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The *Dauntless* Incident: Should a United States Public Vessel Be Declared a "Floating Piece" of United States Territory for Citizenship Purposes?

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COMMENT

THE *DAUNTLESS* INCIDENT: SHOULD A UNITED STATES PUBLIC VESSEL BE DECLARED A "FLOATING PIECE" OF UNITED STATES TERRITORY FOR CITIZENSHIP PURPOSES

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I. INTRODUCTION

In 1981 President Ronald Reagan issued Executive Order No. 12,324¹ (the "Executive Order") and Proclamation No. 4865² (the "Proclamation") which generally addressed the problem of illegal immigration into the United States and the interdiction of illegal

1. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981).

2. Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981) [hereinafter Proclamation].

aliens on the high seas. The Executive Order authorized the Secretary of State to enter into cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal immigration into the United States by sea.³ In the only exercise of authority under the Order, the United States and Haiti⁴ entered into a treaty providing that the two governments would interdict and return Haitian migrants and vessels involved in illegal transport of persons to Haiti.⁵ Under the treaty, the Government of the Republic of Haiti consented to the interdiction of Haitian flag vessels on the high seas by the United States Coast Guard in order to aid in the enforcement of the immigration laws of the United States.⁶ Under the agreement, any vessel violating United States immigration laws may be returned to the Republic of Haiti or released to representatives of its government.⁷

On January 7, 1988, the United States Coast Guard cutter *Dauntless* was patrolling the Windward passage between Cuba and Haiti, an area approximately 500 miles southeast of Miami.⁸ During its patrol, the *Dauntless* sighted and approached the *Dieu Kyve*, a wooden sailboat with eighty-nine Haitian refugees crowded on its deck.⁹ Acting under the authority of the interdic-

3. Exec. Order No. 12,324, *supra* note 1, § 1. President Reagan, alarmed by the influx of illegal migrants into the United States by sea, expressly authorized the Coast Guard "[t]o stop and board . . . vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action." *Id.* § 2(c)(1). The Coast Guard was also instructed "[t]o return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws . . . provided, however, that no person who is a refugee will be returned without his consent." *Id.* § 2(c)(3).

4. Agreement Relating to Establishment of a Cooperative Program of Interdiction and Selective Return of Certain Haitian Migrants and Vessels Involved in Illegal Transport of Persons Coming from Haiti, Sept. 23, 1981, United States-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10241. The agreement was signed at Port-au-Prince, Haiti on September 23, 1981 and entered into force that same day. The treaty expressed "the mutual desire of . . . [the] two governments to cooperate to stop . . . illegal migration" of Haitians into the United States. *Id.*

5. *Id.*

6. *Id.* Conversely, Haitian authorities are authorized to interdict "a U.S. flag vessel, outbound from Haiti, . . . [if] engaged in such illegal trafficking . . ." Whenever the Coast Guard detains a Haitian vessel, they must notify promptly the appropriate Haitian authorities.

7. *Id.*

8. Gerabino, *Haitian Gives Birth to U.S. Baby*, Miami Herald, Jan. 11, 1988, at A1, col. 5.

9. *Id.* See also Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at 8 U.S.C. §§ 1522-1525 (1988)) (amending Immigration and Nationality Act, 8 U.S.C. §§ 1101-1251 (1988)). The Immigration and Nationality Act defines refugee as: "Any person

tion treaty, the Coast Guard intercepted the *Dieu Kyule* and transferred all the refugees to the *Dauntless*.¹⁰ Hours after the interception of the sailboat, the number of refugees aboard the *Dauntless* increased from eighty-nine to ninety when Sate Teresias gave birth to a baby girl.¹¹ The crew of the *Dauntless* welcomed the baby, Wislene, into the world as a United States citizen.¹² Shortly after the birth, Wislene and her mother were airlifted to Georgetown, Bahamas and then to Opa Locka, Florida for medical examinations and treatment.¹³ The other eighty-eight refugees from the *Dieu Kyule* were immediately returned to Haiti.¹⁴

Caught off guard by the unexpected turn of events, the Immigration and Naturalization Service (INS or the "Service") and the Department of State vacillated in determining the citizenship status of the one day old Wislene. Their confusion arose from the question of whether or not a United States public vessel should be considered a "floating piece" of United States territory. This dilemma needed to be resolved as a prerequisite to any final, binding decision by the INS regarding Wislene's citizenship. On the one hand, if the INS ruled that a United States Coast Guard cutter was in fact United States "territory," the fourteenth amendment requirement¹⁵ that one must be born "in the United States" in order to qualify for citizenship would be met. Wislene would then become a bona fide citizen of the United States. On the other hand, in the event that the cutter was deemed not to be United States "territory," Wislene would not qualify for United States citizenship.¹⁶ The INS, in a short two-page memorandum, declared

who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . ." *Id.* at § 1101(42)(A).

10. Gerabino, *supra* note 8, at A4, col. 1.

11. *Id.* The Coast Guard corpsmen delivered Ms. Teresias' baby. This was the first incident of a birth aboard a Coast Guard cutter during an interdiction action.

12. Miami Herald, Jan. 12, 1988, at A1, col. 2. Perry Rivkind, District Director of the Immigration and Naturalization Service (INS) in Miami called this event "a precedent case." *Id.* At the time, there was considerable debate about whether Wislene was a United States citizen or not.

13. Gerabino, *supra* note 8, at A1, col. 2. Once a refugee has entered the United States, he or she is entitled, at a minimum, to a deportation hearing before the INS. 8 U.S.C. § 1252 (1988).

