

March 1993

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Greg Shelton, *The United States Coast Guard's Law Enforcement Authority Under 14 U.S.C. § 89: Smugglers' Blues or Boaters' Nightmare?*, 34 Wm. & Mary L. Rev. 933 (1993), <https://scholarship.law.wm.edu/wmlr/vol34/iss3/10>

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THE UNITED STATES COAST GUARD'S LAW
ENFORCEMENT AUTHORITY UNDER 14 U.S.C. § 89:
SMUGGLERS' BLUES OR BOATERS' NIGHTMARE?

The Coast Guard is our ocean and border water police and patrol force. If that service is not empowered to enforce the laws of the United States along our shores and in boundary waters, those laws are unenforcible [sic], since there is no other agency of this Government equipped to enforce them.¹

As President Bush hosted the leaders of several Latin American countries at a "Drug Summit" in early 1992, many people were questioning whether the enforcement of our nation's drug laws was making any difference.² Drug-related violence in our streets continues to escalate as the government spends ever-increasing sums in an attempt to stem the flow of illegal drugs into our country.³ South American source countries ask for increased aid from the United States in what has become almost an auction of these nations' attitudes toward illegal drugs.⁴ Demand reduction in America remains an illusive goal; indeed, this demand has already spawned development of new and more potent forms of previously known drugs.⁵

In the midst of this uncertainty regarding our national drug policy, one bright spot has been relatively constant. Since the Coast

1. 80 CONG. REC. 9166 (1936) (letter from C.M. Hester, Assistant General Counsel, Treasury Dept., to Sen. Copeland) (advocating passage of a bill to define the jurisdiction of the Coast Guard); see *infra* notes 134-39 and accompanying text for a full discussion of this bill.

2. Douglas Farah & Michael Isikoff, 'Drug Summit' to Convene as Supply Surges, WASH. POST, Feb. 25, 1992, at A1.

3. See Justin E. Fernandez, *Drug Illegality Is Bad Public Policy: The Other End of the Chain*, 23 U. WEST L.A. L. REV. 151 (1992); Karen A. Klocke, *Drug-Related Crime and Addicted Offenders: A Proposed Response*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 639 (1991).

4. See *The Drug Summit in Cartagena, Colombia: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong., 2d Sess. (1990); William R. Long, *Changing Lifestyles: 'Coca' Habit Hard to Break*, L.A. TIMES, Apr. 7, 1992, at 6.

5. Crack is a recently developed derivative form of cocaine. Another derivative has also appeared: ice, a smokeable form of methamphetamine, better known as "speed." *The Menace of Ice*, TIME, Sept. 18, 1989, at 28.

Guard entered the drug war almost two decades ago, the street value of drugs seized by the service has far surpassed government spending to support the agency in its law enforcement efforts.⁶

The Coast Guard is unique among United States armed forces in many ways. Among other distinguishing factors, it is the smallest of the five services⁷ and is the only armed service given responsibility and authority for direct law enforcement action.⁸ Not surpris-

6. The Coast Guard seizes approximately \$1.83 billion in illicit drugs annually. *FY 93 Budget*, U.S.C.G. COMMANDANT'S BULL., Nov. 1992, at 30, 31. The Coast Guard's 1993 budget for the enforcement of laws and treaties, which includes drug interdiction efforts, is \$1.01 billion. *Id.* Maritime seizure records continue to be set. In separate boardings in July 1991, Coast Guard units accomplished the largest single seizure of hashish and the third largest seizure of cocaine in U.S. history. These seizures netted over 70 tons of hashish and over 10,000 pounds of cocaine. See M.W. Linehan, *CGC Adak Seizes Drug Record*, U.S.C.G. COMMANDANT'S BULL., Sept. 1991, at 3; John Moss, *D14 Scores Huge Hash Bust*, U.S.C.G. COMMANDANT'S BULL., Sept. 1991, at 2.

Drug interdiction is but one mission of the Coast Guard. The other primary mission areas are: search and rescue, fishery law enforcement, aids to navigation, boating safety, marine environmental protection, commercial vessel safety, and bridge administration. See *Future of the United States Coast Guard: Hearing Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 2d Sess. 30 (1990)[*hereinafter CG Future Hearings*] (background memorandum).

7. As of October 1, 1991, Coast Guard active duty strength was approximately 38,000 personnel. *1992 U.S. Coast Guard Overview*, U.S.C.G. COMMANDANT'S BULL., Oct. 1991, at 1, 10-11 [*hereinafter Overview*]. By comparison, the next smallest service is the Marine Corps, with an authorized strength of 193,735. *Department of Defense Authorization for Appropriations for Fiscal Years 1992 and 1993: Hearings on S.1507 Before the Senate Comm. on Armed Services*, 102d Cong., 1st Sess., pt. 2, at 30 (1991) (testimony of General A.M. Gray, Commandant, U.S. Marine Corps).

8. The responsibilities of the Coast Guard, including its law enforcement duties, are outlined by statute:

Primary Duties

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research of the high

ingly, the Coast Guard considers itself "the nation's premier maritime law enforcement agency"⁹ It is firmly committed to continuing the "drug war" in the maritime area¹⁰ and, accordingly, drug interdiction is the most significant Coast Guard mission in terms of effort dedicated and money spent.¹¹ A broad grant of enforcement authority from Congress coupled with an equally broad deference by the judiciary to the use of that power has facilitated this commitment. Congress provided its principal support of Coast Guard law enforcement almost half a century ago, with a statute that has not required amendment to meet modern exigencies.¹²

seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities.

14 U.S.C. § 2 (1988). Congress recently designated the Department of Defense as the lead agency of the federal government for intelligence gathering and detection of drug smuggling. See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1004, 104 Stat. 1629 (1990), as amended by Pub. L. No. 102-190, § 1088, 105 Stat. 1484 (1991). The Coast Guard is the only armed service with arrest authority. See 10 U.S.C. § 375 (Supp. III 1991) ("Restriction on direct participation by military personnel").

9. See *CG Future Hearings*, supra note 6, at 41 (statement of Admiral J. William Kline, Commandant, U.S. Coast Guard). This expertise at stopping and boarding vessels was put to the test in the Persian Gulf during operations Desert Shield and Desert Storm, as Coast Guard boarding teams working from Navy ships conducted the majority of boardings to enforce the United Nations embargo against trade with Iraq. See John M. Broder & Paul Houston, *Iraqi Ship Is Seized by U.S., Cargo Diverted*, L.A. TIMES, Sept. 5, 1990, at 1; William P. Coughlin, *Gaps Seen in Iraq Blockade; Boarding Officer Cites Sampling*, BOSTON GLOBE, Nov. 22, 1990, at A7. The concept of Coast Guard personnel conducting operations from Navy warships was implemented in 1986 as an added method of increasing maritime drug interdiction efforts. See 10 U.S.C. § 379 (1988).

10. *CG Future Hearings*, supra note 6, at 7. This concentration on drug law enforcement is mandated, to a great degree, by Congress in the budget process. Recent Coast Guard budgets have included minimum spending requirements for this mission. See *Nomination, USCG: Hearing on Nominations Before the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 34 (1990) [hereinafter *Nomination Hearing*] (prehearing answers to questions, prepared by Rear Admiral M.H. Danell, nominee as Vice Commandant, U.S. Coast Guard).

11. *CG Future Hearings*, supra note 6, at 7 (statement of Admiral J. William Kline); see also *Department of Transportation and Related Agencies Appropriations for 1991: Hearings Before the Subcomm. on the Department of Transportation and Related Agencies of the House Comm. on Appropriations*, 101st Cong., 2d Sess. 395, 426 (1990) [hereinafter *1991 Budget Hearings*] (testimony of Admiral Paul A. Yost, Jr., Commandant, U.S. Coast Guard) (stating that 26% to 27% of Coast Guard operations are related to drug interdiction, compared to about 10% 10 to 15 years ago); *Overview*, supra note 7, at 27 (detailing the missions, personnel, and budget of the Coast Guard for 1992).

