Worst Accidental Oil Spill*, THE DAILY TELEGRAPH (London), Aug. 3, 2010, available at <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7924009/BP-leak-the-worlds-worst-accidental-oil-spill.html> (discussing the blowout at the Macondo well in the Gulf of Mexico) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

77. *See id.* (stating that the spill at the Macondo well is estimated to have leaked more than four million barrels of oil into the Gulf of Mexico).

78. *See generally* *United States v. Royal Caribbean Cruises Ltd.*, 11 F. Supp. 2d 1358 (S.D. Fla. 1998) (denying defendant Royal Caribbean's motion to dismiss claims under the False Claims Act for providing an inaccurate ORB to the United States Coast Guard).

pursued for violations of MARPOL/APPS.⁷⁹ In *Royal Caribbean*, the United States brought suit against Royal Caribbean cruise line for violating the False Claims Act,⁸⁰ instead of bringing suit for MARPOL violations, because the MARPOL violation occurred outside of the United States territorial waters.⁸¹ Therefore, the United States did not have jurisdiction to prosecute the illegal discharge, but did have jurisdiction to prosecute violations of the False Claims Act for actions inside the United States' territorial waters.⁸²

In February of 1993, the Coast Guard observed, via infrared technology, the discharge of oil from the *Nordic Empress*, one of Royal Caribbean's many cruise ships.⁸³ The discharge occurred in Bahamian sovereign waters.⁸⁴ When the *Nordic Empress* entered the port of Miami, the Coast Guard investigated the illegal discharge and observed that the ORB did not indicate the illegal discharge observed by the Coast Guard.⁸⁵

Because the *Nordic Empress* sailed under the flag of Liberia, the United States referred the violation to Liberia pursuant to international law, practice, and MARPOL requirements.⁸⁶ Liberia declined to prosecute because there was reasonable doubt that a MARPOL violation occurred.⁸⁷ After Liberia failed to prosecute Royal Caribbean for violating MARPOL, the United States brought suit under the False Claims Act for presenting to the United States Coast Guard a false ORB.⁸⁸

Royal Caribbean argued that the United States does not have jurisdiction to prosecute the illegal discharge in this case under MARPOL because it occurred outside the United States' territorial waters.⁸⁹ Therefore,

79. See William A. Goldberg, Case Note, *Cruise Ships, Pollution, and International Law: The United States Takes on Royal Caribbean Cruise Lines*, 19 WIS. INT'L L.J. 71, 71–72 (2000–01) (discussing the Department of Justice's novel arguments to find Royal Caribbean liable and avoid violating international law).

80. See False Claims Act, 18 U.S.C. § 1001(a) (2011) (imposing fines and imprisonment for knowing and willful falsification or concealment of a material fact, false representation, or false writing in a matter involving a federal entity).

81. See *Royal Caribbean Cruises*, 11 F. Supp. 2d at 1367 (noting that while jurisdiction for the MARPOL violation belonged to the flag state, Liberia, the government had instead brought an FCA claim for the misleading ORB, over which the US did have jurisdiction notwithstanding MARPOL).

82. See *id.* at 1368 (“To the extent that the presentation of the materially false Oil Record Book to the Coast Guard constitutes a separate, actionable crime under United States law, MARPOL does not bar that prosecution.”)

83. See *id.* at 1361 (reciting the facts of the case).

84. See *id.* (reciting the facts of the case).

85. See *id.* (reciting the facts of the case).

86. See *id.* (reciting the facts of the case).

87. See *id.* at 1361–62 (reciting the facts of the case).

88. See *id.* at 1362 (reciting the history of the indictment).

89. See *id.* (reciting the defendant's motion to dismiss arguments).

any prosecution would violate the terms of MARPOL, traditional maritime law, and principles of international law.⁹⁰ The government argued that Royal Caribbean was not prosecuted for the illegal discharge in the Bahamas, but for presenting a false ORB to the Coast Guard in a United States port. The court agreed.⁹¹ Presenting the false ORB to the Coast Guard is illegal under the False Claims Act, and the United States has jurisdiction to prosecute crimes committed within its territorial boundaries.⁹²

The court found that the United States had jurisdiction over Royal Caribbean for violations of the False Claim Act and that the prosecution did not violate principles of international law.⁹³ The court noted that “even if the statement is arguably true at the time it was made in the location in which it was made, if the statement is false as a matter of United States law and fulfills the other requirements for § 1001 claim, it is actionable.”⁹⁴ The court then determined that if the government could substantiate the *prima facie* elements of the False Claims Act claim, Royal Caribbean’s statements could be actionable under the Act for providing an ORB that did not include the illegal discharge observed in the Bahamas by the Coast Guard.⁹⁵

2. *United States v. Petraia Maritime, Ltd.*⁹⁶

In 2007 the District Court for the District of Maine held that the court lacked jurisdiction to prosecute MARPOL violations by foreign-flagged ships that do not occur within the United States’ territorial waters.⁹⁷ The court held, however, that it does not lack jurisdiction to prosecute violations of ORB maintenance requirements by foreign-flagged ships when that ship is in the United States’ territorial waters.⁹⁸ The court has the power to adjudicate any MARPOL violation that occurs within the territory

90. *See id.* (reciting the defendant’s motion to dismiss arguments).

91. *See id.* at 1368 (“The discharge of oil in an improper manner is one crime; the failure to keep an Oil Record Book as required under MARPOL/APPS is another; and the deliberate presentation of a false material writing to the U.S. Coast Guard is another.”)

92. *See id.* at 1368–69 (determining that MARPOL does not preclude an FCA claim).

93. *See id.* (determining that MARPOL does not preclude an FCA claim).

94. *Id.* at 1363–64 (citing *United States v. Godinez*, 922 F.2d 752 (11th Cir. 1991)).

95. *See id.* (“If the [ORB] documents are [routinely used by federal officials], and the *prima facie* requirements of the five elements of a § 1001 claim are met . . . then the statement is action-able under § 1001.”)

96. *United States v. Petraia Maritime, Ltd.*, 483 F. Supp. 2d 34 (D. Me. 2007).

97. *See id.* at 38–39 (determining that, on these facts, the reasoning in *Royal Caribbean* precluded the federal government from jurisdiction over the MARPOL violation).

98. *See id.* (determining that *Royal Caribbean* did, however, afford the government jurisdiction for the separate offense concerning the ORB violation).

of the United States, including ORB maintenance violations, even if the discharge at issue in the ORB did not occur within the United States territorial waters.⁹⁹

In *Petraia*, the ship *M/V Kent Navigator* sailed under the flag of Gibraltar and was owned by a Swedish company incorporated in the British Virgin Islands.¹⁰⁰ *Petraia* argued that the case should be dismissed because the United States lacked jurisdiction to prosecute under MARPOL because

the alleged inaccuracies in the vessel's oil record book involve a discharge on the high seas outside the territorial jurisdiction of the United States, the actions constituting the crimes alleged in the indictment occurred outside the jurisdiction of the United States, which may not bring such charges under MARPOL and [the United Nations Convention on the Law of the Sea].¹⁰¹

The court disagreed.¹⁰² Citing *Royal Caribbean*, the court concluded that the criminal violation *Petraia* was charged with was not for the illegal discharge of oil on the high seas under MARPOL, but for failure to maintain an accurate ORB while in the United States territorial waters.¹⁰³ By failing to maintain an accurate oil record book while in U.S. territorial waters, *Petraia* violated MARPOL/APPS—which requires specifically recording all legal and illegal discharges—giving the United States the authority to prosecute violations.¹⁰⁴ Therefore, jurisdiction in the District Court of Maine was deemed proper.¹⁰⁵ The court then specifically noted,

to find to the contrary would raise serious questions about the government's ability to enforce, as a matter of domestic law, false statements made in connection with such matters as bank fraud, immigration, and visa cases, where the false statements at issue were made outside of the United States,

99. See *id.* (discussing the jurisdictional status of the various violations).

100. See *id.* at 36 (stating that the ship was registered with the government of Gibraltar, owned by a corporation located in Sweden, and incorporated under the laws of the British Virgin Islands).

101. *Id.* at 36–37.

102. See *id.* at 38 (relying on the reasoning in *Royal Caribbean* to reject defendant's argument).

103. See *id.* (discussing the reasoning of the court in *Royal Caribbean*).

104. See *id.* at 38–39 (“[T]he concurrent jurisdiction provision of MARPOL allowed the United States to prosecute what was clearly a crime in and of itself: the presentation of a false Oil Record Book to the Coast Guard.”).

105. See *id.* (determining that the facts were not sufficiently distinct from *Royal Caribbean* to justify foreclosing jurisdiction).

perhaps acceptable or in the alternative unnecessary under the appropriate foreign regulatory scheme, but nonetheless illegal under United States law.¹⁰⁶

3. *United States v. Jho*; *United States v. Ionia Management*; *United States v. Pena*

Since *Petraia* the Fifth, Second, and Eleventh U.S. Circuit Courts of Appeal have held that jurisdiction is proper for prosecutions of ORB violations when the ship was in a United States port.¹⁰⁷ In *Jho*, the defendants argued the United States could prosecute only ORB violations that had actually occurred within the United States under MARPOL/APPS.¹⁰⁸ The Fifth Circuit summarily rejected this argument, focusing on the purpose and intent of MARPOL/APPS, to prevent oil pollution at sea.¹⁰⁹ The court stated:

Accurate oil record books are necessary to carry out the goals of MARPOL and the APPS. If the record books did not have to be “maintained” while in the ports or navigable waters of the United States, then a foreign-flagged vessel could avoid application of the record book requirements simply by falsifying all of its record book information just before entry into a port or navigable waters.¹¹⁰

If ship owners’ arguments were accepted, then the goal of preventing ocean oil pollution would be undermined.¹¹¹ Based on the Fifth Circuits holding in *Jho*, ship owners, charters, and chief engineers have an

106. *Id.* at 38 (quoting *United States v. Royal Caribbean Cruises Ltd.*, 11 F. Supp. 2d 1358, 1364 (S.D. Fla. 1998)).

107. *See* *United States v. Jho*, 534 F.3d 398 (5th Cir. 2008) (holding that under APPS there is a duty to keep accurate ORB, violation of which could be prosecuted); *United States v. Ionia Mgmt.*, 555 F.3d 303 (2d Cir. 2009) (holding the same); *United States v. Pena*, 684 F.3d 1137 (11th Cir. 2012) (holding the same).

108. *See Jho*, 534 F.3d at 402–03 (discussing the defendant’s claim that because the alleged misconduct was made in international waters, it was outside U.S. ports or navigable waters).

109. *See id.* at 403 (“[I]gnoring the duty to maintain puts the regulation at odds with MARPOL and Congress’ clear intent under the APPS to prevent pollution at sea according to MARPOL.”).

110. *Id.*

111. *See id.* (“We refuse to conclude that by imposing limitations on the APPS’s application to foreign-flagged vessels Congress intended so obviously to frustrate the government’s ability to enforce MARPOL’s requirements.”).

affirmative duty to keep a properly maintained ORB at all times in United States territorial waters.¹¹²

The defendants in *Jho* also argued that jurisdiction was improper because it violated principles of customary international law and the United Nations Convention on the Laws of the Sea (UNCLOS).¹¹³ The defendants argued that the United States did not have jurisdiction to prosecute the violations alleged because the ship in question, the *M/T Pacific Ruby*, was registered in Liberia, and under the law of the flag, only Liberia had jurisdiction to prosecute MARPOL violations by the defendants.¹¹⁴

The court rejected these arguments, asserting that the law of the flag doctrine cannot be used as a shield from the jurisdiction of United States courts.¹¹⁵ The court stated that, “it has long been established that a state has the power to prosecute violations of its laws committed by foreign-flagged vessels in its ports as long as the port state has not abdicated authority to do so.”¹¹⁶ Because the prosecutions in *Jho* were for violations of United States law, the violation of the ORB maintenance requirements occurred within the United States territorial waters, and the United States had not abdicated its sovereignty, the United States had authority to prosecute *Jho* for failing to properly maintain the ORB.¹¹⁷

In *Ionia Management*,¹¹⁸ the Second Circuit addressed similar questions for the first time.¹¹⁹ *Ionia Management*, a company incorporated in Liberia and headquartered in Greece, owned the 600-foot oil tanker named the *M/T Kriton*.¹²⁰ The ship made numerous deliveries of oil to ports along the eastern seaboard of the United States.¹²¹ During this period, its chief engineers routinely discharged oily waste directly into the ocean by diverting the waste around the oily water separator, none of which were recorded in the *Kriton*’s oil record book.¹²² The Department of Justice

112. *See id.* (“[W]e read the requirement that an oil record book be ‘maintained’ as imposing a duty upon a foreign-flagged vessel to ensure that its oil record book is accurate (or at least not knowingly inaccurate) upon entering the ports of navigable waters of the United States.”).

113. *See id.* at 405–06 (discussing this body of law).

114. *See id.* (discussing the defendants’ arguments).

115. *See id.* at 406 (“The Supreme Court has recognized that the law of the flag doctrine does not completely trump a sovereign’s territorial jurisdiction to prosecute violations of its laws.”).

116. *Id.* at 408–09.

117. *See Jho*, 534 F.3d at 409–10 (rejecting the idea that 33 U.S.C. § 1912 prevents prosecution of the oil record book offenses charged against *Jho*).

118. *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303 (2d Cir. 2009).

119. *See id.* at 303 (holding that a duty existed under APPS to keep accurate ORB, violation of which could be prosecuted).

120. *See id.* (reciting the facts of the case).

121. *See id.* (reciting the facts of the case).

122. *See id.* (reciting the facts of the case).

indicted Ionia for thirteen counts of violations of APPS, one count of conspiracy, three counts of falsifying records in a federal investigation, and one count of obstruction of justice.¹²³

While the circumstances of the investigation are not divulged in the Second Circuit's opinion, the court adopted the analysis of the Fifth Circuit in *Jho*, finding that the district court had jurisdiction for the indictments that were issued under MARPOL/APPS.¹²⁴ Quoting *Jho*, the court noted that

[the] Supreme Court has recognized that the law of the flag doctrine does not completely trump a sovereign's territorial jurisdiction to prosecute violations of its laws: The law of the flag doctrine is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign.¹²⁵

In the most recent case to address United States enforcement of MARPOL, *United States v. Pena*,¹²⁶ the Eleventh Circuit continued the trend of upholding jurisdiction for prosecutions of MARPOL violations in United States courts.¹²⁷

In *Pena*, the defendant did not violate the ORB maintenance requirement; however, *Pena* did violate MARPOL certification requirements.¹²⁸ While *Pena* does not involve a failure to properly maintain an accurate ORB or an illegal discharge, the analysis of the court is important and displays the reach of the holdings in *Royal Caribbean*, *Petraia*, *Jho*, and *Ionia Management*.¹²⁹

123. *See id.* at 306 (reciting the basis for the indictments).

124. *See id.* at 308 (“[T]he court [in *Jho*] found that the ORB offenses were charged ‘in accordance with’ the law of the flag We agree for substantially the reasons stated by the Fifth Circuit.”).

125. *Id.* (citing *United States v. Jho*, 534 F.3d 398, 406 (5th Cir. 2008)).

126. *United States v. Pena*, 684 F.3d 1137 (11th Cir. 2012).

127. *See id.* at 1141–42 (“[W]e hold that the United States has jurisdiction to prosecute surveyors for MARPOL violations committed in U.S. ports.”).

128. *See id.* at 1143–44 (reciting the facts of the case).

129. *See United States v. Royal Caribbean Cruises Ltd.*, 11 F. Supp. 2d 1358, 1364 (S.D. Fla. 1998) (holding that whether the United States has the authority to regulate potentially illegal discharges or failure to properly update an ORB outside of United States jurisdiction does not affect the United States Coast Guard's ability to regulate maintenance of an ORB inside U.S. waters); *United States v. Petraia Maritime, Ltd.*, 483 F. Supp. 2d 34, 38 (D. Me. 2007) (citing and agreeing with the holding from *Royal Caribbean*); *Jho*, 534 F.3d at 404 (affirming that the gravamen of the action is not the illegal discharge but the misrepresentation to the United States government); *Ionia Mgmt.*, 555 F.3d at 309 (joining

Hugo Pena was employed by the Universal Shipping Bureau as a ship inspector and conducted ship inspections necessary to receive a certification that the ship complied with MARPOL requirements.¹³⁰ The *Island Express I* changed its flag from St. Kitts and Nevis to Panama.¹³¹ In order to comply with all necessary regulations it was required to have a new IOPP certificate issued. The IOPP certificate is a certification under MARPOL that indicates that a certified ship complies with the MARPOL requirements for proper disposal of bilge water and other oily mixtures.¹³² Pena conducted the survey of the *Island Express I* and issued the certification even though he was aware that the oily water separator was not operational, and that the *Island Express I*'s engineer had fashioned a means to pump the bilge water from the engine room directly to the ship's deck.¹³³ This system rendered the *Island Express I* ineligible for certification.¹³⁴

Pena sought to dismiss the suit because he was issuing certifications for Panama and not the United States.¹³⁵ He argued that any suit against him in the United States would offend notions of extra-territorial enforcement of the law.¹³⁶ The Eleventh Circuit was not persuaded, and concluded that because Pena was operating out of Miami, Florida, and the certification was issued while the *Island Express I* was in United States territorial waters, that the United States had adequate jurisdiction to prosecute this particular violation of MARPOL.¹³⁷ Pena's other arguments—that the indictment failed to allege he had a duty to conduct a complete MARPOL survey, and that failure to conduct a survey is not a crime—were also found to lack merit.¹³⁸

the Fifth Circuit and holding that the APPS imposes a duty on ships to have an accurately maintained ORB when entering a U.S. port).

130. See *Pena*, 684 F.3d at 1143–44 (discussing the factual and procedural history).

131. See *id.* at 1143 (reciting the facts of the case).

132. See *id.* at 1142–43 (noting that the certificate is issued upon successful completion of an inspection by the flag state, either on its own or through a designated “surveyor”).

133. See *id.* at 1143–44 (reciting the facts of the case).

134. See *id.* at 1142 (discussing the MARPOL requirements concerning bilge water discharge).

135. See *id.* at 1145 (discussing Pena's jurisdictional argument).

136. See *id.* (discussing Pena's jurisdictional argument).

137. See *id.* at 1145–46 (noting that a port state's jurisdiction over matters occurring in port is settled law and that MARPOL provides the flag state with mere concurrent jurisdiction over such matters).

138. See *id.* at 1147–48 (discussing and rejecting these arguments).

III. Discussion

A. Use of the Whistleblower Provision of the APP as a Tool in Enforcing MARPOL 73/78

The recent growth in enforcement proceedings under MARPOL and APPS is partially attributable to the 1987 amendment to the APPS.¹³⁹ The 1987 Amendment provided that a whistleblower may be able to receive up to one half of the damages awarded in a successful prosecution for MARPOL/APPS violations.¹⁴⁰ Over the past ten years the United States Department of Justice has significantly increased its use of this provision and subsequently increased the number of prosecutions for MARPOL violations.¹⁴¹ In 2010, for example, the number of vessel pollution case referrals was double the ten-year annual average.¹⁴²

This rise in prosecution and general enforcement has created a sense of unease in the maritime shipping community.¹⁴³ As the law firm Chalos & Co.¹⁴⁴ contends, there is a concern that many of these whistleblowers are acting only out of spite for their employers or out of

139. See Jeanne M. Grasso & Gregory F. Linsin, Blank Rome LLP, *MARPOL Enforcement in the United States*, MARITIME PROFESSIONAL 8, 8–11 (May 2011), available at <http://www.blankrome.com/index.cfm?contentID=37&itemID=2471> (discussing the United States enforcing compliance with the International Convention for the Prevention of Pollution from Ships); see also Chalos & Co. P.C., *U.S. Prosecution of Suspected MARPOL Violations—Whistleblowers: Are they Really Reliable?*, CHALOS & CO. P.C. (2011) [hereinafter Chalos 2011], <http://www.chaloslaw.com/us-prosecution-marpol-violations.html> (discussing the United States government's prosecution of suspected MARPOL violations) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

140. See Act to Prevent Pollution from Ships, 33 U.S.C. § 1908 (2008) (“A person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulations issued thereunder commits a class D felony. . . . [A]n amount equal to not more than ½ of such fine may be paid to the person giving information leading to conviction.”).

141. See Grasso & Linsin, *supra* note 139, at 8 (discussing the United States' aggressive enforcement efforts since the early 1990s); see also Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1826 (Dec. 2011) (“Federal prosecutors have increasingly prosecuted pollution on the high seas and not in U.S. navigable waters.”).

142. See Gullo, *supra* note 56, at 125 (discussing increased prosecution efforts).

143. See Grasso & Liskin, *supra* note 139, at 9 (discussing the preventative measures taken by vessel owners to foster increased compliance as a result of the increased pace of enforcement).

144. Chalos & Co. is an international law firm that specializes in maritime law, with a special practice area devoted to MARPOL violation defense. See CHALOS & CO. P.C., MARITIME & MARPOL CRIMINAL DEFENSE, <http://www.chaloslaw.com/maritime-criminal-defense.html> (last visited Nov. 5, 2013) (discussing the firm's practice).

personal greed.¹⁴⁵ Chalos & Co. cites an incident from Corpus Christi, Texas in which a whistleblower claimed that his vessel, the *M/T Wilmina*, violated MARPOL.¹⁴⁶ Upon receiving the tip, the Coast Guard detained the ship pending further investigation.¹⁴⁷ This investigation did not result in charges under APPS or MARPOL.¹⁴⁸ The detention of a ship and subsequent investigation significantly impacts both the company and crew from loss of revenues and daily pay.¹⁴⁹

While Chalos & Co. presents a valid argument, they ignore the necessity and importance of awarding whistleblowers. These awards are particularly useful when it is difficult to detect violations of laws and relevant treaties.¹⁵⁰ Ocean pollution laws are perfectly suited for these additional detection and enforcement measures.¹⁵¹ It would be an onerous and prohibitively expensive task for the United States and every major shipping country to have a fleet of ships dedicated solely to policing the oceans for MARPOL violations.¹⁵² By employing a regulatory scheme that relies on whistleblowers instead of a large enforcement apparatus, the United States is able to enforce MARPOL more efficiently because it is

145. See Chalos 2011, *supra* note 139 (“[W]histleblowers have been said to be motivated to use the U.S. whistleblower program for self-serving purposes of revenge and exacting large monetary rewards.”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

146. See *id.* (discussing a 2010 dispute between a whistleblower and a foreign-flagged oil tanker, after the whistleblower reported a MARPOL violation).

147. See *id.* (discussing the initial investigation for MARPOL violations).

148. Awilco AS, Press Release May 28, 2010, “USCG Allegation Concerning Violation Of Marpol Regulation By *M/T Wilmina*,” <http://www.ship.gr/news6/awilco1.htm> (stating that the Coast Guard dropped charges against the ship, the crew, and the owner after detaining the ship for twenty days) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

149. See Ho-Sam Bang, *Recommendations for Policies on Port State Control and Port State Jurisdiction*, 44 J. MAR. L. & COM. 115, 118–19 (Jan. 2013) (“Almost every vessel at sea has tight schedules which are arranged by ship owners or charterers. Ship detention in a port causes the owner or charterer of the vessel to lose money.”).

150. See Stefan Rutzel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 TEMP. ENVTL. L. & TECH. J. 1, 34 (1995) (reasoning that whistle-blowers provide a necessary incentive to private organizations, which tend to correct wrongdoing with minimal efforts and are reluctant to investigate other environmental damage).

151. See *id.* at 35, 43 (examining the “legitimate reasons” to maintain silence about the illegal acts of others and why mandating whistleblowing will incentivize employees to come forward, particularly in the area of pollution and environmental misconduct); see also Gullo, *supra* note 56, at 134 (discussing the ways in which vessel polluters avoid detection).

152. See Rutzel, *supra* note 150, at 46 (discussing the expensive approach of having the government investigate and prosecute each violation); see also Gullo, *supra* note 56, at n. 100 (explaining the Coast Guard’s ability to detect oil spills and the costs associated with detection).

more economically viable.¹⁵³ Therefore, in order to efficiently enforce MARPOL oil pollution requirements, enforcement authorities must rely on crewmembers that are willing to testify to the proper authorities, whether in the United States or other MARPOL nations.¹⁵⁴ Moreover, without this information, the proper authorities would be hard pressed to have the reasonable belief necessary to justify an in-depth examination and investigation of a ship's practices.¹⁵⁵

Chalos & Co. is also concerned that whistleblower awards are too large and therefore over incentivize crewmembers reporting violations to the authorities, particularly those in the United States.¹⁵⁶ The United States prosecutions and settlement awards tend to be consistently greater than those awarded by other MARPOL signatories; and because the United States has high punitive damage awards, the possible reward for a whistleblower is significant.¹⁵⁷ The significance of a multi-million dollar award is great when compared to the average ship crewmember salary of \$12,000 per year.¹⁵⁸ Additionally, there are indications that whistleblowers may hold information until their ship reaches the United States or a United States port abroad, so as to be eligible for generous awards under United States law.¹⁵⁹

Grasso and Linsin recognize, however, that because the risks that companies and ship owners take for violating provisions of MARPOL when they enter U.S. ports around the world has increased, there is a trend of

153. See Rutzel, *supra* note 150, at 35 (“[E]xternal whistleblowing helps to update environmental data and to make government aware of problems in compliance, leading to more efficient future regulation and a better determination of the crucial control issues.”); see also Gullo, *supra* note 56, at 155 (“To some individuals involved with the maritime industry and legal counsel representing the interests of vessel owners and operators, whistleblowers are considered ‘one of the U.S. [G]overnment’s biggest weapons’ in vessel pollution prosecutions.”).

154. See Gullo, *supra* note 56, at 155 (explaining the vital role that whistle-blowers play in MARPOL prosecutions).

155. See Rutzel, *supra* note 150, at 36 (explaining that actual violations are often detected after a reported suspicion, even a false one, leads to an investigation).

156. See Chalos 2011, *supra* note 139 (arguing that the credibility of whistleblowers should be questioned due to the lucrative rewards available to them, thus potentially over-incentivizing them); see also Grasso, *supra* note 139, at 8 (reporting that more than fifty-percent of new cases stem from whistle-blowers, most likely because of the lucrative rewards).

157. See COST SAVINGS, *supra* note 5, at 49 (comparing MARPOL fines between several countries).

158. Compare Gullo, *supra* note 56, at 143–44 (discussing low crewmember wages) with *U.S. v. Ionia Mgmt. S.A.*, 555 F.3d 303, 311 (providing an award of \$4.9 million against the ship owner for MARPOL violations).

159. See Grasso & Linsin, *supra* note 139, at 10 (discussing whistleblowers collecting evidence to document the violation and waiting until they arrive back in the United States to disclose the information).

increased MARPOL compliance.¹⁶⁰ For example, some companies have adopted open reporting systems.¹⁶¹ In an open reporting system, a ship owner provides hotlines or anonymous electronic reporting for crewmembers that witness MARPOL violations.¹⁶² In some instances the ship owner will provide an internal monetary award for reports of MARPOL violations.¹⁶³

Although the maritime industry is responding to United States enforcement measures and is beginning to adopt policies to abide by MARPOL and curb oil pollution (or any pollution of the ocean),¹⁶⁴ enforcement by MARPOL nation authorities is necessary. Without enforcement by the Coast Guard and the Department of Justice (and the corresponding authorities in other MARPOL signatories), internal procedures to comply with MARPOL more efficiently would not have been adopted.¹⁶⁵ Because compliance remains far from universal, enforcement must increase both within the U.S and abroad.¹⁶⁶

B. Effect of Department of Justice Enforcement of ORB violations on Principles of International and Maritime Law

In many MARPOL enforcement cases, defendants argue that enforcement of MARPOL in United States courts violates principles of international and maritime law.¹⁶⁷ The argument is that the courts are reaching beyond their jurisdiction in permitting prosecution of ORB violations because these have their roots in illegal discharges that occurred

160. *See id.* at 9 (discussing the many ways companies have dedicated increased resources to improve management practices for environmental compliance).

161. *See id.* (explaining how some companies have decided to “augment the DPA reporting system under their Safety Management System by providing open hotlines or anonymous electronic reporting options to crew members whereby they can alert shoreside management of environmental deficiencies or violations aboard a ship”).

162. *See id.* (describing the benefits of an “Open Reporting System”).

163. *See id.* (discussing the efforts of several companies instituting a monetary reward system).

164. *See id.* (explaining how vessel owners are on notice and have taken proactive steps towards compliance).

165. *See id.* (discussing the link between increased enforcement and increased efforts towards compliance).

166. *See* Gullo, *supra* note 56, at n. 16 (explaining that despite the increased enforcement the level of noncompliance remains high).

167. *See* United States v. Jho, 534 F.3d 398, 405 (5th Cir. 2008) (arguing that prosecuting a violation would violate the principles of international law); *see* United States v. Royal Caribbean, 11 F. Supp. 2d 1358, 1362 (S.D. Fla. 1998) (arguing that the prosecution is inconsistent with the principles of MARPOL and the Law of the Sea Convention of 1982 and would therefore upset the international legal regime).

outside of United States jurisdiction.¹⁶⁸ These arguments ignore the limited nature and specific crimes that the United States successfully prosecutes.

The principles of comity and the law of the flag doctrine involve the respect that nations provide to each other when enforcing laws against citizens of other states.¹⁶⁹ Comity is traditionally defined as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”¹⁷⁰ Law of the flag doctrine is similar to the international law principle of comity. Under the Convention on the High Seas, a state has jurisdiction over vessels that fly its flag, a principle adopted from customary international law’s treatment of ships on the high seas beyond any sovereign’s territorial jurisdiction.¹⁷¹ Comity interacts with the law of the flag doctrine, in that a port state may, but need not, refrain from exercising its rightful jurisdiction over actions taken in port or territorial waters, yielding instead to adjudication by the flag state.¹⁷² From this doctrine, it is clear that there is a long-standing respect for the laws and acts of other nations as part of traditional maritime law.¹⁷³

It has been argued that the United States’ aggressive policy of MARPOL enforcement violates the above traditional principles of international and maritime law specifically enacted in MARPOL and the APPS.¹⁷⁴ If this is the case—that United States’ prosecutions are really prosecutions for MARPOL violations occurring on the high seas—then the United States is violating MARPOL, the law of the flag doctrine, and

168. See *Jho*, 534 F.3d at 405 (reciting defendants’ argument that the United States surrendered its jurisdiction to prosecute violations where the prosecution is not in accordance with international law); see *Royal Caribbean*, 11 F. Supp. 2d at 1362 (reciting defendant’s argument that a false statement concerning discharges made in Bahamian waters was not within the jurisdiction of the Coast Guard).

169. See *Jho*, 534 F.3d at 405–06 (defining the “law of the flag doctrine” and discussing sovereign exercise of jurisdiction).

170. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

171. See *Jho*, 534 F.3d at 406–08 (discussing the United Nations’ opinion on a vessels’ flag and a countries jurisdiction in enforcement against that country).

172. See *id.* at 405 (discussing comity in admiralty cases).

173. See *Hilton*, 159 U.S. at 169–70 (discussing the right of English courts to execute foreign decrees in admiralty, recognized as early as 1607); see also Kathryn T. Martin, Comment, *U.S. Control Over Extraterritorial Water Pollution: The Interplay Between International and Domestic Law*, 22 J. NAT. RESOURCES & ENVTL. L. 209 (2008–2009) (discussing a number of cases illustrating “a growing tendency in U.S. Courts to respect international law and recognize it as a body of law that exists concurrently with U.S. law.”).

174. See Martin, *supra* note 173, at 214 (discussing the Government’s position in *Ionia* and its appearance of arguing the supremacy of U.S. law in regards to standards such as MARPOL).

traditional principles of comity.¹⁷⁵ As Grasso and Linsin note, “none of the recent MARPOL enforcement cases brought in the United States have involved allegations of intentional pollution in U.S. waters.”¹⁷⁶

MARPOL’s focus and goals must be considered when addressing the principles of international law and comity. While it is undoubtedly important to respect basic principles of international law, the United States and the majority of major shipping nations in the world have all signed and ratified MARPOL based on a belief that the pollution of our oceans is a problem.¹⁷⁷ Moreover, because MARPOL is not self-executing, every nation is required to expressly draft and pass legislation enacting the provisions of MARPOL.¹⁷⁸ MARPOL requires legislation that enacts the provisions of the treaty within a nation’s laws and indicates that the signatory countries agree that the principles and goals are important and a worthwhile venture.¹⁷⁹

If the United States is violating principles of international and maritime law, it may be necessary to increase the legitimacy of MARPOL internationally and convince the other signatory nations that they ought to do the same. Yet, because the world’s oceans must be protected, if other MARPOL nations refuse or are unable to enforce MARPOL adequately, then the United States must be the lone crusader acting to protect this precious resource by whatever means necessary.¹⁸⁰ If that requires prosecutions of actual discharges on the high seas or extending the APPS to include all discharges that occur within the United States economic zone, then that is what the United States ought to do.

This argument—that the United States is distorting and violating traditional principles of international and maritime law—also ignores the

175. See generally *United States v. Ionia Mgmt.*, 555 F.3d 303 (2d Cir. 2009) (discussing the interaction of MARPOL and domestic law); *United States v. Jho*, 534 F.3d 398 (5th Cir. 2008); *United States v. Petraia Maritime, Ltd.*, 483 F. Supp. 2d 34 (D. Me. 2007) (discussing the distinction between extraterritorial and jurisdictional violations); *United States v. Royal Caribbean Cruises Ltd.*, 11 F. Supp. 2d 1358 (S.D. Fla. 1998) (discussing the interaction of MARPOL and domestic law).

176. Grasso & Linsin, *supra* note 139, at 10.

177. See MARPOL 73/78, *supra* note 22, at 547 (“The Parties . . . Recogniz[e] also the need to improve further the prevention and control of marine pollution from ships, particularly oil tankers . . .”).

178. See generally, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (discussing the definition of a self-executing treaty).

179. See *id.* (discussing the requirements for a non-self-executing treaty to become binding).

180. See generally COUNCIL ON FOREIGN RELATIONS, *THE GLOBAL OCEANS REGIME* (June 19, 2013), <http://www.cfr.org/oceans/global-oceans-regime/p21035#> (suggesting several ways the United States could improve Ocean pollution, and the discussing the successes of MARPOL enforcement) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

limited scope of the prosecutions brought against chief engineers and ship owners.¹⁸¹ Both prosecutors and courts are careful to prosecute and punish only MARPOL violations that actually occur in United States territorial waters.¹⁸² Of the five cases discussed earlier, none of the crimes alleged or charged were for the illegal discharge of oil or oily mixture, but rather only for the failure to have a properly maintained ORB while in United States territorial waters.¹⁸³ As noted earlier in *Jho*, ship owners and chief engineers have an affirmative duty when in the United States territorial waters to have a properly maintained ORB.¹⁸⁴

Moreover, in *Royal Caribbean*, the court noted that if Royal Caribbean had properly recorded the improper discharge, no criminal prosecution would continue, at least in the United States.¹⁸⁵ The enforcement of MARPOL ORB violations in the United States can have a positive impact on both ocean pollution¹⁸⁶ and the legitimacy of MARPOL as a large multi-national treaty without violating the law of the flag doctrine or principles of international law.¹⁸⁷ If Royal Caribbean had recorded the illegal action, it would have been far more difficult for their flag state, Liberia, to ignore the violation.¹⁸⁸

181. See generally *Jho*, 534 F.3d 398 (charging chief engineer with records violation and false statements in port); *Petraia*, 483 F. Supp. 2d 34 (charging company with records violation and false statements in port); *Ionia*, 555 F.3d 303 (same); *United States v. Pena*, 684 F.3d 1137 (11th Cir. 2012) (charging the compliance surveyor with conspiring to violate records, failing to make required inspection, and false statements to Coast Guard officials); *Royal Caribbean*, 11 F. Supp. 2d 1358 (charging Royal Caribbean with records violation in port).

182. See Berg, *supra* note 6, at 257 (discussing United States jurisdiction over foreign-flagged vessels)

183. See generally *Jho*, 534 F.3d 398 (determining that the United States is able to prosecute a failure to maintain an accurate oil record book); *Petraia*, 483 F. Supp. 2d 34 (same); *Ionia*, 555 F.3d 303 (same); *Pena*, 684 F.3d 1137 (same); *Royal Caribbean*, 11 F. Supp. 2d 1358 (same).

184. See *Jho*, 534 F.3d at 403 (describing the duty upon foreign-flagged vessels to ensure that its oil record book is accurate upon entering the ports of navigable waters of the United States).

185. See *Royal Caribbean*, 11 F. Supp. 2d. at 1371 (“[W]ere the Oil Record Book accurate, in that it reflected any and all alleged illegal oil discharges, there would be no possible §1001 prosecution in this action.”).

186. See COST SAVINGS, *supra* note 5, at 52 (noting that stringent enforcement, inspection, and surveillance can be deployed simultaneously to effectively deter polluters); see also Kehoe, *supra* note 2, at 3–4 (discussing the utility of federal sentencing guidelines for imposing jail time on offenders who, absent U.S. prosecution, would be overlooked by the “flags of convenience” states).

187. See Martin, *supra* note 173, at 217–18 (noting that stronger enforcement efforts, in which vital U.S. ports are a key part, fortifies the international legal regime).

188. See *Royal Caribbean*, 11 F. Supp. 2d at 1361–62 (“Liberia filed its determination that there was reasonable doubt that the *Nordic Empress* was in contravention of MARPOL

By increasing the risk of prosecution for failure to have a properly maintained ORB, and thereby enhancing the incentives for compliance with MARPOL's records requirements, the United States will be able to refer cases to flag states with evidence that the flag state will be hard pressed not to prosecute.¹⁸⁹ With the potential for international backlash and shaming from a failure to prosecute clear MARPOL violations by flag states, these flag states of convenience will no longer be able to ignore the harm that the shipping industry is doing to the oceans, which they aid and abet through non-enforcement.¹⁹⁰ In order for this to be successful, the United States and other nations that collect evidence of MARPOL violations will have to actively publicize this information in order to hold the refusing state accountable in the eyes of the world.¹⁹¹ This means that the United States and other countries have the opportunity to help instigate MARPOL prosecutions by other signatory nations by enforcing compliance with the narrow ORB maintenance requirement.¹⁹²

The United States policy of strict MARPOL enforcement is not a violation of principles of extra-territorial enforcement because the treaty and statute specifically address non-domestic conduct, making it enforceable under its own terms.¹⁹³ As Schoenbaum notes, "A criminal statute may have extra-territorial effect if it is not limited to domestic conduct by its terms and if legislative intent of extraterritorial application can be inferred from its policy or legislative history."¹⁹⁴ MARPOL/APPS limits prosecutorial jurisdiction over illegal discharges to those committed

and that it was 'difficult' to respond to the allegations of 'improperly recorded' Oil Record Book entries under the facts as presented . . .").

189. See *id.* at 1361–62, 1371 (noting that the U.S. prosecution was pursued only after Liberia found favorably for Royal Caribbean, but that U.S. prosecution would have been groundless if the ORB reflected the unlawful discharge).

190. See Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, 2007 MICH. ST. L. REV. 785, 786 (2007) (arguing that shaming can be a powerful tool "to influence the offending state to take corrective action and fill the enforcement gap in international law").

191. See *id.* at 820 (describing the success that Amnesty International has had through collection and exposure of international law violations, and moral appeals to pressure compliance).

192. See *id.* at 813–15 (explaining that international agreement and compliance with a social norm encourages other countries to comply in order to signal "respect for the rule of law," with an eye to future cooperative interactions); see also Martin, *supra* note 173, at 217–18 (noting that the international MARPOL regime would be strengthened by multinational extraterritorial enforcement).

193. See *Royal Caribbean*, 11 F. Supp. 2d at 1364 ("[T]he extraterritoriality doctrine providing jurisdiction over certain extraterritorial offenses whose 'extraterritorial acts are intended to have an effect within the sovereign territory' seems applicable to this case.").

194. 1 SCHOENBAUM, *supra* note 8, at 152–53 (citing *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980)) (emphasizing the importance of legislative intent when determining whether a statute has extraterritorial effect).

in a nation's territorial waters or by ships of its flag,¹⁹⁵ but the United States prosecutions at issue in these cases are not inconsistent with this jurisdictional requirement.¹⁹⁶ The actions that are prosecuted are violations of domestic law occurring within the United States, and insofar as these crimes entail violations of MARPOL, there is no requirement that these prosecutions or cases be referred to flag states as this decision is left to the discretion of the nation where the violation occurred.¹⁹⁷ Therefore, even if the MARPOL prosecutions at issue were extra-territorial, the United States is justified in continuing to prosecute them.¹⁹⁸

The argument that the United States is violating UNCLOS when prosecuting ORB violations ignores that the United States, as a sovereign nation, has the right to enforce its own laws within its own jurisdiction,¹⁹⁹ even though parts of UNCLOS overlap with United States common law as customary international law.²⁰⁰ In *Royal Caribbean*, even though the root

195. See 33 U.S.C. § 1902(a)(2) (“This chapter shall apply . . . with respect to Annexes I and II to the Convention, to a ship, other than a ship referred to in paragraph (1), while in the navigable waters of the United States.”).

196. See *United States v. Jho*, 534 F.3d 398, 398 (5th Cir. 2008) (alleging that Jho gave false testimony to the U.S. Coast guard and knowingly failed to maintain an oil record book); see also *United States v. Petraia Maritime, Ltd.*, 483 F. Supp. 2d 34, 39 (D. Me. 2007) (holding that the United States had jurisdiction to bring charges for having an inaccurate ORB while in the United States' navigable waters); *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 308 (2d Cir. 2009) (joining the Fifth Circuit and holding that the APPS imposes a duty on ships to have an accurately maintained ORB when entering a U.S. port); *United States v. Pena*, 684 F.3d 1137, 1146 (11th Cir. 2012) (quoting *Wilson v. Girard*, 354 U.S. 524, 529 (1957) (per curiam)) (“[T]he United States ‘has exclusive jurisdiction to punish offenses against its law committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.’”); *Royal Caribbean*, 11 F. Supp. 2d at 1364 (holding that whether the United States has the authority to regulate potentially illegal discharges or failure to properly update an oil record book outside of United States jurisdiction does not affect the United States Coast Guard's ability to police the maintenance of an oil record book inside U.S. waters).

197. See MARPOL 73, Art. IV(2) (stating that when there occurs “[a]ny violation . . . within the jurisdiction” of a state party, that state must “[c]ause proceedings to be taken in accordance with its law” if it does not turn evidence over to the flag state); 33 U.S.C. § 1908(f) (stating that where a ship sails under the flag of a foreign MARPOL signatory, “the Secretary . . . may refer the matter to the government of the country of the ship's registry or nationality”) (emphasis added).

198. See *Royal Caribbean*, 11 F. Supp. 2d at 1364 (“[T]he extraterritoriality doctrine providing jurisdiction over certain extraterritorial offenses whose ‘extraterritorial acts are intended to have an effect within the sovereign territory’ seems applicable to this case.” (quoting *U.S. v. Padilla-Martinez*, 762 F.2d 942 (11th Cir. 1985))).

199. See *id.* at 1368 (noting that the federal government's ability to enforce MARPOL-violating discharges in international waters “does not bear upon our inquiry as to whether the United States has jurisdiction to enforce its [domestic] laws in port in Miami, Florida”).

200. See 1 SCHOENBAUM, *supra* note 8, at 24 (“With respect to the traditional uses of the sea, therefore, the United States accepts the [Law of the Seas] Convention as customary international law, binding upon the United States.”).

cause of the crime was an illegal discharge under MARPOL, Royal Caribbean was prosecuted for violations of the False Claims Act, a United States law.²⁰¹ No nation can be obligated to not enforce its own laws within its own territorial limits against foreign individuals.²⁰² Therefore, the enforcement of ORB requirements is merely the United States applying the laws of the United States against those who choose to avail themselves of the United States territory and the United States ports.²⁰³

IV. What is the Correct Path Forward?

A. Practical Considerations and Realities of Large Multi-National Treaties

Because large portions of the oceans are not part of any sovereign nation and because of the necessity of ocean travel, a multi-national treaty addressing the ocean oil pollution is necessary.²⁰⁴ And as noted before, without strict enforcement by all signatories, the treaty loses legitimacy and power to accomplish its goal.²⁰⁵ In the case of MARPOL, the world is interested in protecting one of the largest, if not the largest, natural resources on the planet.²⁰⁶

The most effective solution to the problem of effective enforcement of MARPOL is to create an international court that is the sole adjudicative body for MARPOL violations.²⁰⁷ An international MARPOL court would

201. See *Royal Caribbean*, 11 F. Supp. 2d at 1369 (“[C]ustomary international law principles, which can be binding as a component of domestic law, require this Court to consider UNCLOS as setting forth binding principles of international law.”).

202. See *id.* at 1364 (“Under MARPOL . . . the United States . . . has the duty and the obligation to board and inspect ships while in port and to pursue appropriate measures to address any violations thereof.”); see also Amanda M. Caprari, *Lovable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean*, 42 Conn. L. Rev. 1493, 1513 (July 2010) (discussing the undeniable duty to enforce national anti-piracy laws but not legal duty to enforce UNCLOS anti-piracy laws outside of a nation's territorial waters).

203. See *id.* (discussing the application of the extraterritoriality doctrine).

204. See 1 SCHOENBAUM, *supra* note 8, at 22 (explaining the unique nature of the law of the seas as customary international law and the need for an enforcement mechanism); see also DE LA RUE & ANDERSON, *supra* note 10, at 3–7 (listing the international conventions that govern the law of the sea).

205. See William Burke-White, Dean and Professor of Law, University of Pennsylvania Law School, Transnational Law Institute Lecture Series (Jan. 31, 2013) available at <http://www.youtube.com/watch?v=pMpCrZdsfag> (arguing that treaties require strict adherence by parties in order for them to bear meaning).

206. See MARPOL 78 *supra* note 22, at 546 (describing the need to protect international oceans from pollution).

207. See Rebecca Becker, *MARPOL 73/78: An Overview in International Environmental Enforcement*, 10 GEO. INT'L ENVTL. L. REV. 625, 638 (1998) (describing the need for solutions to MARPOL enforcement).

have original jurisdiction for violations of all of the MARPOL Annexes and avoid the difficulties of extra-territorial enforcement, traditional international and maritime law principles, and comity from becoming a barrier to enforcement in the United States or other courts.²⁰⁸

While an international MARPOL court as the exclusive forum for MARPOL violations would be the most effective and efficient solution to the problem of MARPOL legitimacy and actual enforcement power associated with MARPOL,²⁰⁹ it would be unlikely to garner the support of United States. The United States is unlikely to ratify and sign any amendments to MARPOL that would attempt to remove jurisdiction from its courts.²¹⁰

The United States has traditionally been skeptical of international treaties and even more skeptical of treaties that involve international courts that could subject the country or its citizens to jurisdiction and possible prosecution.²¹¹ Any proposal for an International MARPOL court would not subject the United States as a sovereign nation to jurisdiction in this court. It will still be difficult, however, to convince the United States Congress to join an international MARPOL court, which would have jurisdiction over U.S. citizens and corporations for environmental crimes committed on the high seas, even if all concerns of due process are answered in the court's charter.²¹²

Because an international MARPOL court is not practical, a different solution is needed to deal with MARPOL violations. Any solution will have to focus on increasing compliance by ships in their daily operations and increasing the incentives to comply.²¹³

208. *See id.* (stressing the importance of improved intergovernmental enforcement in enforcement of MARPOL).

209. *See id.* (noting that this option circumvents the problem of voluntary compliance).

210. *See United States v. Royal Caribbean*, 11 F. Supp. 2d 1358, 1364 (2006) (describing the United States' duty to enforce the compliance of laws in its sovereign territory).

211. *See e.g.*, Leila Nadya Sadat, *The Nurembourg Paradox*, 58 AM. J. COMP. L. 151 (Winter 2010) (discussing and comparing the reasons for the French adoption of the International Criminal Court Treaty with the United States' failure to adopt and join the International Criminal Court).

212. *See Becker, supra* note 207, at 638–39 (noting that an international tribunal “would only be effective upon the consent of MARPOL nations,” which likely prize sovereignty too much to make such a tribunal politically feasible).

213. *See id.* at 641–42 (stressing the importance of publicity, education, and directives on ships about the need to protect the seas from illegal oil dumping).

B. Who is the Proper Party to Prosecute?

In most of the cases discussed, the defendant is the ship owner that has violated provisions of MARPOL.²¹⁴ These ship owners have the deepest pockets and the ability to pay high settlements or damages as well as front potentially expensive litigation costs.²¹⁵ Some have suggested, however, that the prosecution of ship owners unfairly prejudices a company or individual for the acts of the crew and often the chief engineer.²¹⁶ Therefore, they argue that prosecutions should focus on the chief engineer or the specific individuals responsible for the illegal discharge or ORB violation.²¹⁷

In addition to Linsin's proposal to focus prosecutions on chief engineers instead of ship owners, Kehoe has argued that the United States Courts should use the illegal discharges from outside the United States jurisdiction when sentencing those liable for MARPOL violations within United States jurisdictions.²¹⁸ He argues that this will increase the deterrent effect.²¹⁹ Increased punishment that may be applied for an ORB violation will reduce the incentive for chief engineers to try to cut costs by illegal discharges regardless of any explicit company policy to abide by all provisions and requirements of MARPOL.²²⁰

214. Compare *Royal Caribbean*, 11 F. Supp. 2d at 1358 (prosecuting only corporate ship-owner for crewmember malfeasance) with *United States v. Jho*, 534 F.3d 398, 398 (5th Cir. 2008) (prosecuting corporate ship-owner and chief engineer for engineer's malfeasance).

215. See Craig H. Allen, *Proving Corporate Criminal Liability for Negligence in Vessel Management and Operations: An Allision-Oil Spill Case Study*, 10 LOY. MAR. L.J. 269, 270 (2010) (noting that corporate fines are often dismissed as an inconsequential penalty because of their small size compared to the scope of a company's business).

216. See Grasso & Linsin, *supra* note 139, at 10–11 (noting that companies can be held accountable for the actions of rogue employees simply because of mere inattention).

217. See Grasso & Linsin, *supra* note 139, at 8 (arguing that the focus on companies resulting from whistleblower charges distorts incentives and causes internal compliance systems to atrophy); Cf. Justice Rakoff, *A Conversation with Judge Rakoff* (Mar. 1, 2013) (on file with WASHINGTON & LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT) (suggesting that for securities law violations, it is not the company that committed the crime but the individual, so holding individuals liable for violations will have a stronger deterrent effect).

218. See Kehoe, *supra* note 2, at 25 (arguing that the extraterritorial oil dumping was a predicate fact to prosecution of the ORB offense, thus constituting offense conduct justifying heightened penalties under the Sentencing Guidelines).

219. See *id.* at 40–42 (arguing that *United States v. Abrogar* undermined “the significant deterrent effect that the risk of jail time can have on engineers who violate MARPOL and APPS” and that such imprisonment is fair given engineers' knowledge of the risks of noncompliance).

220. See *id.* at 40–41 (arguing that engineers make a variety of choices, including one to falsify record books, for which independent punishment is an appropriate deterrent).

Linsin, Grasso, and Kehoe all make valid points. If a ship owner or charterer has a strict policy regarding compliance with MARPOL but the ship's engineer acts independently, holding the owner or the charterer liable for refusal to comply with MARPOL or mere willful ignorance of the actions of their engineering crew is problematic.²²¹ Additionally, there is a strong argument that if stopping MARPOL violations is the goal and stricter enforcement is the means by which that is best accomplished, then harsher sentencing for willful violations of MARPOL may be a legitimate sanction.²²²

The argument that the chief engineer ought to be held ultimately liable, however, does not account for actual facts in many, if not most, cases.²²³ Chief engineers are under constant pressure to reduce costs from the ship owner or the charter party and while the costs of compliance with MARPOL are very low, this pressure to reduce costs will force an engineer to find savings in any form available.²²⁴

Chief engineers are also in a particularly vulnerable position. George Chalos of Chalos & Co. discusses the case of Ioannis Mylonakis, a chief engineer aboard the *M/T Georgios*.²²⁵ Mylonakis was prosecuted along with the ship owners for MARPOL violations; however, unlike the

221. See *id.* at 41 (arguing that penalizing charterers for the actions of the chief engineer or vessel crew is not an effective deterrent); see also Grasso & Linsin, *supra* note 139, at 10 (arguing for more efficient prosecutorial procedures in order to hold the most culpable people responsible for MARPOL violations).

222. See Kehoe, *supra* note 2, at 42 (“[T]here are statutes in addition to APPS with Guideline provisions that can be used to authorize jail time sentences against chief engineers and other supervisory crew members who pollute the world’s oceans with oily wastes.”).

223. See COST SAVINGS, *supra* note 5, at 4 (“Savings derived by not complying with the IMO’s regulations leads to lower operating costs that can be used to derive an unfair advantage in the notoriously competitive ship charter market.”)

224. See Kehoe, *supra* note 2, at 41–42 (describing the economic pressures facing chief engineers from corporate ship-owners); Andrew W. Homer, *Red Sky at Morning: The Horizon for Corporations, Crew Members, and Corporate Officers as the United States Continues to Aggressive Criminal Prosecution of Intentional Pollution from Ships*, 32 TUL. MAR. L.J. 149, 167 (Winter 2007) (describing the pressures and responsibilities of the master and chief engineer on ships).

225. See Chalos & Co. P.C., *Wrongly Accused Chief Engineer Takes Intentional Polluters to Task*, CHALOS & CO., P.C. (2012) [hereinafter Chalos 2012], available at <http://www.chaloslaw.com/wrongly-accused-chief-engineer.html> (describing a lawsuit filed by a chief engineer accused and acquitted of MARPOL charges) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT); see also Bob Rust, *Chief Engineer Sues Owner*, TRADEWINDS (Aug. 25, 2012), available at <http://www.chaloslaw.com/pdf/tradewinds-mylonakis-article.pdf> (detailing Mylonakis’s claim that his employer for allegedly scapegoated him for the company’s wrongdoing) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

ship owners, Mylonakis was acquitted.²²⁶ Mylonakis sued the ship owner, Styga, for malicious prosecution.²²⁷ Mylonakis alleged that Styga supplied false information to the government in their plea agreement that led to his indictment.²²⁸ On December 4, 2012, the District Court for the Southern District of Texas granted summary judgment in favor of Styga on Mylonakis' malicious prosecution claim.²²⁹ This case displays the distinct position of vulnerability that a chief engineer faces when both the ship owner and the chief engineer are prosecuted for MARPOL violations.²³⁰ A chief engineer is susceptible to prison sentences, unlike the corporate ship owner,²³¹ and the chief engineer is unlikely to have the same representation that the ship owner does in order to defend their interests.²³²

Chief engineers are under enormous pressure from the ship owners to keep daily operation costs down and are particularly vulnerable when MARPOL violations are prosecuted.²³³ The ultimate responsibility in maritime shipping situations ought to rest on the person or entity that has ultimate authority.

Due to low enforcement and low penalties for violations there are currently few incentives for compliance with MARPOL.²³⁴ One solution to increase MARPOL compliance would be to not only find the company

226. See *Mylonakis v. M/T Georgios*, 909 F. Supp. 2d 691, 703 (S.D. Tex. 2012) (noting that Mylonakis was acquitted, whereas the ship's owners entered into a guilty plea agreement).

227. See *id.* at 699 (describing Mylonakis's claims against Styga, including the claim for malicious prosecution).

228. See *id.* at 702–03 (describing the events that lead to Mylonakis' indictment).

229. See *id.* at 740–41 (ruling that Mylonakis had raised no genuine issues of material fact to support a malicious prosecution claim).

230. See Chalos 2012, *supra* note 225 (describing the position of the company and the engineer relative to the lawsuit).

231. See Kehoe, *supra* note 2, at 31–39 (identifying the statutes that allow prosecution of individuals for MARPOL violations); see Rakoff, *supra* note 216 and accompanying text (discussing penalties against the individuals engaging in criminal action).

232. See *Giuseppe Bottiglieri Shipping Co. S.P.A. v. United States*, 843 F. Supp. 2d 1241, 1244–46 (S.D. Ala. 2012) (noting that while the corporate ship owner haggled with the Coast Guard over terms for the ship's release from port, the chief engineer was charged with making false statements).

233. See COST SAVINGS, *supra* note 5, at 4 (explaining ship company's motivations to fail to comply with dumping regulations in order to save money); see Chalos 2012, *supra* note 225 (explaining a chief engineer's lawsuit after being falsely accused of oil dumping for which his employer was responsible).

234. See Jane Korineck & Patricia Sourdin, *Clarifying Trade Costs: Maritime Transport and Its Effect on Agricultural Trade*, 32 APPLIED ECONOMIC PERSPECTIVES AND POLICY 417, 417–18, NO. 3 (2010), available at <http://aep.oxfordjournals.org/content/32/3/417.full.pdf+html> (describing the impacts trade costs have on shipping and motivations to cut costs in various ways) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

liable for MARPOL violations but also find the individual owner or control person of the company liable on a theory similar to corporate veil piercing if the limited liability company was formed to defraud or if no evidence of fraud on an individual liability theory similar to the one in *United States v. Park*.²³⁵ By prosecuting the company as a corporation and the company executive as an individual there will be an added deterrent effect through high monetary fines against the corporation and potential prison and individual monetary fines against the control person.²³⁶

It would also be useful to utilize chief engineers and ship captains as witnesses and sources in these prosecutions by granting immunity to any chief engineer or captain that provides evidence to the proper authorities regarding MARPOL violations.²³⁷ By utilizing chief engineers and control persons, prosecutors will have more access to company policies, both explicit and implicit.²³⁸ The number of whistleblowers available to provide evidence increases prosecutions.²³⁹ A focused increase in the number of available whistleblowers and witnesses to MARPOL violations will create a culture of MARPOL compliance within the industry and foster ship owners' use of inter-corporate regulation in order to avoid MARPOL liability.²⁴⁰

235. See Larry S. Kane, *How Can We Stop Corporate Environmental Pollution?: Corporate Officer Liability*, 26 NEW ENG. L. REV. 293, 303 (Fall 1991) (quoting *United States v. Park*, 421 U.S. 658 (1975)) (noting *Park*'s holding that "a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime"); see also Douglas S. Brooks & Thomas C. Frongillo, *Environmental Prosecutions: Criminal Liability Without Mens Rea and Exposure Under the Responsible Corporate Officer Doctrine*, 79 DEF. COUNS. J. 12, 16 (Jan. 2012) ("Thus, the key component of the *Park* decision . . . has been specifically adopted in the environmental law area, is the imposition of criminal liability on corporate officials who fail to prevent the harm at issue, regardless of their direct involvement in bringing about such harm.").

236. In order for this argument to be one hundred percent effective a change in personal jurisdiction jurisprudence under the Fifth and Fourteenth Amendment for maritime cases is required. For an in depth discussion of how the courts see personal jurisdiction in maritime cases see generally, Steven R. Swanson, *Fifth Amendment Due Process, Foreign Shipowners and International Law*, 36 TUL. MAR. L.J. 123 (Winter 2011) (arguing that courts should reconsider Fourteenth Amendment jurisprudence to look at the nature of the shipping business and benefits to the owners vessel of doing business in the United States to show that a vessel owner or charterer has personally availed himself of doing business in the United States and the courts should recognize that Fifth and Fourteenth Amendment due process standards are not necessarily the same).

237. See Kane, *supra* note 235, at 315–16 (describing a hypothetical that illustrates the relationship between a corporate officer and the agent executing the illegal act).

238. See *id.* (noting that agents often have access to explicit and implicit corporate policies).

239. See Grasso & Linsin, *supra* note 139, at 8 (describing incentives for whistleblowers who witness wrongdoing to report illegal oil dumping to authorities at U.S. ports).

240. See *id.* at 10–11 (explaining the overall goal of MARPOL compliance).

In addition to relying on more whistleblowers, prosecutors ought to increase the penalties they are seeking against the ship owners and charter holders.²⁴¹ Kehoe has argued against this view.²⁴² In support of his argument that current damage awards against companies, especially smaller companies, are sufficient, he cites the \$4.9 million judgment awarded against Ionia Management.²⁴³ The evidence that the judgments have had a positive effect on compliance and deterrence, however shows a different picture. In a 2003 OECD report on MARPOL and enforcement, the OECD argues specifically that even though the cost of compliance with MARPOL is only two percent of daily operational costs and in the United States the penalties awarded have been significant, compliance has not significantly increased because the risk of being caught combined with the cost of a successful prosecution still does not outweigh the cost savings of non-compliance.²⁴⁴

Increasing the possible financial penalty against a corporation will also increase the award a whistleblower may be eligible to receive.²⁴⁵ Therefore, detection of violations by the proper authorities and deterrence from non-compliance with MARPOL will both be increased at the same time.²⁴⁶

The maritime industry may contend that an increase in the size of penalties for MARPOL violations will both negatively impact the global maritime industry and directly injure the United States maritime industry, particularly major port cities.²⁴⁷ Yet, compliance with MARPOL is a relatively low percentage of daily operational costs.²⁴⁸ Even though the compliance costs are low, “the level of noncompliance with MARPOL

241. See COST SAVINGS, *supra* note 5, at 4 (outlining the financial benefits charter holders receive by ignoring MARPOL violations that go unpunished).

242. See Kehoe, *supra* note 2, at 41 (noting that “the level of noncompliance with MARPOL remains unacceptably high” notwithstanding the already stiff penalties sought by the Justice Department in MARPOL prosecutions).

243. See *id.* at 41 (“[A]fter a jury conviction and a court imposed fine of \$4.9 million dollars in the Ionia case, the court prohibited the defendant’s vessels from returning to U.S. ports until the corporate operator had installed certain pollution prevention equipment on board all of its vessels.”).

244. See COST SAVINGS, *supra* note 5, at 44, 49–50 (comparing the operating costs to fines and other costs associated with noncompliance).

245. See 33 U.S.C. § 1908(a) (allowing courts to award whistleblowers up to half the nominal value of a MARPOL fine).

246. See Rutzel, *supra* note 150, at 35 (indicating that further punishment increases compliance through individual and general deterrence).

247. See *id.* at 36 (discussing the negative impacts that whistleblowing may have on a corporation financially).

248. See COST SAVINGS, *supra* note 5, at 44 (“Environmental compliance costs represent approximately 1–2% of the total fixed costs (capital and operating costs) of the respective vessels chosen in this simulation.”).

remains unacceptably high, especially among operators of general cargo vessels that tend to have tighter operating budgets and earn low freight rates, leading to a greater temptation to cut all costs that do not directly endanger navigation.²⁴⁹ A two percent daily operating cost increase is unlikely to derail and injure the maritime shipping industry.²⁵⁰ Moreover, the United States economy is one of the largest in the world,²⁵¹ and will not see an end to the transatlantic shipping into its ports due to increased enforcement and penalties for MARPOL violations when the cost of compliance is only a minimal increase in daily operational costs.²⁵²

If the goal of MARPOL violation penalties is to deter discharges of oil and other waste into the oceans,²⁵³ then the penalties must necessarily have that effect. When the risk of prosecution and the cost of violation are low, there is no deterrent effect.²⁵⁴ In order for deterrence to work, the risk of prosecution and the cost of the penalty must both be prohibitively high.²⁵⁵ Otherwise companies will continue to focus on their balance sheets and look to save that two percent a day.²⁵⁶ As the OECD report indicates, the cost of compliance is negligible, yet, compliance is still a problem.²⁵⁷ This increase in penalties must cause the maritime shipping industry to ask, “to comply or not comply?”

C. The Whistleblower's Role in Increasing United States Enforcement

To increase effective enforcement of MARPOL in the United States an increase in detection through increased use and possibly change of

249. Kehoe, *supra* note 2, at 41.

250. See COST SAVINGS, *supra* note 5, at 44 (describing the minimal impact of overall environmental cost compliance).

251. See Central Intelligence Agency, *Country Comparison: Stock of Foreign Direct Investment – At Home*, THE WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2198rank.html> (listing the number of investments made domestically by citizens of other countries, which can be used to determine the size of the international market directed towards the home country) (last visited Nov. 22, 2013) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

252. See COST SAVINGS, *supra* note 5, at 44 (showing daily compliance costs as a proportion of operating costs).

253. See MARPOL 73/78, *supra* note 26, at 62 (“Recognizing also the need to improve further the prevention and control of marine pollution from ships, particularly oil tankers . . .”).

254. See COST SAVINGS, *supra* note 5, at 47 (noting that some operators believe that MARPOL violations are worthwhile because of the low probability of being caught).

255. See *id.* at 49 (arguing that where fines are low, operators can simply consider this the cost of doing business).

256. See *id.* at 45 (discussing the financial incentives for operators in tight markets).

257. See *id.* at 44 (discussing the limited impact of compliance).

the whistleblower award provision in the APPS is necessary.²⁵⁸ While increased use of various technological means should not be discounted, low flying planes with infrared detectors and unmanned drones are all expensive tools that require a significant investment by the United States government both in equipment and in man-hours.²⁵⁹ This is not the case for whistleblowers.

The United States can increase incentives for whistleblowers by reducing the risks they may undertake by coming forward to the Coast Guard or other individuals.²⁶⁰ One way to reduce these risks is to change the whistleblower provisions in the APPS to remove the discretion that the courts have in criminal cases and that the Secretary of Defense or Administrator of the EPA has in civil cases relating to awards.²⁶¹ By making whistleblower awards mandatory, the whistleblower will no longer fear coming forward, due to the possibility of losing his or her job, losing weeks of work while he or she is sequestered for trial proceedings, and losing the possibility of future employment without receiving compensation for the risks they have undertaken.²⁶² All of these events may still happen, but a significant whistleblower award as provided for in APPS allows a potential whistleblower to take these risks without necessarily affecting his or her ability to provide for him or herself and his or her family.

Increasing the use of the whistleblowers as part of an enforcement strategy is the best approach for a variety of reasons. While external monitoring through airplanes or drones may yield good results, it is not as economically efficient or feasible as rewarding those with inside knowledge

258. Jeanne Grasso & Gregory Linsin, *Furthering Compliance or Compromising Compliance Programs? Whistleblower Rewards*, 73 MAR. REP. 18, 20 [hereinafter Grasso & Linsin, *Furthering Compliance*] (June 2011), available at <http://www.marinelink.com/magazines/archive.aspx?MID=3> (“By implementing the enhanced compliance and verification measures discussed above, companies may be able to avoid becoming the government’s—and the whistleblower’s—next target.”) (last visited Nov. 23, 2013) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

259. See Kehoe, *supra* note 2, at 7 (indicating that Coast Guard cutters and airplanes equipped with forward looking infrared radar are effective means of patrolling the coast line at night).

260. See Jenny Lee, Note, *Corporate Corruption & The New Gold Mine*, 77 BROOK. L. REV. 303, 317 (Fall 2011) (“Due to its inherent risks, whistleblowing, to some extent, should be incentivized through regulatory policies that ‘encourage individuals to break the code of silence in corrupt organizations.’”).

261. See 33 U.S.C. § 1908(a) (“In the discretion of the court, an amount equal to not more than ½ of such fine may be paid to the person giving information leading to conviction.”).

262. See *Anderson v. United States*, 2012 WL 6087283, *1 (N.D. Cal. Dec. 6, 2012) (dismissing the case for lack of subject matter jurisdiction, leaving the plaintiff, a whistleblower, without any sort of compensation despite the risks he had taken).

of the inner workings of the ship on a day-to-day basis.²⁶³ Additionally, potential witnesses and whistleblowers are on every ship, whereas it would be nearly impossible for any other detection method, without significant costs both in equipment and man power on a day to day basis, to cover the entire territorial waters of the United States and every ship therein.²⁶⁴

The Coast Guards ability to detect violations of MARPOL expands with increased penalties, increased whistleblower awards, and with a corresponding increase in guarantees that whistleblowers will receive an award.²⁶⁵ These policies will raise the risk and the cost of non-compliance, creating an environment where compliance is no longer a question.²⁶⁶

D. Arguments in Favor of Extra-Territorial Enforcement

Prosecutors should be allowed to pursue prosecutions for violations that occur outside the United States territorial waters. While it has been the case that the law of the flag doctrine has limited prosecution efforts to ORB violations, the United States is not necessarily bound to the law of the flag in every situation.²⁶⁷

The law of the flag is not an absolute rule, but rather a conditional rule.²⁶⁸ The law of the flag doctrine may be ignored if public policy outweighs the competing policy governing the law of the flag or if a foreign registration and incorporation of a ship and its owner are a mere façade to

263. See Rutzel, *supra* note 150, at 34 (“Whistleblowing leads to increased compliance, either voluntary or enforced, without demanding additional public funds for supervision, detection, and evidence gathering.”).

264. See Gullo, *supra* note 56, at 144 (“APPS’s whistle-blower provision provides DOJ with a cooperating witness (albeit a witness with a monetary incentive to testify) that it can use as either pretrial leverage or as live testimony at trial.”); see also Chalos & Parker, *supra* note 6, at 232 (“However, the government’s most effective ‘secret weapon’ in the war against MARPOL violations is the use of ‘whistleblowers,’ most of whom are current or former crewmembers.”).

265. See Grasso & Linsin, *Furthering Compliance*, *supra* note 258, at 18 (stating that open reporting systems to anonymously disclose violations are among the most effective means of detecting MARPOL violations).

266. See Grasso & Linsin, *supra* note 139, at 8 (“[P]rosecutions [of MARPOL violations] are now yielding higher penalties, jail time and the banning of ships from United States ports.”).

267. See SCHOENBAUM, *supra* note 8, at 75 (“Accordingly, Story declared that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England . . .”).

268. See *id.* (stating that admiralty and maritime jurisdiction is dependent on several factors).

avoid the laws of a specific nation.²⁶⁹ In these situations the substantive law of the United States may be applied.²⁷⁰

The important policy goals of MARPOL, the protection of our oceans, weigh heavily in favor of extra-territorial enforcement.²⁷¹ Therefore courts should allow prosecutions for any discharges that occur on the high seas or for actual discharges that occur and are not properly recorded in an ORB.

The United States should not seek to immediately prosecute MARPOL violations that occur outside of the United States' territorial waters. In order to foster international cooperation and international relations, it is good policy to initially abide by the MARPOL referral provision, where cases are referred to the flag state initially.²⁷² If a flag state, such as Liberia or the Bahamas, refuses or fails to prosecute violations of MARPOL and the Coast Guard or Department of Justice have provided clear evidence that a violation has occurred, then public policy in favor of protecting our oceans outweighs any concerns of comity and international law.²⁷³ Without the enforcement of MARPOL and legitimate penalties for failure to abide by MARPOL,²⁷⁴ the policy that our oceans deserve protection and the treaty seeking to provide that protection lose all meaning.²⁷⁵

Moreover, when the Department of Justice has been given a case, it should be on the lookout for incorporation and registration that is a mere façade.²⁷⁶ If all indications are that the corporation is a shell, then the

269. See *id.* at 264 (listing a variety of factors that go into conflicts and choice of laws, including the place of the wrongful act, the domicile of the injured, the allegiance of the ship owner, the place where the contract of employment was made, *forum non conveniens*, etc.).

270. See *Southern Cross S.S. Co. v. Firipis*, 285 F.2d 651, 653 (4th Cir. 1960) (“However, if the law of the flag is to control, the flag must not be one of convenience merely but bona fide.”); see also 2 AM. JUR. 2D *Admiralty* § 105 (2013) (“The law of the flag may also be disregarded when foreign registration and incorporation are a mere façade to avoid the consequences of U.S. shipping laws.”).

271. See MARPOL 78, *supra* note 22, at 62 (stating the policy goals of MARPOL, which include the protection of the ocean through enforcement and regulatory means).

272. UNITED STATES GENERAL ACCOUNTING OFFICE, COAST GUARD: ENFORCEMENT UNDER MARPOL V CONVENTION ON POLLUTION EXPANDED, ALTHOUGH PROBLEMS REMAIN 19 (1995) (discussing federal policy on flag state referral).

273. See 2 AM. JUR. 2D *Admiralty* § 105 (“However, the law of the flag is not absolutely controlling, and will not be applied where considerations against its application outweigh those in its favor, as in the instance where public policy dictates that the law of the forum be applied.”).

274. See generally COST SAVINGS, *supra* note 5 (discussing the role of legal penalties vis-à-vis the economics of the shipping industry).

275. See *Burke-White*, *supra* note 205 (noting that treaties become meaningless without the deference of, or enforcement by, signatory parties).

276. See *Southern Cross S.S. Co. v. Firipis*, 285 F.2d 651, 653 (“However, if the law of the flag is to control, the flag must not be one of convenience merely but bona fide.”); see

United States should seek to prosecute and gain jurisdiction as the flag state when possible.²⁷⁷

Through novel legal arguments²⁷⁸ and expanding jurisdiction for MARPOL prosecutions,²⁷⁹ the Department of Justice will be able to enforce MARPOL more broadly and successfully prosecute more than mere ORB violations. Therefore, the policy goals behind MARPOL, to reduce the pollution and damage to our oceans, will be furthered.²⁸⁰

E. Increasing MARPOL's Legitimacy as a Multi-National Treaty

Professor William Burke-White from the University of Pennsylvania School of Law argues that a major impediment to the legitimacy of large multinational treaties is the failure of enforcement by signatory nations.²⁸¹ MARPOL is subject to this problem.²⁸² Therefore, the legitimacy of MARPOL as a multinational treaty is in question.²⁸³

The United States can increase the legitimacy of MARPOL and help promote consistent enforcement of MARPOL by other signatories by continuing to aggressively prosecute MARPOL violations of U.S. flagged and foreign-flagged vessels that enter U.S. ports.²⁸⁴ The majority of ships that sail through the Gulf of Mexico are foreign-flagged.²⁸⁵ If the United

also 2 AM. JUR. 2D. *Admiralty* § 105 (“The law of the flag may also be disregarded when foreign registration and incorporation are a mere façade to avoid the consequences of U.S. shipping laws.”).

277. See Shaun Gehan, Note, *United States v. Royal Caribbean Cruises, Ltd.: Use of Federal “False Statements Act” To Extend Jurisdiction Over Polluting Incidents Into Territorial Seas of Foreign States*, 7 OCEAN & COASTAL L.J. 167, 168–69 (2001) (“[A]pplications of domestic law are entirely consistent with the aims of the applicable international treaties and offer a viable means of protecting the marine environment, particularly when flag States themselves are hesitant to act.”).

278. See *id.* (arguing that domestic law can be applied to matters within the jurisdiction of another sovereign in order to effect the aims of conventional international law); see also Berg, *supra* note 6, at 277 (“Issues of international comity may be raised by the expanded enforcement jurisdiction.”).

279. See generally Berg, *supra* note 6 (discussing the DOJ’s efforts to expand US reach in MARPOL cases).

280. See MARPOL 78, *supra* note 22, at 1 (laying out the policy goals of MARPOL).

281. See Burke-White, *supra* note 205 (discussing ways to improve treaty legitimacy).

282. See COST SAVINGS, *supra* note 5, at 52 (noting that the absence of any of the specified enforcement factors “increases the facility with which substandard operators can breach international environmental regulations”).

283. See Burke-White, *supra* note 205 (discussing the importance of enforcement to treaty legitimacy).

284. See COST SAVINGS, *supra* note 5, at 6 (arguing that greater penalties are necessary).

285. See Brian Baker, Comment, *Flags of Convenience and the Gulf Oil Spill: Problems and Proposed Solutions*, 34 HOUS. J. INT’L L. 687, 713 n.184 (Summer 2012)

States prosecutes the foreign-flagged ships that have violated MARPOL, specifically targeting nations that have lax MARPOL enforcement, the world will take notice.²⁸⁶ This will potentially embarrass these nations that refuse to enforce MARPOL and lead these nations to begin devoting resources to MARPOL enforcement.²⁸⁷

Additionally, if other nations do not increase their enforcement, the role of the United States with respect to ocean oil pollution may need to change to indicate the United States' commitment to the protection of the world's oceans and the importance of MARPOL as a multi-national treaty.²⁸⁸

F. Economic Practicalities of Consistent Enforcement

This Note has advocated for stricter enforcement of MARPOL by all MARPOL parties. This Note has not yet addressed the costs related to investigation and enforcement of MARPOL. Investigating and monitoring of the oceans for violations of MARPOL is an expensive endeavor.²⁸⁹ It requires the use and maintenance of at least a small naval fleet as well as the prosecutorial resources of a well-funded government attorney's office.²⁹⁰ Many of the active flag states encourage ship owners to register their vessels in order to help that state's economy.²⁹¹ These flag states are not major economic power houses²⁹² and do not have the resources to

(looking at statistics to show the impact that foreign-flagging has on the U.S. and neighboring economies).

286. See George D. Gabel Jr., *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 TUL. L. REV. 1433, 1453 (June 2007) (stating that prosecution of criminal acts aboard foreign-flagged ships is necessary to protect the international maritime community).

287. See Andrew Rakestraw, *Open Oceans and Marine Debris: Solutions for the Ineffective Enforcement of MARPOL Annex V*, 35 HASTINGS INT'L & COMP. L. REV. 383, 404–08 (2012) (discussing lax and ineffective enforcement by other countries, which would necessitate more rigid action); see also Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 270–82 (Nov. 2011) (explaining enforcement generally and how it can be used to persuade others to act).

288. See Chalos & Parker, *supra* note 6, at 226 (discussing at several points the increased aggressiveness of the United States government in pursuing these violations)

289. See Garrett, *supra* note 141, at 1849–50 (explaining how violators are often foreign corporations, which are able to avoid detection, which makes investigation more difficult and expensive).

290. See Kehoe, *supra* note 2, at 7 (implying that Coast Guard cutters are necessary and effective at monitoring for MARPOL violations on the coastline).

291. See Baker, *supra* note 285, at 695–99 (discussing the advantages provided to ship-owners by flag of convenience states, and noting that in Liberia's case, ship registration fees account for eight percent of the country's GDP).

292. See International Transport Worker's Federation, *FOC Countries*, ITF GLOBAL, <http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm> (last visited Oct. 1,

monitor the oceans, let alone have a navy of their own that would provide them with the tools to monitor violations of MARPOL effectively.²⁹³

With the modern proliferation of flags-of-convenience,²⁹⁴ the ability to enforce MARPOL by flag states is becoming increasingly suspect because of the high costs associated and the lack of wealth and resources that flag states have.²⁹⁵ Therefore, in order to increase MARPOL enforcement and reduce ocean pollution a solution to the high costs of enforcement is necessary. One solution is to create an international fund that is designed to help fund flag states that are less affluent build the means and have the means to properly investigate and prosecute MARPOL violations.²⁹⁶ Another solution would be to provide the International Maritime Organization (IMO) with more power over enforcement within the high seas.²⁹⁷ Providing the IMO with a centralized enforcement power may receive similar objections to an international MARPOL court.²⁹⁸ If the IMO has a centralized prosecutorial power like INTERPOL and there is a way to fund the court proceedings while granting due process rights, this would be the ideal solution. Regardless of the solution that is adopted, a means by which enforcement can be easily carried out is necessary if the goals and aspirations of MARPOL are to be met.

V. Conclusion

The lofty goals of MARPOL and the APPS to eradicate ocean pollution are both admirable and necessary. Without strict enforcement of the entire treaty covering oil pollution, air pollution, hazardous wastes,

2013) (listing thirty-four small flag states, including Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Bolivia, etc.) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

293. See Baker, *supra* note 285, at 689–90 (describing how responsibility for the Deepwater Horizon oil rig was the responsibility of the Marshall Islands, an extremely small and underdeveloped island in the South Pacific, which was forced to outsource compliance of safety to an outside corporation).

294. See *id.* at 692–96 (discussing the development of flags of convenience states).

295. See *id.* at 689–90 (discussing the shortfalls of having the Marshall Islands as a flag state).

296. See generally Susan Bloodworth, *Death on the High Seas: The Demise of TOVALOP and CRISTAL*, 13 J. LAND USE & ENVL L. 443 (1998) (detailing the now defunct funds for oil spill cleanup Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), which are similar to this proposal).

297. See Becker, *supra* note 207, at 638 (“A radical option to improve environmental enforcement would be to empower the IMO with the authority to enforce compliance.”).

298. See *id.* (noting that allowing IMO to enforce and police MARPOL violations is problematic because of issues like funding and sovereign immunity).