14. Gerabino, *supra* note 8, at A1, col. 2.

15. Section 1 of the fourteenth amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

16. If the INS decided that Wislene was not a United States citizen, she would acquire

Wislene Teresias ineligible for United States citizenship.¹⁷

II. SUMMARY OF THE ARTICLE

This comment will focus on the issues relevant to the question of whether a United States public vessel is United States "territory," and, therefore qualifies any person born upon such vessel for United States citizenship or whether a United States public vessel is United States territory only in a metaphorical sense. Further, this comment will contrast and compare merchant vessels with public vessels, demonstrating why it is imperative that public vessels be recognized as "territory" of the state of registry. In addition, this comment will examine the phenomenon of fluctuating territorial status, where a merchant ship within a state's territorial water is regarded as territory of the coastal state, yet, upon crossing over into the high seas, no longer possesses that characteristic.¹⁸ Finally, this comment will discuss policy concerns which principally impact the INS decision on the *Dauntless* incident.

III. UNITED STATES CITIZENSHIP IN GENERAL

United States citizenship is governed by both the fourteenth amendment of the United States Constitution and the Immigration and Nationality Act of 1952.¹⁹ An individual may gain United States citizenship in five principal ways: 1) birth in the United States;²⁰ 2) birth outside the United States, but to parents who are

Haitian nationality under the rule of *jus sanguinis*. The principle of *jus sanguinis* provides that a child's citizenship is determined by the citizenship of the parents. BLACK'S LAW DICTIONARY 775 (5th ed. 1979). As Ms. Teresias was a citizen of Haiti, Wislene would also become a Haitian citizen.

17. See Memorandum from Perry A. Rivkind to Jack Penca (Jan. 12, 1988) (unpublished memorandum available in the offices of Inter-American Law Review, University of Miami School of Law) [hereinafter INS Memorandum]. For a reprint of the INS Memorandum, see *infra* app.

Following the INS decision, Sate Teresias requested political asylum.

18. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter Law of the Sea Treaty]. Article 86 of this treaty defines the high seas as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." *Id.* art. 86.

19. Act of June 27, 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1988)).

20. 8 U.S.C. § 1401(a), (b). This citizenship requirement includes children born to Indians, Eskimos, Aluets or any other aboriginal tribe.

both citizens of the United States;²¹ 3) birth outside the United States and its outlying possessions to parents, one of whom is a United States citizen "who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth . . . and the other of whom is a national . . . of the United States";²² 4) if a person of unknown parentage and under five years of age is found in the United States;²³ and 5) birth outside the "geographical limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth . . . was physically present in the United States . . . for a period . . . totaling not less than five years, at least two of which were after attaining the age of fourteen years" ²⁴

The Romans originally used the word citizen to denote an individual who had the freedom to wander through Rome and the right to exercise all political and civil privileges that the government had to offer.²⁵ Citizenship was often perceived as a "legal bond" between a person and his home state, encompassing certain rights and duties.²⁶ From the inception of citizenship, states held the power to establish their own requirements for citizenship as well as restraints on citizenship.²⁷

21. 8 U.S.C. § 1401(c). One of the parents must have a "residence in the United States or one of its outlying possessions." *Id.*

22. 8 U.S.C. § 1401(d).

23. 8 U.S.C. § 1401(f). If it is shown, however, before the child reaches the age of twenty-one, that he was not born in the United States, then the child is not a United States citizen.

24. 8 U.S.C. § 1401(g).

25. See *Thomasson v. State*, 15 Ind. 449, 451 (1860). Aristotle viewed a citizen as "one who is fit to both govern and obey, fit both to make the laws and to observe them." Ignatieff, *The Myth of Citizenship*, 12 *QUEEN'S L.J.* 399, 401-02 (1987).

26. See Wiessner, *Blessed Be the Ties that Bind: The Nexus Between Nationality and Territory*, 56 *Miss. L.J.* 447, 449 (1986). The legal bond theory is one of relationship and is well-known in the United States. Citing Justice Rehnquist's dissent in *Sugarman v. Dougall*, 413 U.S. 634, 652 (1972), Wiessner illustrates this theory: "In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence." Wiessner, *supra*, at 449, n.7.

27. See *Nishimura Eiku v. United States*, 142 U.S. 651 (1892). "It is an accepted maxim of international law, that every sovereign nation has the power, inherent in sovereignty, and essential to self preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Id.* at 659. The United States Constitution, as originally adopted, gave Congress the right to regulate naturalization, and therefore, the right to make laws concerning citizenship. U.S. CONST. art. I, § 8, cl. 4.

Prior to 1866, there was no constitutional or statutory provision defining United States citizenship. It was generally held, under the common law principle of *jus soli*,²⁸ that a person born in the United States acquired citizenship at birth.²⁹ Congress formally adopted this principle in the Civil Rights Act of 1866³⁰ and incorporated it two years later into the fourteenth amendment. Although the fourteenth amendment was adopted with the specific intent to confer citizenship on individuals of African descent, it nonetheless provided, for the first time, a constitutional basis for citizenship.³¹ Consequently, under the fourteenth amendment, a citizen of the United States is any person, regardless of race or color, born within the territorial limits of the United States or naturalized in accordance with United States laws.³²

At present, the current nationality law of the United States is the Immigration and Nationality Act (the "Act").³³ Section 1401 of the Act embraces the language of the fourteenth amendment, stating in part: "The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof. . . ." All persons born in the United States, therefore, become United States citizens.³⁴ In contrast, persons born in outlying possessions are nationals of the United States.³⁵

The relevant citizenship language of the Act and the fourteenth amendment are essentially indistinguishable. An examination of the fourteenth amendment and the Act demonstrates that citizenship can only be achieved by fulfilling two indispensable re-

28. See BLACK'S LAW DICTIONARY 775 (5th ed. 1979).

29. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (despite alien parentage, a child born on land over which the United States exercised dominion as a sovereign power, is a citizen).