12. See *infra* notes 134-39 and accompanying text.

The courts, however, have fully endorsed unfettered authority for the agency's law enforcement mission only during the last two decades as a perceived need for this wide latitude arose in the context of halting the flood of illegal drugs from South America.¹³

The Coast Guard's effectiveness in preventing the importation of illegal drugs into the United States has not come without a price.¹⁴ Beyond the huge sums the federal government has spent on the drug war,¹⁵ vessel owners must accept as part of the "cost" of enjoying waterborne business or recreation the possibility that the Coast Guard may stop and board their boats at any time.¹⁶ For the recreational boater who already faces pervasive regulations¹⁷ that require him to carry certain expensive equipment in order to enjoy his leisure time aboard a vessel which itself requires a substantial investment, the appearance of a Coast Guard law enforcement team is particularly disturbing.¹⁸

Americans are confronted regularly by law enforcement officers both on our nation's roads and on our waterways. The legal rules governing the enforcement officers' authority to make an initial stop in these two places, however, are quite different. The highway patrol or local police officer is governed by the reasonable suspicion requirement which the Supreme Court announced in *Delaware v.*

13. See *infra* notes 142-317 and accompanying text.

14. As concern with the drug problem has grown, Congress has reacted by granting successively broader enforcement powers to various federal agencies. These expansions are of questionable constitutionality and may violate international law as well. See Mary B. Neumayr, Note, *Maritime Drug Law Enforcement Act: An Analysis*, 11 HASTINGS INT'L & COMP. L. REV. 487 (1988); Jeffrey D. Stieb, Paper, *Survey of United States Jurisdiction Over High Seas Narcotics Trafficking*, 19 GA. J. INT'L & COMP. L. 119 (1989); Michael Touseley, Note, *United States Seizure of Stateless Drug Smuggling Vessels on the High Seas: Is It Legal?*, 22 CASE W. RES. J. INT'L L. 375 (1990).

15. The Pentagon's drug war budget almost tripled from 1989 to 1992, rising from \$439 million in 1989 to approximately \$1.2 billion in 1992. See Charles Lane et al., *The Newest War*, NEWSWEEK, Jan. 6, 1992, at 18, 19.

16. See 14 U.S.C. § 89(a) (1988); *infra* notes 20-22 and accompanying text; see also Arthur S. Hayes, *Searches for Drugs Roil Boaters*, WALL ST. J., April 30, 1990, at B1, B4 (discussing the increasingly intrusive nature of Coast Guard and Customs Service boardings of pleasure vessels).

17. See, e.g., 33 C.F.R. §§ 155, 159, 173, 175 (1991); 46 C.F.R. § 25 (1991).

18. See *infra* notes 356-63 and accompanying text.

Prouse.¹⁹ In contrast, Coast Guard boarding officers are not similarly restricted under 14 U.S.C. § 89, which provides broad authority for stopping vessels subject to United States jurisdiction.²⁰ Ironically, the expansion of the scope of Coast Guard authority occurred roughly parallel with a judicially engineered contraction of the discretion allowed land-based enforcement officers.²¹ This broad authority is obviously very useful to the Coast Guard in detecting and interdicting the smuggling of illegal drugs into the

19. 440 U.S. 648, 663 (1979) (holding that under the Fourth Amendment's reasonable search and seizure requirements, police may stop a motorist only if they have an "articulable and reasonable suspicion" that the motorist is in violation of a law).

20. The statute provides:

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of 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. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

14 U.S.C. § 89.

21. See *infra* note 333.

United States.²² In terms of enforcement power, Coast Guard boarding officers are clearly America's "supercops."

This Note examines the Coast Guard's law enforcement authority under 14 U.S.C. § 89 and the rationale for this authority. First, it reviews the history of the statute and analyzes cases from the Prohibition era and their applicability to modern drug smuggling cases. Second, the Note discusses the judicial treatment of section 89 during the current "drug war" by looking at Supreme Court decisions such as *Delaware v. Prouse* that have interpreted law enforcement powers under the Fourth Amendment. Finally, it considers changes in Coast Guard policy and operations within the authority of 14 U.S.C. § 89 and presents suggestions for future policies.

DEVELOPMENT OF 14 U.S.C. § 89

Early History

In 1790, the first Congress of the United States created the Revenue Cutter Service, the forerunner of the Coast Guard.²³ At that time, the government sought to generate revenue to pay the country's debt²⁴ by imposing duties, or tariffs, on goods imported into

22. This authority is also supplemented by other statutory provisions. For example, § 143 of 14 U.S.C. provides:

Commissioned, warrant, and petty officers of the Coast Guard are deemed to be officers of the customs and when so acting shall, insofar as performance of the duties relating to customs laws are concerned, be subject to regulations issued by the Secretary of the Treasury governing officers of the customs.

14 U.S.C. § 143; see also *United States v. Green*, 671 F.2d 46, 51-52 (1st Cir.) (holding that Coast Guard officers are empowered to stop and board vessels with Customs authority under 19 U.S.C. §§ 1401(i), 1581(a), 1587(a)), *cert. denied*, 457 U.S. 1135 (1982); *United States v. Guillen-Linares*, 636 F.2d 78 (5th Cir. 1981) (holding that Customs regulations apply when Coast Guard personnel act as agents of the Customs).

23. See Act of Aug. 4, 1790, ch. 35, 1 Stat. 145, 164-65, 175 (repealed 1799); IRVING H. KING, *GEORGE WASHINGTON'S COAST GUARD* 16-17 (1978). The legislative history of the early sessions of Congress is limited, in part because the Senate sat in closed session from the beginning of the first Congress in 1789 until February 20, 1794. 1 *ANNALS OF CONG.* 15 (Joseph Gales ed., 1789).

24. See Act of Aug. 4, 1790, ch. 34, 1 Stat. 138, 138 ("An Act making provision for the [payment of the] Debt of the United States") (alteration in original).

the United States.²⁵ Congress implemented a program of duties on various goods in 1789;²⁶ however, because no organization existed to enforce the law at sea, smugglers easily evaded payment of these duties.²⁷ In order to provide for the effective collection of the customs tariffs, Congress included very generous enforcement provisions in the statute creating the Revenue Cutter Service:

[I]t shall be lawful for all collectors, and the officers of the revenue cutters herein after mentioned, to go on board of ships or vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels; and the said officers respectively shall have free access to the cabin, and every other part of a ship or vessel²⁸

The act also established officers of the Revenue Cutter Service as officers of the Customs, with appropriate enforcement authority similar to that described above.²⁹

In order to strengthen commerce, Congress also required vessels to register in the United States before they could be used in fisheries and waterborne trade among the states.³⁰ The Revenue Cutter Service quickly proved an effective mechanism of the new government. As a result of its enforcement of the customs laws, the na-

25. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827) (discussing the need for regulation of foreign commerce in the pre-Constitution period as a factor in the establishment of the new government).

26. Act of July 4, 1789, ch. 2, 1 Stat. 24.

27. See KING, *supra* note 23, at 12-15. See generally James S. Carmichael, Comment, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51 (1977) (detailing the development of both statutory and case law empowering the Coast Guard to utilize searches and seizures of vessels at sea pursuant to its law enforcement power).

28. Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. at 164. A "league" is a measure of distance generally equal to three statute miles. BLACK'S LAW DICTIONARY 889 (6th ed. 1990). The Revenue Cutter Service's authority therefore extended to 12 miles offshore, which is also the extent of the current United States Territorial Sea. See Proclamation No. 5928, 3 C.F.R. § 547 (1989).

29. Act of Aug. 4, 1790, ch. 35, § 64, 1 Stat. at 175.

30. See Act of Feb. 18, 1793, ch. 8, 1 Stat. 305, 305 ("An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."). The Revenue Cutter Service was given enforcement authority within this statute to detect "any breach of the laws of the United States." *Id.* § 27, 1 Stat. at 315.

tion's foreign debt was eliminated by 1796.³¹ In 1794, Congress added to the duties of the Service the responsibility of enforcing prohibitions against American involvement in the slave trade.³² The 1790 Act was superseded and repealed in 1799 by a new act³³ that left the enforcement authority of the Service essentially unchanged.³⁴

As relationships with England deteriorated in advance of the War of 1812, Congress enacted laws prohibiting trade with the British Empire.³⁵ The revenue cutters actively enforced these laws, seizing several vessels that were of British registry or had British cargo.³⁶ After the war, Congress acted to protect and promote American shipping by closing U.S. ports to British ships sailing from ports in England or the British colonies.³⁷ The revenue cutters continued previous enforcement efforts under the new law.³⁸

Congress strengthened the American stance against the importation of slaves in 1800³⁹ and 1818,⁴⁰ and the Revenue Cutter Service

31. HOWARD W. BLOOMFIELD, *THE COMPACT HISTORY OF THE UNITED STATES COAST GUARD* 11 (1966).

32. *See id.* at 17; KING, *supra* note 23, at 118.

33. *See* Act of Mar. 2, 1799, ch. 22, § 112, 1 Stat. 627, 704.

34. *See id.* §§ 97-102, 1 Stat. at 699-700; *see also* Church v. Hubbard, 6 U.S. (2 Cranch) 187, 235-36 (1804) (discussing the 1799 Act in the context of the right of nations under international law to enact trade regulations and enforce them by stopping and boarding vessels). In *Church*, the court stated that

it never was contended, that it could only be exercised within the range of the cannon from their [shore] batteries. Indeed, the right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that, in the opinion of the American government, no such principle as that contended for has a real existence.

Id. The 1799 Act also authorized construction of up to 10 new cutters for the service. Ch. 22, § 97, 1 Stat. at 699. Other provisions of the Act allowed the President to assign the revenue cutters to the Navy, *id.* § 98, 1 Stat. at 699-700 (repealed 1933), and provided for a distinct ensign and pendant to mark revenue cutters. *Id.* § 102, 1 Stat. at 700.

35. *See* Act of Mar. 2, 1811, ch. 29, 2 Stat. 651; Act of May 1, 1810, ch. 39, 2 Stat. 605; Act of June 28, 1809, ch. 9, 2 Stat. 550; Act of Mar. 1, 1809, ch. 24, 2 Stat. 528.

36. *See* *The Ann*, 13 U.S. (9 Cranch) 289 (1815) (involving a vessel seized for carrying British cargo with the intent of importing it into the United States); *The Fanny's Cargo*, 13 U.S. (9 Cranch) 181 (1815) (involving a vessel seized for attempting to import cargo from Great Britain); *The Brig Penobscot v. United States*, 11 U.S. (7 Cranch) 356 (1813) (involving a vessel seized for importing salt from Antigua into Savannah).

37. Act of Apr. 18, 1818, ch. 70, 3 Stat. 432 (repealed 1830).

38. *See* *The Frances and Eliza*, 21 U.S. (8 Wheat.) 398 (1823).

39. Slave Trade Act, ch. 51, 2 Stat. 70 (1800).

40. Slave Trade Act, ch. 91, 3 Stat. 450 (1818).

enforced these laws zealously⁴¹ However, one seizure of a slave vessel resulted in a judicially determined limit to the cutters' authority to conduct searches and seizures.⁴² In this case, a Spanish vessel, the *Antelope*, was found with a cargo of slaves on the high seas (further than twelve miles from shore) off the coast of the United States and was seized for violation of the Slave Trade Acts.⁴³ The Supreme Court, noting that Spain had not outlawed the slave trade, ruled that the visit and seizure of the *Antelope* was illegal.⁴⁴ The Court indicated that the seizure would have been upheld if the vessel had entered United States waters and thereby violated our law, but its language was not unequivocal:

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say in this Court, that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The Courts of no country execute the penal laws of another; and the course of the American government on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors.⁴⁵

The following year the Court decided a case involving undertones of piracy but only briefly addressed this uncertainty in the scope of the revenue cutters' authority to stop and search vessels.⁴⁶ In that case, a U.S. vessel approached the *Marianna Flora*, a vessel of Portuguese registry, which then fired on the American ship, mistaking it for a pirate ship.⁴⁷ The *Marianna Flora* was seized and brought into port for "piratical aggression" against the American ship.⁴⁸ The Court first emphasized that no unconditional right of visitation or search existed to enable the enforcement of American

41. See *The Slavers*, 69 U.S. (2 Wall.) 350, 350 (1864) (involving a vessel seized by the revenue cutter *Harriet Lane* because it was equipped and prepared for the purpose of slave trading); *The Merino*, 22 U.S. (9 Wheat.) 391, 393-94 (1824).

42. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

43. *Id.* at 68.

44. *Id.* at 122.

45. *Id.* at 122-23.

46. *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826).

47. *Id.* at 5-6.

48. *Id.* at 6.

law⁴⁹ However, recognition of the right to "approach any vessels descried at sea, for the purpose of ascertaining their real characters" has minimized this restriction.⁵⁰ Ultimately, the Court ruled that the seizure of the *Marianna Flora* was a lawful exercise of this right.⁵¹

In 1866 Congress passed "[a]n Act further to prevent smuggling and for other Purposes."⁵² The Act did not repeal the 1799 Act,⁵³ but many of its sections supplemented or superseded the parallel provisions in the earlier law. For example, the authority of customs officers, including revenue cutter officers, was defined in terms similar to the previous enactments.⁵⁴ Significantly, the new law omitted one critical term. Previously, the authority to stop and board for revenue enforcement had been expressly limited to ships within the United States or "within four leagues of the coast thereof."⁵⁵ The Act of 1866 omitted this geographic reference and expanded the enforcement authority to cover "any breach or violation of the laws of the United States."⁵⁶ Officers were also authorized to arrest persons who violated the law;⁵⁷ previous sanctions had limited authorized action to seizure and possible forfeiture of the vessel.⁵⁸

The Coast Guard received its present name in 1915 when the Revenue Cutter Service was combined with the Life-Saving Service to form a new agency.⁵⁹ The new name had no effect on the law

49. *Id.* at 42 ("The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.").

50. *Id.* at 43.

51. *Id.* at 58.

52. Act of July 18, 1866, ch. 201, 14 Stat. 178 (repealed 1922). The primary purpose of the statute was to update the antismuggling laws to account for new territories created during this country's westward expansion. See CONG. GLOBE, 39th Cong., 1st Sess. 3419 (1866).

53. Act of Mar. 2, 1799, ch. 22, 1 Stat. 627.

54. Act of July 18, 1866, § 2, 14 Stat. at 178.

55. Act of Mar. 2, 1799, § 99, 1 Stat. at 700.

56. Act of July 18, 1866, § 2, 14 Stat. at 178. This was not an omission by oversight; Congress believed that greater authority was required in order to police the frontiers and control rampant smuggling. See CONG. GLOBE, 39th Cong., 1st Sess. 3419, 3440-41 (1866). An amendment to the bill that would have required suspicion of wrongdoing before stopping a vessel was defeated in the House by a vote of 59 to 35. *Id.* at 3440-41, 3443.

57. Act of July 18, 1866, § 2, 14 Stat. at 178.

58. See Act of Mar. 2, 1799, § 70, 1 Stat. at 678; Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315.

59. Act of Jan. 28, 1915, ch. 20, 38 Stat. 800. The Life-Saving Service was created by the Act of June 18, 1878, ch. 265, 20 Stat. 163. The principal purpose of the 1915 statute was to

enforcement power of the organization, as the Act expressly continued the applicability of preexisting statutes and directed that “[a]ll duties now performed by the Revenue-Cutter Service and Life-Saving Service shall continue to be performed by the Coast Guard.”⁶⁰ These duties would thrust the Coast Guard into the center of a contentious “war” in very short order.

The Prohibition Era

The Eighteenth Amendment, ratified on January 16, 1919,⁶¹ prohibited “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes.”⁶² The Amendment granted Congress and the states authority to enforce its prohibition on alcohol by “appropriate legislation.”⁶³ Accordingly, Congress enacted the National Prohibition Act⁶⁴ with a powerful enforcement mechanism.⁶⁵ The effects of the amendment on the law enforcement and criminal justice systems of the United States were profound.⁶⁶

bring the personnel of the Life-Saving Service under the pension system available to the Revenue Cutter Service. *See* 52 CONG. REC. 1949-78 (1915). As a result of the merging of the two services, in 1915 the Coast Guard consisted of 25 seagoing ships, 19 harbor tugs and launches, 279 Coast Guard stations, and 4,093 active duty personnel. *Id.* at 1952.

60. Act of Jan. 28, 1915, § 2, 38 Stat. at 801.

61. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

62. *Id.* § 1.

63. *Id.* § 2.

64. National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (repealed in part 1934).

65. Section 26 of title 2 of the Act provided:

When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.

Id. § 26, 41 Stat. at 315.

66. As one judge noted, “[V]iolators apprehended run into the thousands in this district alone, and there is every reason to believe that only a very small percentage of those who violate the law are caught and charged.” *United States v. Ford*, 3 F.2d 643, 643 (S.D. Cal. 1925). Furthermore, in the judge’s words, “[I]t [was] not too much to say that the traffic in illicit liquor [was] the nursery of crime of every description.” *Id.* at 644; *see* *Maul v. United*

Parallels to the current situation, which has resulted from the illegal trade in drugs rather than alcohol, are striking and undeniable. For example, the smuggling techniques then and now include use of foreign "motherships,"⁶⁷ bribery of enforcement officials, and random violence.⁶⁸ Furthermore, several Coast Guardsmen were killed in the line of duty during Prohibition;⁶⁹ fortunately as yet, no Coast Guardsman has lost his life in the drug war as a direct result of a smuggler's actions, but the danger involved is comparable.⁷⁰ Ultimately, the legalization of alcohol ended Prohibition. Today, as victory in the war on drugs remains elusive despite increased costs,⁷¹ the advocates of legalization or decriminalization of drugs gain new members. Most importantly, the Prohibition cases represented the first major judicial treatment of Fourth Amendment search and seizure issues in the maritime setting and provided the basis for much of the reasoning of courts adjudicating drug smuggling cases today.⁷²

Congress enacted another revenue statute in 1922 to regulate foreign commerce, repealing the 1866 statute.⁷³ The 1922 statute was significant because Congress reintroduced the restriction on boardings to within four leagues of the coast of the United States⁷⁴ and also provided procedural guidelines for procuring search war-

States, 274 U.S. 501, 526 n.30 (1927) (Brandeis, J., concurring) (stating in reference to Coast Guard law enforcement efforts during Prohibition: "In 1919, the aggregate of vessels boarded was 2,005; in 1922, 31,653; in 1925, 53,080. The number of vessels seized or reported for violations of law increased from 601 in 1919 to 1,887 in 1925.").

67. See Edward H. Lueckenhoff, Note, *Free Navigation: Examination of Recent Actions of the United States Coast Guard*, 13 VAND. J. TRANSNAT'L L. 141, 141-42 (1980) (describing the "mothership" technique); *infra* note 89 and accompanying text.

68. See generally HAROLD WATERS, *SMUGGLERS OF SPIRITS: PROHIBITION AND THE COAST GUARD PATROL* (1971) (providing accounts of the "rum wars" from a Coast Guardsman who served during Prohibition).

69. See BLOOMFIELD, *supra* note 31, at 149-50.

70. In August 1990, four Coast Guard aviators were killed when their E2C radar plane crashed short of the runway at Roosevelt Roads, Puerto Rico on its return from a drug smuggling surveillance mission. *Coast Guard Plane Crash Kills 4 on Drug Patrol*, MIAMI HERALD, Aug. 25, 1990, at 5A.

71. See STEVEN WISOTSKY, *BREAKING THE IMPASSE IN THE WAR ON DRUGS* 1-3, 90-115 (1986).

72. See *infra* notes 76-133 and accompanying text.

73. Act of Sept. 21, 1922, ch. 356, 42 Stat. 858 (repealing Act of July 18, 1866, ch. 201, 14 Stat. 178).

74. *Id.* § 581, 42 Stat. at 979.

rants when an enforcement officer suspected that merchandise for which duties had not been paid was stored in a house, store, or other building.⁷⁵ The statute made no mention, however, of search warrants for vessels. In light of these two sections, Congress clearly did not require warrants for searches of vessels located within four leagues of the coast. The subject of warrantless searches, as might be expected, soon received much attention from the courts.

An early case, *Carroll v. United States*,⁷⁶ involved a stop and search not of a ship, but of an automobile transporting alcoholic beverages in violation of the National Prohibition Act.⁷⁷ Chief Justice Taft, writing for the Court, held that Congress, in enacting the National Prohibition Act, distinguished between searches of buildings or private dwellings and those of vehicles.⁷⁸ A warrant would be necessary to search a building or private dwelling, but not to search a vehicle.⁷⁹ The Court derived this distinction from the Act and the legislative history of an amendment to the Act that provided for sanctions against an officer who searched a private dwelling without first obtaining a warrant.⁸⁰ The Court then found that such a distinction was consistent with the Fourth Amendment⁸¹ and was supported by the series of revenue and customs laws enacted since the formation of our constitutional government.⁸²

Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.⁸³

75. *Id.* § 595, 42 Stat. at 983.

76. 267 U.S. 132 (1925).

77. *Id.* at 134.

78. *Id.* at 147.

79. *Id.* at 146-47.

80. *Id.* at 144-47.

81. *Id.* at 149.

82. *Id.* at 149-52.

83. *Id.* at 151.

Among the early acts to which the Court referred for this justification were the Acts of 1790 and 1799 establishing and defining the authority of the Revenue Cutter Service.⁸⁴ In language that could arguably apply with equal force to vessels, the Court discussed when a warrantless search of a vehicle would be legal. The Court acknowledged that “[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”⁸⁵ Ultimately, the majority held that probable cause was required to justify a warrantless search of an automobile.⁸⁶ In dissent, Justice McReynolds agreed that the acts of the early Congresses authorized search and seizure upon mere suspicion, but contended that the National Prohibition Act did not confer such authority.⁸⁷

In *United States v. Ford*,⁸⁸ the seizure of a Canadian vessel located beyond the (three-mile) territorial sea of the United States but within the four-league (twelve-mile) area for violation of the National Prohibition Act presented the question of enforcement against foreign vessels. The vessel was charged with using what later became known as the “mothership” technique, whereby a large vessel carries a quantity of contraband to a point off the coast but outside territorial waters and transfers the contraband cargo to several smaller “contact” boats for transfer to shore.⁸⁹

84. *Id.* at 151; see *supra* notes 23-34 and accompanying text (discussing the 1790 and 1799 Acts).

85. *Carroll*, 267 U.S. at 153-54.

86. *Id.* at 158-59.

87. *Id.* at 166-67 (McReynolds, J., dissenting).

88. 3 F.2d 643, 643 (S.D. Cal. 1925).

89. *Id.* The reasoning underlying this tactic is simple: by using a number of small, hard-to-detect vessels for the final stage of the smuggling operation, the probability of most, if not all, of the contraband's reaching its intended market is increased. The limited enforcement resources could not interdict all of the contact boats, and the seizure of even half of the cargo still left the smugglers with an overall profit from the venture. Because of the enormous profit margins in illegal drugs, this technique was used extensively in the 1970s and early 1980s, but Coast Guard enforcement efforts shifted to interdicting the mothership far from the coast, and the technique is not used so widely today. See *Coast Guard Budget, Fiscal Year 1991: Hearing Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 2d Sess. 12 (1990) (statement of Admiral Paul A. Yost, Jr., Commandant, U.S. Coast Guard).

In response to this practice by British "motherships," the United States and Great Britain signed a treaty in which Britain granted blanket authority to the United States to board British vessels located at a distance off the coast that could be travelled by the vessel in an hour's steaming.⁹⁰ Naturally, legal disputes soon arose over whether a vessel had been within the one-hour steaming range when seized.⁹¹ *Ford* did not confront the court with such a dispute, but presented the question whether the treaty with England was necessary to allow seizure of the vessel in question.⁹² Without providing an exact answer to this question, the court noted that "[o]ur own legislation authorizes revenue cutters to visit vessels four leagues from the coast; and the acts of Congress on this subject are a clear expression of the opinion of our government that nothing in the law of nations prohibited them to confer such power on its cruisers."⁹³ The court also found that the Act of 1799 was virtually identical to the British Hovering Act, which established four leagues from the coast as the enforcement jurisdiction of British customs statutes.⁹⁴ "[B]oth of these statutes," the court stated, "have been declared repeatedly to be consistent with the law and usage of nations."⁹⁵ The court reasoned that "a general search on the high seas is a very different thing from a reasonable search at a reasonable distance from shore to prevent and punish foreigners for a violation of our laws and assistance to our own citizens in violating them"⁹⁶ and held the search and seizure lawful.⁹⁷

The exact extent of Coast Guard enforcement authority soon became the subject of disagreement among federal courts. A district

90. *Ford*, 3 F.2d at 644. An agreement entered into in 1981 between the United States and Great Britain is currently in force to address drug smuggling. Agreement to Facilitate the Interdiction of Vessels Suspected of Trafficking Drugs, Nov. 13, 1981, U.K.-U.S., T.I.A.S. No. 10296; see *United States v. Biermann*, 678 F. Supp. 1437, 1441-42 (N.D. Cal. 1988), *aff'd sub nom. United States v. Davis*, 905 F.2d 245 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 753 (1991); see also *Stieb*, *supra* note 14, at 140-41 (discussing the agreement).

91. See, e.g., *Cook v. United States*, 288 U.S. 102, 107-09 (1933) (dismissing charges emanating from the seizure of a vessel 11.5 miles from shore because the ship could travel a maximum of 10 miles per hour).

92. *Ford*, 3 F.2d at 644.

93. *Id.* at 646.

94. *Id.*

95. *Id.*

96. *Id.* at 648.

97. *Id.*

court in Texas addressed the question in a case involving an American vessel that had been stopped 19.5 miles offshore and seized after a cargo of assorted liquor was found aboard.⁹⁸ The defendants contended that the seizure was unlawful because it occurred beyond the legal enforcement area.⁹⁹ The court disagreed and pronounced an expansive theory of Coast Guard authority:

That the officers of a revenue cutter have the authority to seize and search a vessel within the territorial waters of the United States, where there is probable cause to suspect it is smuggling, or endeavoring to smuggle, goods into the United States, without warrant, is too clearly settled since the foundation of this government, both by statute and judicial decision, to admit of argument here. . . . That this right is as strong and vigorous outside of the territorial waters as inside those waters must also stand to reason, for the waters of the high seas belong as much to the United States as to any other nation, and the powers of the United States may be as well exercised there as in her own waters, subject only to diplomatic considerations.¹⁰⁰

A Massachusetts court in *United States v. Bentley*¹⁰¹ reached a different conclusion. In that case, a Coast Guard patrol seized a motorboat laden with liquor at a point greater than twelve miles offshore.¹⁰² The defendants sought to suppress the use of the motorboat or liquor as evidence.¹⁰³ The court referred to the case of *The Underwriter*,¹⁰⁴ and agreed that section 581 of the Tariff Act of 1922¹⁰⁵ limited the exercise of authority by Coast Guard officers to the waters within four leagues of the coast of the United States.¹⁰⁶ In concluding its opinion allowing the motion to sup-

98. *The Rosalie M.*, 4 F.2d 815, 816 (S.D. Tex. 1925), *aff'd*, 12 F.2d 1970 (5th Cir. 1926).

99. *Id.*

100. *Id.*

101. 12 F.2d 466 (D. Mass. 1926).

102. *Id.* at 466-67. The crew of the motorboat initially attempted to bribe the Coast Guard officers to permit the motorboat to retrieve illegal liquor from a nearby British schooner and return to the United States; the Coast Guard officers refused the bribe and seized the motorboat when it returned from the British vessel with the liquors. *Id.*

103. *Id.* at 467.

104. 6 F.2d 937 (D. Conn. 1925), *rev'd*, 13 F.2d 433 (2d Cir. 1926), *aff'd sub nom.* *Maul v. United States*, 274 U.S. 501 (1927).

105. Tariff Act of 1922, ch. 356, § 581, 42 Stat. 851, 979.

106. *Bentley*, 12 F.2d at 467.

press, the court summarized: “[M]y study has failed to reveal any legislation conferring upon revenue officers or officers of the Coast Guard authority to search and seize, except section 581 of the Tariff Act . . .”¹⁰⁷

The decision of the district court in *The Underwriter* reached the Supreme Court in 1927¹⁰⁸ in a case that would later have repercussions in the halls of Congress.¹⁰⁹ The case arose from the seizure of the tug *Underwriter* with 811 cases of whiskey aboard at a point thirty-four miles from shore.¹¹⁰ The district court held that “[n]owhere is there any authority vested in the Coast Guard to make a seizure beyond the 12-mile limit” and dismissed the action.¹¹¹ The Second Circuit reversed and reinstated the complaint.¹¹² The Supreme Court, in an opinion by Justice Van Devanter, held the seizure lawful and affirmed the circuit court.¹¹³

The Supreme Court traced the development of the Coast Guard’s search and seizure authority and implicitly agreed with the district court that section 581 of the Tariff Act of 1922 provided a limit to the area of exercise of the authority to board and search.¹¹⁴ Tracing the enactment and repeal of the revenue enforcement statutes, the Court found that a provision of the Act of March 2, 1799 was still effective.¹¹⁵ This provision contained no limiting language regarding the place of seizure.¹¹⁶ Therefore, the Court held that the seizure was legal if based upon violation of a revenue law.¹¹⁷ Because the vessel had engaged in a trade for which

107. *Id.*

108. *Maul v. United States*, 274 U.S. 501 (1927), *rev’g* *The Underwriter*, 6 F.2d 937 (D. Conn. 1925).

109. *See infra* note 135 and accompanying text (discussing the legislative history of the 1936 Act defining the jurisdiction of the Coast Guard).

110. *The Underwriter*, 6 F.2d at 937.

111. *Id.* at 940.

112. *The Underwriter*, 13 F.2d 433 (2d Cir. 1926), *aff’d sub nom.* *Maul v. United States*, 274 U.S. 501 (1927).

113. *Maul*, 274 U.S. at 512.

114. *Id.* at 504-07.

115. *Id.* at 504-05.

116. *Id.* at 505. This section provided: “It shall be the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue, as well without as within their respective districts.” *Id.* (quoting Revised Stat., tit. 34, ch. 10, § 3072 (1875) (original version with materially similar language at Act of Mar. 2, 1799, ch. 22, § 70, 1 Stat. 627, 678 (repealed 1935))).

117. *Id.* at 507-08.

she had no proper license, the requisite violation was present.¹¹⁸ The Court also reviewed the statutes and confirmed that Coast Guard officers were "officers of the customs" and therefore were authorized to make seizures for violations of the revenue acts.¹¹⁹

The logic of this opinion is somewhat troubling. The Act of 1799 on which the Court based its holding expressly restricted revenue cutter officers' boarding authority to the area within twelve miles of the coast.¹²⁰ Logically, the authority to board should be a prerequisite to the authority to seize. Arguably, Congress' failure to repeal or expressly to supersede this statute was an oversight.¹²¹ Finally, even though Congress may have power to provide search and seizure authority on the high sea, a restrictive reading is justified because Congress placed specific geographic limits in previous laws.¹²² It is reasonable to expect that Congress would have exercised its power explicitly

In a concurring opinion, Justice Brandeis criticized the reasoning of the majority: "As I read the statutes, they do not confer express authority, but the authority exists because it is to be implied as an incident of the police duties of ocean patrol which Congress has imposed upon the Coast Guard."¹²³ Brandeis believed a separate opinion was necessary because the majority opinion could be interpreted as restricting the Coast Guard's authority.¹²⁴ He then pro-

118. *Id.* at 508.

119. *Id.* at 509-10. In language very similar to that of the district court in *The Rosalie M.*, 4 F.2d 815, 816 (S.D. Tex. 1925), *aff'd*, 12 F.2d 1970 (5th Cir. 1926), the Court further explained the basis of its holding:

If Congress were without power to provide for the seizure of such vessels on the high sea, a restrictive construction might be justified. But there is no want of power in this regard. The high sea is common to all nations and foreign to none; and every nation having vessels there has power to regulate them and also to seize them for a violation of its laws.

Maul, 274 U.S. at 511.

120. Ch. 22, § 99, 1 Stat. at 700.

121. A look at the long list of laws repealed upon enactment of 14 U.S.C. § 89 reveals the possibility that one line item could have been unknowingly omitted. *See* Act of Aug. 4, 1949, ch. 393, § 20, 63 Stat. 495, 561-65.

122. *E.g.*, Tariff Act of 1922, ch. 356, § 581, 42 Stat. 851, 979; Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164.

123. *Maul*, 274 U.S. at 512 (Brandeis, J., concurring).

124. *Id.* at 513. Brandeis reasoned:

If the statutes are construed as granting to the Coast Guard express authority to make the seizure in question in order to protect the revenue, the authority

vided a brief history of the Coast Guard to emphasize the point that Congress and the Treasury had continually expanded the enforcement responsibility and authority of the service beyond the revenue laws.¹²⁵ His historical summary concluded with a policy argument:

If the officers of revenue cutters were without authority to seize American merchant vessels found violating our laws on the high seas beyond the twelve-mile limit, or to seize such vessels found there which are known theretofore to have violated our laws without or within those limits, many offenses against our laws might, to that extent, be committed with impunity. For clearly no other arm of the Government possesses such authority.¹²⁶

Once the Court had pierced the twelve-mile enforcement veil, the stage was set, not only for the remainder of Prohibition, but also for the drug war of today. The expansion of enforcement authority in *Maul* had immediate impact and remains significant today. An example of its immediate impact was the case of *United States v. Lee*,¹²⁷ decided the same day as *Maul*, which involved the seizure of a motor boat located alongside a schooner twenty-four miles offshore in an area known as "Rum Row."¹²⁸ When a searchlight from the Coast Guard patrol boat shone on the motorboat, officers could see several cans of liquor.¹²⁹ The First Circuit held the visit and search and seizure illegal because they were conducted more than twelve miles from the coast.¹³⁰ The Supreme Court reversed, referring to its holding in *Maul* for Coast Guard authority to seize a vessel beyond the twelve mile limit.¹³¹ From *Maul*, the Court was able to derive the Coast Guard's authority to board and search a vessel when there was probable cause to believe

so granted is obviously very narrow, and the express grant may possibly be read as exhausting the authority conferred beyond the twelve-mile limit; in other words, as showing that no implied authority is conferred.

Id.

125. *Id.* at 514-17.

126. *Id.* at 520.

127. 274 U.S. 559 (1927).

128. *Id.* at 560.

129. *Id.* at 560-61.

130. *Lee v. United States*, 14 F.2d 400, 405 (1st Cir. 1926), *rev'd*, 274 U.S. 559 (1927).

131. *Lee*, 274 U.S. at 562.

a violation of law was occurring.¹³² The Court stated that when probable cause is present, "search and seizure of the vessel, and arrest of the persons thereon, by the Coast Guard on the high seas is lawful, as like search and seizure of an automobile, and arrest of the persons therein, by prohibition officers on land is lawful."¹³³

Fine-tuning the Statute

In response to the Supreme Court's decision in *Maul*, Congress in 1936 enacted the substantive provisions of what would become 14 U.S.C. § 89.¹³⁴ The statute did not expand the Coast Guard's authority, but the Treasury Department desired passage of the bill in order to define clearly the jurisdiction and authority of the Coast Guard.¹³⁵ Final enactment and codification of Title 14 of the United States Code, entitled "Coast Guard," was accomplished 159 years after the creation of the Coast Guard.¹³⁶ Congress avoided any significant changes from the earlier law,¹³⁷ and the section has

132. *Id.*

133. *Id.* at 563.

134. Act of June 22, 1936, ch. 705, 49 Stat. 1820 (codified as amended at 14 U.S.C. § 89 (1988)); see H.R. REP. NO. 2452, 74th Cong., 2d Sess. 2 (1936) ("The occasion for this bill arises out of the decision of the Supreme Court of the United States on May 31, 1927, in the cause of *Maul v. United States*.").

135. See 80 CONG. REC. 9165-66 (1936). In support of the bill, the Assistant General Counsel of the Treasury Department explained:

The bill does not enlarge the present authority of the Coast Guard but merely reaffirms the jurisdiction which it has been exercising for many years. Today it is enforcing all of the laws which this bill would authorize it to enforce. Its present authority is general, however, and this bill is necessary because of the Supreme Court decision holding that the Coast Guard must have specific authority to enforce the laws of the United States. The Coast Guard is our ocean and border water police and patrol force. If that service is not empowered to enforce the laws of the United States along our shores and in boundary waters, those laws are unenforcible [sic], since there is no other agency of this Government equipped to enforce them.

Id. at 9166 (letter from C.M. Hester, Assistant General Counsel, Treasury Dept., to Sen. Copeland).

136. Act of Aug. 4, 1949, ch. 393, 63 Stat. 495, 502.

137. See 95 CONG. REC. 10,210 (1949) (statement of Sen. O'Connor) ("In our preparation of the bill, it was our intention, and we carried it through, to make no substantive changes at all in the law. Our every effort in conjunction with the House committee was merely to revise and codify the preexisting law.").

remained intact,¹³⁸ with the exception of the removal of one word.¹³⁹

THE MODERN CASES

The repeal of the Eighteenth Amendment in 1933 ended the illegal smuggling of alcohol aboard vessels, but the desire to make illicit, tax-free profits remained, and other forms of contraband soon drew the smugglers' attention. Whereas the illegal substance during Prohibition was alcohol, after Prohibition's repeal, the chief illegal substances became cocaine¹⁴⁰ and marijuana.¹⁴¹

The Coast Guard's emphasis on law enforcement changed dramatically after the end of Prohibition. The onset of World War II, the postwar emergence of the United States as an economic power with increased marine commerce, and the wars in Korea and Vietnam all forced the Coast Guard to focus on missions other than law enforcement until well into the 1970s.¹⁴² The emergence of marijuana as a popular drug in the late 1960s and early 1970s stimulated importation of the drug from South America to satisfy America's demand, necessitating large shipments of the contraband.¹⁴³ The Coast Guard now had a new focus to an old mission. These large loads of marijuana were easily detected once a boarding party was aboard a vessel,¹⁴⁴ and the Coast Guard rapidly im-

138. See 14 U.S.C. § 89 (1988).

139. Act of Aug. 3, 1950, ch. 536, 64 Stat. 406 (deleting the word "To," which had preceded "examine" in the second sentence).

140. See, e.g., *Massiah v. United States*, 377 U.S. 201, 202 (1964) (involving a defendant who had smuggled 3.5 pounds of cocaine from South America aboard a commercial vessel in 1958), *overruled by* *Miranda v. Arizona*, 384 U.S. 436 (1966).

141. See *infra* note 144 and accompanying text.

142. A history of the Coast Guard published in 1966 does not even discuss law enforcement as a mission during this period. See BLOOMFIELD, *supra* note 31, at 273-86.

143. At the height of marijuana use in 1979, 22.5 million Americans were current users of the drug. NATIONAL NARCOTICS INTELLIGENCE CONSUMERS COMM., THE NNICC REPORT 1991, at 43 (1992) [hereinafter NNICC REPORT]. Through 1985, the vast majority of marijuana imported into the United States came from Colombia and other South American countries. See Joel Brinkley, *Drug Crops Are Up in Export Nations*, *State Dept. Says*, N.Y. TIMES, Feb. 15, 1985, at A1.

144. See *United States v. Dillon*, 701 F.2d 6, 6 (1st Cir. 1983); *United States v. Watson*, 678 F.2d 765, 766 (9th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *United States v. Robbins*, 623 F.2d 418, 419 (5th Cir. 1980); *United States v. Erwin*, 602 F.2d 1183, 1184 (5th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

plemented an aggressive boarding strategy to stem the flow of the drug into the country¹⁴⁵

The transition was not entirely painless, however. It took time for Coast Guard boarding officers to become adept in identifying the substances involved and understanding the full extent of their authority under 14 U.S.C. § 89.¹⁴⁶ Nonetheless, the Coast Guard soon established a reputation for successful law enforcement, due in large part to the deference the judiciary accorded the Coast Guard in drug cases. The Supreme Court tacitly endorsed this deference to the Coast Guard,¹⁴⁷ even though it simultaneously restricted the enforcement procedures of land-based officers.¹⁴⁸

Before Prouse: Early Skirmishes in the Drug War

One of the first modern drug-smuggling cases involved an American sailing vessel that the Coast Guard boarded and seized on the high seas in the Yucatan Channel¹⁴⁹ after sighting it running at night without lights.¹⁵⁰ In an action for forfeiture of the vessel, the district court held that the stopping and boarding of the vessel was lawful under 14 U.S.C. § 89; it was also lawful based upon the Coast Guard's reasonable suspicion of illegal activity because the vessel was running at night without lights.¹⁵¹

Because marijuana has a relatively distinct odor, a large quantity of marijuana was often detected from downwind of the suspect vessel before the boarding. *See United States v. Mena*, 863 F.2d 1522, 1526 (11th Cir.), *cert. denied*, 493 U.S. 834 (1989); *United States v. Padilla-Martinez*, 762 F.2d 942, 946 (11th Cir.), *cert. denied*, 474 U.S. 952 (1985); *United States v. Wray*, 748 F.2d 31, 33 (1st Cir. 1984); *United States v. Glen-Archila*, 677 F.2d 809, 812 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982).

145. *See* OPERATIONAL LAW ENFORCEMENT DIV., U.S. COAST GUARD, DIGEST OF LAW ENFORCEMENT STATISTICS 1 (1991) [hereinafter LAW ENFORCEMENT STATISTICS].

146. *See United States v. Odom*, 526 F.2d 339, 341 (5th Cir. 1976) (involving a boarding officer who repeatedly had to request instructions when he was confronted with a marijuana cargo in the hold of a fishing vessel).

147. *See infra* note 291 and accompanying text (discussing the Supreme Court's treatment of 14 U.S.C. § 89).

148. *See infra* notes 208-16, 333 and accompanying text.

149. The Yucatan Channel is located between Cuba and Mexico. *See Odom*, 526 F.2d at 340.

150. *United States v. One (1) 43 Foot Sailing Vessel Winds Will*, 405 F Supp. 879, 881 (S.D. Fla. 1975), *aff'd*, 538 F.2d 694 (5th Cir. 1976). During the boarding and inspection for safety violations, officers discovered over a ton of marijuana. *Id.*

151. *Id.* at 883.

The court justified the constitutionality of the boarding on several grounds. First, the court reasoned that because the defendant was a United States vessel, it was an extension of the territory of the United States, and therefore jurisdiction extended to it and gave government officials the right to board and inspect it.¹⁵² Second, the court found that the character of maritime law and the law of nations imposed an obligation on each country to exercise effective control and jurisdiction over all vessels flying its flag.¹⁵³ Finally, the court reasoned that section 89 granted the authority to the Coast Guard to board and inspect—powers the Coast Guard had possessed since its inception¹⁵⁴ and which courts had upheld repeatedly¹⁵⁵ The court also analogized the government's interest "in the safety and administrative control of vessels operating under the protection of its flag and authority of its documents to the traditionally high government interest in liquor or firearms dealers which have historically justified administrative measures such as limited warrantless inspections or searches."¹⁵⁶ This analogy is clearly applicable in the case of commercial vessels from which revenues are derived, but is strained when used in connection with recreational vessels.

In *United States v. Brignoni-Ponce*,¹⁵⁷ a case that could have rendered *Delaware v. Prouse*¹⁵⁸ unnecessary,¹⁵⁹ the Supreme Court considered the legality of a stop of an automobile near the Mexican border by agents of the Border Patrol.¹⁶⁰ The asserted justification for the stop was the apparent Mexican origin of the vehicle's occupants.¹⁶¹ The government contended that the stop was legal based upon a provision of the Immigration and Nationality Act.¹⁶² Justice Powell, writing for the majority, recited the maxim

152. *Id.* at 881-82.

153. *Id.* at 882.

154. *Id.* (citing Act of Aug. 4, 1790, ch. 35, 1 Stat. 145).

155. *Id.* (citing *Maul v. United States*, 274 U.S. 501 (1927)).

156. *Id.* at 883.

157. 422 U.S. 873 (1975).

158. 440 U.S. 648 (1979).

159. See *infra* notes 208-16 and accompanying text (discussing *Prouse*).

160. *Brignoni-Ponce*, 422 U.S. at 874-75.

161. *Id.* at 875.

162. *Id.* at 877. The government argued that the Immigration and Nationality Act authorized "agents, without a warrant, 'within a reasonable distance from any external boundary

that "no Act of Congress can authorize a violation of the Constitution"¹⁶³ and then discussed the Court's previous holdings in *Terry v. Ohio*¹⁶⁴ and similar cases involving investigatory stops.¹⁶⁵ The Court ruled that the reasonable suspicion requirement of *Terry* applied to this stop¹⁶⁶ and held that because the standard was not met, the stop was unconstitutional.¹⁶⁷ The holding was narrow, applicable only to enforcement of a particular law regarding illegal aliens.¹⁶⁸ The more general question of random vehicle stops remained unclear until *Prouse*.

In *United States v. Odom*,¹⁶⁹ a circuit court first discussed 14 U.S.C. § 89 in the context of a drug seizure. In *Odom*, the Coast Guard boarded the American registered vessel Mar-J-May on the high seas without any prior indication of violations of United States law.¹⁷⁰ While checking for the vessel's identification number, the boarding officer discovered marijuana bales in the vessel's hold.¹⁷¹ The district court upheld the boarding and search under border search standards because the vessel had been headed to-

of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle.' " *Id.* (quoting the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3)).

163. *Id.* (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)).

164. 392 U.S. 1 (1968).

165. *Brignoni-Ponce*, 422 U.S. at 878.

166. *Id.* at 881.

167. *Id.* at 884.

168. *Id.* The Court explained:

The effect of our decision is to limit exercise of the authority granted by [the Immigration and Nationality Act]. Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.

Id.

169. 526 F.2d 339 (5th Cir. 1976).

170. *Id.* at 341. Officers boarded the ship in order to conduct a routine safety and documentation inspection. *Id.*

171. *Id.* A large percentage of maritime seizures of contraband have resulted from a plain view or plain smell discovery occurring while a boarding officer was looking for a vessel's documentation number. See, e.g., *United States v. Watson*, 678 F.2d 765, 766 (9th Cir.), cert. denied, 459 U.S. 1038 (1982); *United States v. Demanett*, 629 F.2d 862, 865 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981); *United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir. 1980) (en banc).

The increased smuggling of contraband within concealed compartments, as well as among and within commercial cargo carried, has reduced the frequency of these "easy" detections.

ward the United States.¹⁷² Holding that the boarding and “administrative inspection” of the vessel were permissible under the authority of section 89, the Fifth Circuit did not reach the border issue.¹⁷³ The court determined that the further search, which verified that the substance in the hold was marijuana, was justified by the probable cause that arose during the lawful inspection.¹⁷⁴ The court did not, however, explore the constitutionality of the statute.

The “administrative inspection” justification for the Fifth Circuit’s holding in *Odom* was undermined by the Supreme Court in *Marshall v. Barlow’s, Inc.*;¹⁷⁵ however, *Marshall* involved the owner of an electrical and plumbing shop who denied agents of the Occupational Safety and Health Administration (OSHA) permission to conduct a safety compliance inspection of his facilities without a warrant.¹⁷⁶ After reviewing the government’s contentions that warrantless searches were necessary,¹⁷⁷ the Court restated the reasons underlying the warrant requirement of the Fourth Amendment:

The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.¹⁷⁸

The Court ruled that the government interest did not justify a warrantless search.¹⁷⁹ This holding, however, was not extended to administrative and safety inspections of vessels at sea.¹⁸⁰

See, e.g., NNICC REPORT, *supra* note 143, at 9 (discussing various methods cocaine traffickers have employed to conceal shipments of the drug on seagoing vessels).

172. *Odom*, 526 F.2d at 341-42.

173. *Id.* at 342.

174. *Id.*

175. 436 U.S. 307 (1978).

176. *Id.* at 310. The owner claimed that a warrantless search would violate his Fourth Amendment right against illegal search and seizure. *Id.*

177. *Id.* at 311.

178. *Id.* at 323.

179. *Id.* at 324.

180. *Id.* (holding narrowly that warrantless inspections are not constitutional under OSHA).

The Fifth Circuit again examined the constitutionality of Coast Guard actions under 14 U.S.C. § 89 in *United States v. Warren*.¹⁸¹ A full panel in *Warren* reversed a three-judge panel's previous ruling that a Coast Guard boarding and search of an American vessel beyond the twelve-mile limit was unconstitutional.¹⁸² In their search, boarding officers found only small quantities of drugs, the possession of which was not illegal on the high seas.¹⁸³ The boarding party questioned the crew regarding the purpose of the trip and the lack of certain equipment; the answers aroused suspicion that the vessel was smuggling.¹⁸⁴ One crewman admitted that a large quantity of money was aboard and led the boarding party to where the money was stored.¹⁸⁵ Basing their action on an admission that this money had not been declared, the officers arrested the crew for violation of currency laws.¹⁸⁶ A subsequent search of the vessel revealed equipment for baling marijuana and other evidence of drug distribution.¹⁸⁷

A three-judge panel of the circuit court held that the warrantless search of the vessel violated the Constitution because the Coast Guard boarding officers "extend[ed] for no reason a search for safety purposes beyond that which [was] reasonably needed to determine if the safety and documentary regulations [had] been followed."¹⁸⁸ Sitting en banc, the court held that *Odom* controlled¹⁸⁹

181. 578 F.2d 1058 (5th Cir. 1978) (en banc), *modified en banc*, 612 F.2d 887 (5th Cir.), *cert. denied*, 446 U.S. 956 (1980), *overruled by* *United States v. Bengivenga*, 845 F.2d 593 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988).

182. *Id.* at 1061.

183. *Id.* at 1062 n.2. At present, possession of any quantity of a controlled substance aboard a U.S. vessel is illegal. *See infra* note 348 and accompanying text (discussing Zero Tolerance enforcement).

184. *Warren*, 578 F.2d at 1062. Although the defendant said the boat was chartered for fishing and diving, the boarding party noted the absence of the necessary equipment. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1063. During the subsequent inventory search, the Coast Guard found a trash compactor, plastic bags, a letter from the Colombian consulate, a list of equipment to be used to load and package marijuana, a list of Colombian contacts, and the defendant's passport indicating a visit to Colombia two weeks earlier. *Id.*

188. *United States v. Warren*, 550 F.2d 219, 225 (5th Cir. 1977), *rev'd en banc*, 578 F.2d 1058 (5th Cir. 1978), *modified en banc*, 612 F.2d 887 (5th Cir.), *cert. denied*, 446 U.S. 956 (1980), *overruled by* *United States v. Bengivenga*, 845 F.2d 593 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988).

189. *Warren*, 578 F.2d at 1066.

and found that Coast Guard authority under subsection 89(a) "is plenary when exercised beyond the twelve-mile limit; it need not be founded on any particularized suspicion."¹⁹⁰ The defendants, however, claimed that a customs regulation required probable cause to justify boarding an American vessel on the high seas.¹⁹¹ The court admitted that a reading of subsection 89(b)¹⁹² in isolation would lead to a probable cause requirement.¹⁹³ In light of the language of subsection 89(c),¹⁹⁴ however, the court found that the customs regulation imposed no restriction on the authority of Coast Guard officers. The court stated, "[W]e think it clear that by enacting section 89(c), Congress intended to give the Coast Guard the broadest authority available under law. Subsection c of section 89 interdicts any regulations that might impinge upon that authority."¹⁹⁵

In a lengthy dissent, Judge Fay, a member of the three-judge panel that heard the case originally, attacked virtually every finding and conclusion of the en banc opinion.¹⁹⁶ His opening comment set the tone: "It is my belief that the constitutional rights of American citizens have been dealt a severe blow by today's *en banc* opinion, and I am somewhat stunned by the cursory treatment this opinion gives to certain serious constitutional and factual is-

190. *Id.* at 1064-65.

191. *Id.* at 1067. The defendants invoked 19 C.F.R. § 162.3(a)(2) (1977). *Warren*, 578 F.2d at 1067. A subsequent amendment to this section deleted the probable cause requirement. See 19 C.F.R. § 162.3 (1992).

192. Subsection 89(b) of 14 U.S.C. provides:

The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

14 U.S.C. § 89(b) (1988).

193. *Warren*, 578 F.2d at 1067-68.

194. "The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States." 14 U.S.C. § 89(c).

195. *Warren*, 578 F.2d at 1068, 1070.

196. *Id.* at 1079-92 (Fay, J., dissenting).

sues."¹⁹⁷ Although the Coast Guard's authority to stop and board an American vessel on the high seas for the purpose of conducting a safety or documentation inspection was not at issue,¹⁹⁸ Judge Fay argued that the constitution limited these legal stops to the scope necessary to conduct a valid inspection.¹⁹⁹ According to Judge Fay, the Customs and DEA agents accompanying the Coast Guard boarding team had conducted an inquiry and search that was totally independent of, and unrelated to, the safety and documentation inspection.²⁰⁰ Because indications that a crime was being committed resulted from this unlawful inspection, no independent probable cause existed for searching the vessel or arresting the crew.²⁰¹ Therefore, the Coast Guard's actions were illegal and evidence subsequently obtained was inadmissible.²⁰²

Judge Fay argued that the majority opinion granted the Coast Guard "unfettered discretion to seize American vessels on the high seas."²⁰³ Comparing the case to the Supreme Court's opinion in *United States v. Brignoni-Ponce*,²⁰⁴ he asserted that restrictions imposed on border stops for detection of illegal aliens should be applied to Coast Guard stops for safety inspections.²⁰⁵ His dissent also discussed constitutional restrictions on street stops and searches of persons for investigatory purposes and asserted that

197. *Id.* at 1079.

198. *Id.*

199. *Id.* at 1080. