

## Seafarer Detention Under Ship Pollution Law Must Have Limits

By **Kierstan Carlson, Jeanne Grasso and Gregory Linsin** (April 22, 2024, 5:23 PM EDT)

The Act to Prevent Pollution from Ships is the U.S. law that implements the International Convention for the Prevention of Pollution from Ships, or MARPOL.

Since a policy shift in 2010, the U.S. Coast Guard's approach to enforcing the APPS has trapped hundreds of foreign seafarers in a legal limbo in the U.S., which has deprived them of their liberty, commonly for a year or more; impaired their maritime careers; and exacted serious emotional and psychological tolls on the seafarers and their families.

The Coast Guard should urgently remedy this situation by limiting, in its agreement on security, how long seafarers can be detained in the U.S. in connection with MARPOL investigations.

### Legal Framework

APPS defines the conduct that would constitute a violation of the law by most commercial vessels, and provides for criminal and civil penalties. It also includes several key provisions to facilitate investigations of potential violations, including in rem liability, as well as a provision that allows the Coast Guard to request U.S. Customs and Border Protection to withhold customs clearance for a vessel if reasonable cause exists to believe that the vessel, its owner or the operator violated APPS.

The Coast Guard determines whether such reasonable cause exists, and, if so, whether to refer the matter to the U.S. Department of Justice for possible criminal enforcement.

The Coast Guard also has authority under APPS to require the "filing of a bond or other surety satisfactory" before the vessel can continue trading. If these requirements are met, the Coast Guard will request CBP to grant the vessel clearance to depart.

### Brief History of U.S. Coast Guard Policies and Procedures Regarding Security Agreements

In the early stages of the vessel enforcement program in the 1990s, the Coast Guard developed an agreement on security to incorporate the elements it deemed necessary to constitute "surety satisfactory" under APPS.

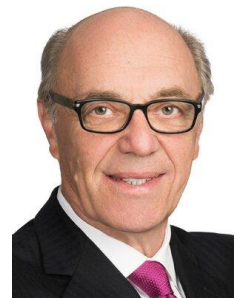
The Coast Guard's form security agreement aimed to create conditions that would enable the DOJ to



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conduct its criminal investigation even after the vessel departed, while permitting the vessel to continue trading.

These security agreements are signed by a Coast Guard legal officer and the vessel owner or operator, and contain several standard requirements, including that the vessel owner and operator must: (1) post a surety bond; (2) agree to disembark certain crew members — usually eight to 10 from the engine department, plus the master — whom the government determines are necessary to its investigation; and (3) agree to continue to pay the full wages, as well as housing and healthcare costs, and a per diem, for the disembarked crew members while they reside in the U.S.

The owner and operator also must request that the disembarking crew members surrender their passports, which are then usually held by the agent during the course of the investigation — and cannot be returned to the seafarers without 72 hours notice to the Coast Guard. Over the years, various parties have challenged the Coast Guard's authority to require these commitments, but the courts have consistently rejected these challenges.

Initially, security agreements did not contain any time limitation. However, after about a decade, the Coast Guard became concerned about the risks inherent in the open-ended nature of these agreements.

To mitigate these risks, around 2001, the Coast Guard inserted a 120-day time limit into security agreements based on its judgment that 120 days would give the DOJ adequate time to investigate the case and determine whether an enforcement action was warranted. The 120-day time limit remained a standard feature of security agreements until about 2010 when, because of concerns about delay tactics used by certain defense counsel, the Coast Guard removed the time limit entirely.

Therefore, since 2010, vessel owners and operators involved in MARPOL investigations have been required to execute security agreements with no time limitations whatsoever in order to enable their vessels to sail, relying only on the DOJ's good faith to investigate in a timely manner. In practice, however, the DOJ has not investigated these factually straightforward cases efficiently, and hundreds of foreign seafarers have been stuck in the U.S., many for over a year and some for more than 18 months, as a result.

### **Failure of Current Security Agreement Policy to Protect Seafarers' Interests**

Security agreements often negatively affect seafarers, personally and professionally, during the course of a MARPOL investigation. At first glance, the terms of a security agreement do not appear to be overly burdensome, as seafarers are housed in hotels and receive full wages and per diem payments. In reality, it is an unpleasant experience at best — away from their homes, families and careers.

The seafarers are all foreign citizens, some with a limited ability to speak English. While these seafarers expected to be away from home for months at a time while sailing, their stays in the U.S. due to a security agreement — signed by the Coast Guard and the owner or operator, not the seafarers themselves — often far exceed the length of a standard contract. Not to mention that some seafarers are disembarked at or near the end of their contracts, substantially extending their time away from home.

They often miss significant life events — marriages, deaths and even the births of their own children. Their career progression may be seriously delayed — to the point where some cadets who have been involved in MARPOL investigations choose not to continue pursuing a career in shipping. And, the longer

seafarers remain in the U.S., the more substantial the impact — on their physical and mental health and that of their families back home.

Without any limitation on the duration of security agreements, many DOJ investigations have dragged on to the detriment of seafarers, as there is no incentive or requirement for the DOJ to expedite the investigation. The length of time that seafarers are required to remain in the U.S. pursuant to a security agreement may vary depending on numerous factors, such as the level of their involvement in the alleged misconduct, and the discretion of the individual prosecutor and his or her assessment of whether the information a particular seafarer can provide is material to the investigation.

Some seafarers may be released early, but many are kept in the U.S. for the duration of the investigation regardless, including until a plea agreement is signed, or a trial is held. And some may go to jail even after being "voluntarily" detained in the U.S. for more than a year.

Recent MARPOL cases have extended far beyond the prior Coast Guard 120-day policy, with many seafarers remaining in the U.S. much longer. Publicly available information reveals that, between 2010 and 2023, the time between the date of the Coast Guard's initial MARPOL examination and the date on which a plea agreement was entered or an indictment was returned averaged approximately 265 days.

The estimated average days elapsed jumps to about 300 days per case for cases in the last 10 years. Recall too, many cases involve eight to 10 crew members being detained for these periods of time, and we are aware of examples where seafarers remained in the U.S. for well over 500 days.

The length of required stays in the U.S. has expanded without any attendant protections and little consideration for seafarers' welfare. The Coast Guard has the authority and responsibility to define the terms of security agreements, but little power to expedite an investigation — as required by the security agreement — because the DOJ has discretion to determine a seafarer's importance to the investigation, and thus how long the seafarer must remain in the U.S.

And, while the Coast Guard can oversee seafarer well-being during the investigation, it must do better — not only does Coast Guard policy fail to limit the duration of seafarers' stays in the U.S., its involvement during the pendency of a security agreement typically only involves doing a check-in on the seafarers if there is a complaint.

This leaves seafarers adrift without a safety net. Shipowners and operators pay for housing, wages and per diem, but there is nothing these companies can do to remedy missed life events, career delays, and the mental and physical health impacts of the de facto confinement imposed by a security agreement. Indeed, a seafarer's only option is to have his lawyer demand the return of his passport, a decision likely to prompt a negative response from the prosecutor, and result in the issuance of a material witness warrant and, potentially, his detention under more onerous conditions.

### **Reinstating a Reasonable Time Limitation To Balance Legitimate Enforcement Interests and Seafarer Welfare**

The Coast Guard's security agreement policy requires an urgent change. The U.S. government undoubtedly has a legitimate interest in investigating potential crimes; however, concerns regarding seafarer welfare warrant the reintroduction of a time limitation as a mandatory condition of security agreements.

While 120 days may be too short a time limit, 180 days is an entirely reasonable time period for the DOJ to conduct interviews, issue subpoenas for documents and compel grand jury testimony, if needed.

MARPOL cases are not factually complex usually and do not warrant investigations that stretch on for a year or more. In most cases, the underlying misconduct lasted only a short time period and key facts are obtained during the Coast Guard's expanded MARPOL examination — before a security agreement is even entered into.

Most material facts likely either were relayed by a whistleblower who provided the Coast Guard with photo and video evidence at the outset of the case or can be ascertained by the evidence the Coast Guard collected during its onboard investigation. Plus, if an owner or operator fails to comply with a grand jury subpoena or a witness resists testifying, the DOJ can move a court to compel production of documents or testimony.

There is no reason the government cannot utilize its investigative tools efficiently, within a six-month period, to assess the merits of a case and the necessity of particular seafarers to remain in the U.S. for extended periods of time. In the unusual case that may require more than six months to complete the investigation, the DOJ has the full range of other statutory authorities, relied upon by every other federal prosecutor, to complete its investigation.

It is long overdue for Coast Guard leadership to step in, reimpose a reasonable time limit in security agreements and protect the rights of foreign seafarers who have little to no leverage in these cases. To do otherwise would continue to inflict an enormous injustice on scores of innocent seafarers every year. A 180-day limitation achieves this goal and strikes an appropriate balance of interests.

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