30. Civil Rights Act of 1866, 14 Stat. 27.

31. See Burgess, *Being and Becoming an American: Citizenship in the USA*, 16 COLO. LAW. 1563, 1564 (1987).

32. See generally *Wong Kim Ark*, 169 U.S. 649; *Prowd v. Gore*, 57 Cal. App. 458, 207 P. 490 (Cal. Dist. Ct. App. 1922).

33. See *supra* note 19.

34. 8 U.S.C. §§ 1403, 1406 & 1407. See also Burgess, *supra* note 31, at 1567. The United States is defined as the continental mainland, Hawaii, Puerto Rico, the Virgin Islands, and Guam. In addition, the "ports, harbors, bays, enclosed sea areas, and a three-mile marginal belt, along the coasts thereof, form a part of the territorial limits of the United States." 5 Fed. Immigration L. Rep. (WSB) ¶ 16,520; INS Operations Instructions Interpretations § 301.1(a)(2).

35. 8 U.S.C. § 1408. See also Burgess, *supra* note 31, at 1567. All other individuals are classified as either non-immigrant or immigrant aliens. *Id.* at 1566.

quirements, one jurisdictional and the other physical. A citizen, therefore, is one born on soil that is part of the contiguous United States and exclusively under the authority of the United States government.

To fully grasp this concept, the following illustration is useful. Ms. X, a United States citizen, gives birth in a local hospital in a small town in Pennsylvania. First, the child's birth physically occurred in the United States. Second, the child is subject to all laws, ordinances, and legislation of both the State of Pennsylvania and the United States. Accordingly, the birth satisfied both citizenship requirements and, consequently, the child is a United States citizen. This illustration provides a simple and uncomplicated application of the fourteenth amendment and the Act's citizenship requirements. However, this concept becomes more difficult to grasp when foreign territory is involved.

Children born in the United States to a parent accredited to the United States as a foreign diplomat do not acquire United States citizenship.³⁶ The child, instead, acquires the citizenship of the parent as if he or she had been born in the country of which his or her parent is a representative.³⁷ Members of a diplomat's immediate family enjoy the same privileges and immunities as those proffered to the diplomat himself.³⁸ As the diplomat owes his allegiance to his sovereign, so too does the diplomat's child even though born in the receiving state. Therefore, despite a birth in the United States and a technical qualification for United States citizenship,³⁹ the child will not become a United States citizen.

36. Generally, a state sends an emissary to a receiving state in a gesture of friendship and conciliation. When a representative departs the sending state, he travels as if under a special protective shield, a shield of governmental immunity. Therefore, even when settled in a receiving state, the envoy is wrapped in a cloak of sheltering immunity. The diplomat is subject only to the laws of the sending state. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention]. For example, a diplomatic agent is immune from criminal jurisdiction of the receiving state. *Id.* art. 32(1),(2).

37. 3 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 373, at 282 (1906). Foreign diplomats are those individuals listed in the Department of State Blue List and include ambassadors, ministers, and *chargés d'affaires*.

38. Vienna Convention, *supra* note 36, art. 37(1). "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36." *Id.* Members of the administrative and technical staff of the mission receive the same protection as the diplomat but the protection does not extend to "acts performed outside the course of their duties." *Id.* art. 37(2).

39. 8 U.S.C. § 1401(a).

Wislene Teresias' birth aboard a United States Coast Guard cutter on the high seas certainly does not lend itself to a simple application of the fourteenth amendment and the Act's citizenship standards. However, the INS, in an attempt to resolve the matter promptly and painlessly, processed Wislene's case in a routine and unimaginative manner. Further, the INS result set forth an alarming precedent in terms of United States dominion over its public vessels.

IV. THE IMMIGRATION AND NATURALIZATION SERVICE DECISION

The first segment of the INS opinion carefully traces the limited case law pertaining to the legal status of vessels registered in the United States.⁴⁰ It is important to note that there are few court decisions that specifically address this type of issue.⁴¹ The seminal case, which was the first case that the INS examined, was *Cunard S.S. Co. v. Mellon*.⁴² The *Cunard* case involved a number of private steamship companies operating passenger ships between the United States and foreign ports.⁴³ The companies, ten of which were foreign corporations⁴⁴ and two of which were of United States registry,⁴⁵ were seeking to enjoin the Secretary of the Treasury from enforcing the National Prohibition Act against them.⁴⁶ Because the Court felt that the Act was so closely related to the eighteenth amendment, it first examined the phrase—"the United States and all territory subject to the jurisdiction thereof. . . ."⁴⁷

40. See INS Memorandum, *supra* note 17.

41. *Id.*

42. 262 U.S. 100 (1923).

43. *Id.* at 119.

44. *Id.* at 100.

45. *Id.*

46. *Id.* at 119. The Department of the Treasury was attempting to require that all ships, whether of foreign or United States registry, seal their liquor stores upon entering United States territorial waters. *Id.* at 119-20. However, the Attorney General, interpreting the National Prohibition Act in conjunction with the eighteenth amendment, declared it unlawful for any ship, whether foreign or domestic, to bring alcoholic beverages into United States territorial waters. In addition, he opined that domestic ships could not carry liquor at any time, even when on the high seas. *Id.* at 120.

47. *Id.* at 121. Several interpretations of the word "territory" were proposed and argued by both appellant ship companies and appellee, the Secretary of the Treasury. The plaintiffs, in general, argued that a United States flag ship was not "territory subject to the jurisdiction of the United States" when on the high seas or in foreign ports. *Id.* at 117. The reasoning behind this argument centered around the belief that the eighteenth amendment did not give Congress the "power to legislate for lands subject to the jurisdiction of the United States . . . or for vessels of the United States engaged in foreign or coastwise com-

The Court defined the term "territory" as "the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power."⁴⁸

Despite the fact that the *Cunard* Court examined the language of the eighteenth amendment in the context of private merchant vessels, the INS wholeheartedly embraced the Court's definition of "territory." Because the eighteenth and the fourteenth amendments employ identical language, the Service posited that the *Cunard* clarification was apropos for the *Dauntless* predicament. Therefore, the INS decision balanced precariously on a 1923 decision that interpreted language of a since-repealed amendment.⁴⁹

In addition, the *Cunard* decision was entirely fact specific. Any interpretation other than the one set forth in *Cunard*, under the circumstances, would have ravaged commonly accepted international edicts of sovereignty. The Court was not amenable to the idea of relinquishing customary jurisdiction over foreign merchant vessels while in United States coastal waters.⁵⁰ This was too great a leap to make. However, in the *Dauntless* case, the INS deliberately opened that door to future predicaments involving United States public vessels when sailing in foreign seas by declaring that a United States public vessel was not the territory of the United States.

The INS then examined case law that specifically contemplated the issue of births on United States private vessels. The INS scrutinized two pre-1950 cases, both of which held that a child born of an alien parent aboard a United States registered merchant vessel did not qualify for United States citizenship.

The first case, *Lam Mow v. Nagle*,⁵¹ involved the birth of a child to Chinese parents, both domiciliaries of the United States, aboard a United States merchant vessel on the high seas.⁵² The question before the court was whether the child was a citizen of

merce." *Id.* The appellee, however, agreed with the District Judge that vessels, no matter where they were located, were "territory subject to the jurisdiction of the United States . . . and subject to the penalties of the National Prohibition Act. . . ." *Id.*

48. *Id.* at 122. The Court interpreted the term, as used in the eighteenth amendment, in a physical rather than a metaphorical sense. "[I]t refers to areas . . . having fixity of location and recognized boundaries." *Id.*

49. The eighteenth amendment was repealed by section 1 of the twenty-first amendment, which was ratified on December 5, 1933. See U.S. CONST. amend. XXI, § 1.

50. *Cunard*, 262 U.S. at 124-25.

51. 24 F.2d 316 (9th Cir. 1928).

52. *Id.* at 317.

the United States.⁵³ The Fourth Circuit, relying on the definition of territory adopted in *Cunard*, declared that a child must be born in a location where the sovereign is in total possession and power so that at his birth, he owes complete obedience to the sovereign.⁵⁴ As the vessel was used exclusively for commercial endeavors and was not under the sole jurisdiction of the United States, the child was found not to be a United States citizen.⁵⁵

The second case, *In the Matter of A—*,⁵⁶ addressed a similar question. Here, a child was born of lawful permanent United States residents aboard a United States merchant vessel some 400 miles from the United States coast.⁵⁷ Embracing the reasoning of the *Cunard* and the *Lam Mow* decisions, the Central Office of the INS declared that the child was not a United States citizen.⁵⁸

Despite the fact that the case law the INS relied on involved private merchant vessels, the INS proclaimed that the result did not change merely because a child was born on a public vessel.⁵⁹ At this point, the logic of the INS decision disintegrates. The application of the controlling case law from private to public vessels rests solely on a statement from the Department of State's Foreign Affairs Manual⁶⁰ and the unofficial agency positions of the Navy and Coast Guard.⁶¹ The INS ruled that the *Dauntless* was not part of United States territory and, therefore, Wislene's birth aboard a United States public vessel failed to qualify her for United States citizenship.⁶²

53. *Id.*

54. *Id.* at 318. The court explained that there are some exceptions to this rule. To take one example, a child born to an ambassador would be considered a subject of the sovereign whom the ambassador represents. *Id.*

55. *Id.*

56. 3 I. & N. Dec. 677 (CO 1949).

57. *Id.* The child's parents were of Portuguese descent yet were lawful permanent residents of the United States. They were returning to the United States at the time of the child's birth.

58. *Id.* at 679.

59. See INS Memorandum, *supra* note 17; *Helgesen v. United States*, 275 F. Supp. 789 (S.D.N.Y. 1966) (defining a Coast Guard vessel as a public vessel).

60. DEP'T OF STATE, 7 FOREIGN AFF. MANUAL 1113.1-4(a).

61. Both the Navy and Coast Guard, according to the INS Memorandum, *supra* note 17, do not consider their vessels to be United States territory.

62. See INS Memorandum, *infra* app. Obviously, in light of the foregoing authorities, if the *Dauntless* had been within the three mile territorial limit at the time of Wislene's birth, she would have automatically qualified for United States citizenship. See RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 511 (1986) [hereinafter RESTATEMENT] (the territorial sea is "a belt of sea that may not exceed 12 nautical miles, measured from a baseline which is either the low-water line along the coast, or the seaward limit of the

V. AN EXAMINATION OF UNITED STATES CITIZENSHIP REQUIREMENTS

A. *The Physical Requirement*

Both the fourteenth amendment and the Act require that for an individual to attain United States citizenship at birth, she must be born on United States territory.⁶³ However, the concept of what is United States territory is not always easily discernable.

The INS wholeheartedly adopted the Court's interpretation in *Cunard* of the phrase "in the United States." According to this definition, an individual born on actual United States soil qualifies for United States citizenship.⁶⁴ However, an individual could also acquire United States citizenship if born aboard a ship sailing in United States territorial waters.⁶⁵ It is irrelevant whether the ship is of foreign or domestic registry, so long as it is located in the territorial waters at the time of the birth.⁶⁶ These are the only two available avenues towards citizenship according to the INS.

The notion that a child born aboard a foreign registered vessel located in United States coastal waters can acquire United States citizenship seems somewhat confusing at first. However, this preliminary confusion results from the voluntary submission of a merchant vessel, upon entering the coastal waters of the United States, to exclusive U.S. jurisdiction.⁶⁷ In contrast, public vessels upon entering the coastal waters of a foreign state, do *not* submit themselves to the exclusive jurisdiction of that state. Instead, the doctrine of sovereign immunity controls.⁶⁸

internal waters of the coastal state. . ."). The United States has adopted a 12 mile belt as the territorial sea limit. The Presidential Proclamation Extending Territorial Sea of the United States to Twelve Miles, 24 WEEKLY COMP. PRES. DOC. 1661 (Dec. 27, 1988).

63. Section 1 of the fourteenth amendment and 8 U.S.C. § 1401(a) both require that birth be physically located within United States territory to qualify for automatic citizenship. However, 8 U.S.C. § 1401(c)-(e), (g) provide for "constructive physical locality at birth to qualify for United States citizenship."

64. See INS Memorandum, *infra* app.

65. *Id.*

66. G. HACKWORTH, *supra* note 37, at 10.

67. See INS Memorandum, *infra* app.

68. The doctrine of sovereign immunity recognizes that where one sovereign exercises jurisdiction over certain property, a different sovereign cannot exercise concurrent jurisdiction. See L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW, CASES AND MATERIALS 33-34 (2d ed. 1987) [hereinafter HENKIN & PUGH]. The doctrine developed at a time when sea travel first became commonplace, reflecting the need for maintaining order both on the high seas and in territorial waters. Normally, foreign sovereigns would not vol-

In 1952, the Department of State clarified its stand on sovereign immunity.⁶⁹ Immunity was recommended only when public acts of a foreign sovereign were involved.⁷⁰ Commercial activity carried on by private parties was excluded completely from immunity.⁷¹ However, in 1976, the Foreign Sovereign Immunities Act was adopted,⁷² which formally recognized that foreign public vessels were worthy of deference while in the coastal waters of another state and refused to show deference to foreign merchant vessels.⁷³

Examining an analogous situation can best explain this principle. The Vienna Convention of Diplomatic Relations⁷⁴ provides that embassy premises are inviolable by the host state.⁷⁵ The property is recognized as territory of the foreign state and the receiving state is under a duty to protect the embassy from any intrusion or disturbance of the peace.⁷⁶ Diplomatic immunity allows the diplomat to carry on his official business free from outside pressures or coercion.⁷⁷ Therefore, even though the embassy is physically located in the host state, it is perceived as territory of the sending state.

Under this logic, Wislene's birth aboard the *Dauntless* in international waters, fulfills the physical requirement for United States citizenship. The cutter, a public vessel under the complete control of a commanding officer employed by the United States government, was entitled to all of the privileges and immunities allowed under the Foreign Sovereign Immunities Act.⁷⁸ Because the vessel qualifies for this type of immunity, it is free from the exercise of jurisdiction by any foreign sovereign even if found in

untarily subject themselves to the jurisdiction of a host without an implied understanding that an absolute grant of immunity from the territorial sovereign's power accompanied the ship's entry into the host's territory. See *Schooner-Exchange v. McFadden*, 11 U.S. 116 (1812).

69. *The Tate Letter*, 26 DEP'T ST. BULL. 984 (1952).

70. *Id.*

71. *Id.*

72. 28 U.S.C. §§ 1602-1611 (1976), reprinted in 15 I.L.M. 1388 (1976). The Act was adopted, in part, to eliminate the discretionary element of determining what did or did not qualify for sovereign immunity.

73. *Id.* § 1611(b).

74. Vienna Convention, *supra* note 36.

75. *Id.* art. 22(1). Embassies are entitled to this status primarily due to foreign policy considerations.

76. *Id.* art. 22(2).

77. *Id.* preamble.

78. See *supra* note 72.

the territorial waters of a foreign state.⁷⁹ Under the Act, the *Dauntless* essentially carved out an island of United States sovereignty from an area that is otherwise recognized as territory of the coastal state.⁸⁰ Thus the cutter and all persons aboard were subject to the sole jurisdiction of the United States.

B. *The Jurisdictional Requirement*

International law has long recognized that a state has jurisdiction over all vessels flying its flag.⁸¹ A state also has absolute power to prescribe, adjudicate, and enforce rules of law for conduct occurring within its own territory.⁸² Whether or not a state may exercise jurisdiction, under international law, depends on two factors: "(i) . . . the interest that state . . . may reasonably have in exercising the particular jurisdiction asserted . . . ; [and] ii) . . . the need to reconcile that interest with the interest of other states in exercising jurisdiction."⁸³

The general rule is that an individual who commits a crime aboard a United States flag ship, public or private, is subject to prosecution in the United States⁸⁴ and the matter would be adjudicated in the United States courts under applicable United States laws.⁸⁵ Under these circumstances, the vessel is considered to be "territory" of the United States.⁸⁶ However, when two different states assert concurrent jurisdiction, it is necessary to determine

79. 28 U.S.C. § 1611(b)(2).

80. G. HACKWORTH, *supra* note 37, at 11.

81. Case of the S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30-31 (Sept. 7). This was a case of concurrent jurisdiction. It involved a collision on the high seas of a Turkish steamer and a French steamer. Eight Turkish sailors and passengers were killed as a result of the collision. The French steamer, the *Lotus*, arrived in Constantinople and criminal proceedings were instituted against the captain of the Turkish steamer and the officer of the watch on board the *Lotus*. *Id.* at 5. The French Government presented its arguments to the court in decree-like form. They argued that "acts performed on the high seas on board a merchant ship are, in principle and from the point of view of criminal proceedings, amenable only to the jurisdiction of the courts of the State whose flag the vessel flies. . . ." *Id.* at 7. The Turkish Government relied on the argument that "[v]essels on the high seas form part of the territory of the nation whose flag they fly, and . . . the place where the offence was committed being [a vessel] . . . flying the Turkish flag, Turkey's jurisdiction is as clear as if the case had occurred on her territory. . . ." *Id.* at 9.

82. Island of Palmas Case (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829, 839 (Perm. Ct. Arb. 1928).

83. HENKIN & PUGH, *supra* note 68, at 823.

84. 18 U.S.C. §§ 1, 7 (1988).

85. *Id.* § 7.

86. Case of the S.S. *Lotus*, *supra* note 81, at 25.

which state has a greater connection to the participants and the location where the incident occurred.⁸⁷

An example of the later proposition is when a passenger murders a fellow passenger aboard a United States flag ship. Both passengers are United States citizens and the vessel is docked in a foreign port at the time of the crime. The United States in such a situation would maintain that it has jurisdiction over the matter because the vessel is registered in the United States and because the victim and alleged murderer were United States citizens. The foreign state could claim jurisdiction based on the occurrence of the crime in its sovereign jurisdiction.

In the end, territorial considerations do not control in concurrent jurisdiction problems. They are resolved on a case by case basis and in accordance with principles of comity. A court would examine the various relationships and determine which state had a greater interest in the resolution of the matter.

In addition, a state has the power to exercise jurisdiction over conduct that occurs outside its territory but which that state feels the repercussions within.⁸⁸ In this context, a criminal act committed aboard a United States flag ship on the high seas would be regarded as having been committed on United States territory and the United States would have exclusive jurisdiction over the matter.

As discussed previously, a foreign public vessel is considered territory of the foreign sovereign even when found in territorial waters of another state.⁸⁹ Therefore, any crime committed aboard a United States Coast Guard cutter would be subject to adjudication under United States law and in a United States court. Because the ship is visualized as territory, the right to exercise jurisdiction is the same as if the crime had been committed in Miami, Florida.

Sate Teresias was subject to the jurisdiction of the United States the moment she set foot aboard the *Dauntless*. If she had murdered anyone on the cutter, her case would have been adjudicated in the United States. Sate Teresias was not immune from the

87. See, e.g., *United States v. Flores*, 289 U.S. 137 (1933).

88. Case of the S.S. *Lotus*, *supra* note 81, at 29. This doctrine is the protective principle of jurisdiction. When a state has an interest in protecting itself against acts that threaten its existence or proper functioning as a state, even though those acts are not executed within its territory or by a national of their state, the state can exercise jurisdiction over the event.

89. See *supra* notes 68-76 and accompanying text.

criminal, civil or administrative jurisdiction of the United States.⁹⁰ Precisely because the mother was subject to the jurisdiction of the United States at the time she gave birth, it naturally follows that the child was subject to its jurisdiction as well. Thus, Wislene Teresias fulfilled the second prong of the fourteenth amendment citizenship "test."⁹¹

VI. MERCHANT VESSEL VERSUS PUBLIC VESSEL

Courts that have examined the issue of whether a birth aboard a ship found on the high seas qualifies the child for United States citizenship under the fourteenth amendment have done so under exceptionally narrow factual circumstances. Both the *Lam Mow* and the *In the Matter of A*— births occurred aboard merchant vessels.⁹² Merchant vessels and public vessels are, however, disparate in nature. While they are flag ships of a particular state, a merchant vessel is perceived as one that is merely registered by the state, with no special connection to the state other than an administrative one.⁹³ A public vessel, however, has a special relationship with its registering state such that there is no mistaking its allegiance towards nor agency with its sovereign.

The basic facts of both *Lam Mow* and *In the Matter of A*— cases are similar to those of the case of Wislene Teresias. All three involved a birth aboard a United States flag ship on the high seas. In all three cases, the child was born to a parent who was not a citizen of the United States. The one distinguishing factor, the one that makes all the difference for Wislene, is that she was born aboard a Coast Guard cutter and not a passenger ship.

A public vessel is "one [that is] owned absolutely by the United States" and "whose officers are civil service employees"⁹⁴ A Coast Guard cutter has specifically been recognized as a

90. As she would be if she were a diplomat and covered by the Vienna Convention, *supra* note 36, art. 31(1).

91. U.S. CONST. amend. XIV, § 1 (" . . . and subject to the jurisdiction thereof. . . ").

92. *In the Matter of A*—, 3 I. & N. Dec. 677 (CO 1949); *Lam Mow v. Nagle*, 24 F.2d 316 (9th Cir. 1928).

93. *Lam Mow*, 24 F.2d at 317. While it is true that the merchant vessels owes allegiance to no other country but the one in which it is registered, that does not hold any particular significance.

94. *Helgesen v. United States*, 275 F. Supp. 789, 790, n.3 (S.D.N.Y. 1966). The United States owns absolutely the public vessel. If the vessel were sold, the proceeds would be put into the United States Treasury. See 10 U.S.C. § 2575 (1988). Ownership is an important consideration in determining whether a vessel is territory of the state of registry, but there

public vessel.⁹⁵ A warship is also an example of a public vessel.⁹⁶ On the high seas, "[w]arships represent the sovereignty and independence of their State more fully than anything else can represent it on the ocean. . . ."⁹⁷ A Coast Guard cutter is the equivalent of a warship and enjoys the same immunities.⁹⁸

The distinction between a merchant vessel and a public vessel is an important one for our discussion. While a merchant vessel might be registered and licensed by the United States, the United States has no real control over the ship nor does it retain any aspect of ownership of the vessel.⁹⁹ Owners of merchant ships usually have little or no connection with the country of registry and many nations permit ship registry with few prerequisites except the payment of a fee.¹⁰⁰ If a merchant ship enters the territorial waters of a foreign state in a capacity other than innocent passage,¹⁰¹ the

is more to ownership than considerations of jurisdiction and control. The Naval Station at Guantanamo Bay, Cuba serves as a useful illustration of this concept. The United States exercises jurisdiction and control over this Naval Station. The Department of State officially declared that this territory "has never been incorporated into or become a party of the United States and that, accordingly, that portion of Article 14 of the Amendments to the Constitution of the United States which related to the acquisition of American citizenship through birth in the United States does not apply. . . ." The Assistant Secretary of State to the Secretary of the Navy, Mar. 26, 1932, Dep't of State File No. 131/5594 (citing *Downes v. Bidwell*, 182 U.S. 244, 251 (1901)). Despite this statement, a United States public ship can be distinguished from the Naval Station at Guantanamo Bay. The outer section and a part of the shore line of the bay, used as the naval base, is leased by the United States under treaties signed by both Cuba and the United States. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, United States-Cuba, T.S. No. 418 (continued in effect by the Treaty of May 29, 1934, T.S. No. 866).

95. *Helgesen*, 275 F. Supp. at 795.

96. *Id.* at 790, n.3. A warship is defined as "a ship belonging to the armed forces [bearing] the external marks distinguishing [the] ship [as to] its nationality, under the command of an officer duly commissioned by the government of the state and whose name appears in the appropriate service list and manned by a crew which is under regular armed forces discipline." *Id.*

97. B. BRITTIN, *INTERNATIONAL LAW FOR SEAGOING OFFICERS* 114 (5th ed. 1986) (quoting A.P. Higgins). Ships that are "owned or operated by a state and used only on governmental noncommercial service are considered to be in the same category as warships and enjoy the same immunity." B. BRITTIN, *INTERNATIONAL LAW FOR SEAGOING OFFICERS* 100 (4th ed. 1981).

98. The cutter is owned absolutely by the United States. The crew of the cutter is composed entirely of civil service employees paid solely by the United States. A Coast Guard cutter is under the command of a duly commissioned officer and bears external distinguishing marks that identify the vessel's nationality.

99. 46 U.S.C. § 2101 (1982).

100. Law of the Sea Treaty, *supra* note 18, art. 91. However, there must be a genuine link between the flag ship and the state.

101. *Id.* art. 19(1). Passage is considered innocent "so long as it is not prejudicial to the peace, good order or security of the coast State." *Id.* Any threat or use of force, any exercise or practice with weapons, and any act aimed at collecting information to the prejudice of

coastal state is authorized to seize and arrest the offender.¹⁰² In contrast, if a warship violates the laws of passage of a coastal state, the coastal state is only permitted to "require the warship to leave its territorial waters immediately."¹⁰³

The unique character of a warship is most evident when that vessel is in a foreign port.¹⁰⁴ When a warship enters a foreign port with the permission of the coastal state, the coastal state is granting impliedly the warship certain immunities from the territorial jurisdiction of that state.¹⁰⁵ When a merchant vessel enters a port of a foreign nation, it is required to comply with any laws or regulations of the receiving nation.¹⁰⁶ If the merchant vessel or its sailors, while in port, violates any of the coastal state's laws, it is subject to the jurisdiction of the receiving nation and will be adjudicated accordingly.¹⁰⁷

Following the same line of reasoning, it makes sense that a private merchant ship is not considered territory of the United States. It owes no special allegiance to the state and receives no special jurisdiction immunities from foreign states. As discussed, however, public vessels are accorded a much different status. Accordingly, public vessels cannot be viewed in the same light as merchant ships when deciding citizenship questions under the fourteenth amendment. If public vessels are considered to be no greater than merchant vessels in this aspect, why then are they treated differently in terms of immunity to foreign jurisdiction?

the defense of the coastal state are deemed prejudicial to the peace. *Id.* art. 19(2).

102. B. BRITTIN, *supra* note 97, at 105-06 (4th ed.).

103. *Id.* at 106. The warship's sovereign state exercises exclusive jurisdiction over them, under all circumstances. If a foreign state interferes with that jurisdiction, it is considered an act of war on their part. *Id.* at 100.

104. *Id.* at 106.

105. *Id.* The immunities arise from customary international law and are not clearly defined. While the warship is in port, police or other port authorities are not "entitled to board the ship without permission of her commanding officer." *Id.* at 107. Nor is a commanding officer compelled to submit to a search of his ship. *Id.* When a warship enters a port it silently agrees to comply with all harbor regulations. If the warship fails to comply with any regulation, the host country may complain about the violation only through diplomatic channels. *Id.*

Any sovereign state may forbid a foreign warship to enter its ports. However, as a rule, nations usually grant access of warships to their ports for nations with which they are at peace. *Id.* at 106. Permission to enter a foreign port is usually obtained through diplomatic channels. The United States has entered into several "Naval Visits" agreements with nations whose ports are used most often by U.S. warships. *Id.*

106. *Id.* at 118.

107. R. CHURCHILL & A. LOWE, *THE LAW OF THE SEA* 54 (1988).

VII. POLICY CONSIDERATIONS

Fundamental and overpowering policy concerns were instrumental in the final determination of the *Cunard* case. The Court had difficulty reconciling United States policy goals to maintain exclusive control over its territory with the concept of a merchant ship as a "floating piece" of territory.¹⁰⁸ The state's ability to subject a private merchant ship, freely entering and exiting the territory for purposes of trade, to its laws and jurisdiction, was of the utmost importance.¹⁰⁹ The Court emphasized the need for a nation to retain exclusive and absolute jurisdiction over private vessels that have voluntarily entered its territory.¹¹⁰ If the Court had decided that United States merchant vessels were territory of the registering state the United States would have relinquished all claims of jurisdiction over any actions of foreign merchant ships within United States territorial waters.¹¹¹

These policy concerns do not play a part in the situation where a child is born aboard a public vessel. By declaring a Coast Guard cutter a part of United States territory, the United States is not relinquishing any power. There would be no loss of control and no frustration of policy goals. The vessel is the property of the United States and would enjoy immunity from foreign jurisdiction even if found in the coastal waters of another state. Likewise the policy arguments relied on in *Lam Mow* and *The Matter of A*—also fail to bolster a decision that declares that a public vessel of the United States is not its territory. Primarily, the courts were concerned that by declaring a merchant ship to be United States territory for citizenship purposes would lead to an uncontrollable influx of new citizens born on United States ships throughout the world. Obviously, the INS could never monitor or control who was a citizen in this type of scenario. Conversely, the INS can certainly oversee births aboard public vessels. First, individuals who are not United States citizens do not have free access to public ships.¹¹²

108. *Cunard*, 262 U.S. at 125.

109. *Id.*

110. *Id.* at 124. It is imperative that foreign nationals who are traveling in other countries, not engaged in the business of a sovereign or national pursuits, be subject to the jurisdiction of the country in which they are found. *Id.* at 126.

111. A state exercising such a right over their own merchant vessels wherever they may be in the world, would be inviting other states to exercise equivalent powers.

112. A Turkish citizen would never be able to purchase a ticket to travel on a public vessel and possibly time the birth of a baby so that her child would become a United States citizen.

Secondly, the Haitians that were removed from the *Dieu Kytle* did not voluntarily board the *Dauntless*.¹¹³ They were intercepted in international waters and forced onto the Coast Guard cutter.¹¹⁴ Under these circumstances, there is little danger of a citizenship explosion that would overwhelm the administrative capabilities of the INS. The policy concerns that appeared so practical where merchant ships were involved fail when applied to a situation involving a public vessel.

VIII. CONCLUSION

The INS analyzed the facts surrounding Wislene's birth aboard the *Dauntless* in a narrow and routine manner. They were caught up in the little details and failed to examine the impact of their decision on a more global scale. This decision will certainly have few repercussions in terms of children being born on United States public vessels. The likelihood of this occurring repeatedly is minimal. However, this decision will continue to have reverberations long into the future in terms of its precedential value. Declaring that a United States public vessel is not considered United States territory can only lead to impending disasters in international encounters. Will our naval vessels, when in foreign ports be subject to the jurisdiction of the foreign sovereign? Will foreign sovereigns be authorized to enter freely our public vessels whenever they are encountered in another's coastal waters? These are considerations that were disregarded in the evaluation of Wislene Teresias' citizenship status. It is not so much the fact that the INS has denied citizenship to one child, but more that the INS has opened the door to diminished control over United States public vessels while in international waters.

KIM KIEL

113. See *supra* text accompanying note 10.

114. *Id.*

APPENDIX

Memorandum from Perry A. Rivkind to Jack Penca

Q. Is the child of an alien born on a Coast Guard vessel in international waters a United States citizen by birth?

A. No. Under the law of the United States such a child is not a U.S. citizen.

The Fourteenth Amendment to the United States Constitution provides that "all persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States" This provision has been codified in section 301 of the Immigration and Nationality Act, Title 8, United States Code, sec. 1401, which states: "The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof;"

To determine whether the child in this case is a U.S. citizen, then, the first determination to make is whether the birth occurred in the United States.

In *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923) the Supreme Court held that the phrase "the United States and all territory subject to the jurisdiction thereof" means: "the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power. . . . [T]he term is used in a physical and not a metaphorical sense . . . it refers to areas or districts having fixity of location and recognized boundaries." 262 U.S. at 122. The definition of the United States in section 101(a)(38) of the Immigration and Nationality Act, Title 8, United States Code, sec. 1101(a) is likewise a geographical definition. The State Department regulations also define the United States in a geographic sense. 22 C.F.R. sec. 50.1(a).

Since the Coast Guard ship is not a part of the geographic territory of the United States, one must then consider whether it can be considered United States territory under any other provision of law so as to confer citizenship at birth upon the child.

The situation has arisen in the past where a child has been born on a United States merchant vessel to an alien and a question raised as to whether the child is a United States citizen. The determination has always been that the child is not a U.S. citizen. *Lam Mow v. Nagle*, 24 F.2d 316 (9th Cir. 1928); *Matter of A*, 3 I&N

Dec. 677 (CO 1949).

Although both cases involved U.S. merchant vessels and a Coast Guard ship is a public vessel, Title 46, United States Code, sec. 781; *Helgesen v. United States*, 275 F. Supp. 789 (S.D.N.Y. 1966), the result does not change.

The Department of State's Foreign Affairs Manual, 7 F.A.M. 1113.1-4(a) states: "A U.S. registered ship on the high seas is not considered to be part of the United States. Therefore, a child born on such a vessel outside U.S. territorial waters does not acquire U.S. citizenship by reason of place of birth." The Department of State's legal counsel informs me that this provision is applicable to both public vessels and merchant vessels. Counsel for both the Navy Department and the Coast Guard also stated that their agencies' positions are in accord with that of the Department of State and they do not consider their vessels to be floating pieces of United States territory.

Based upon the authority I have uncovered I conclude that the child born on the Coast Guard ship is not a U.S. citizen since the child was not born in the United States as required by the Fourteenth Amendment for acquisition of citizenship at birth.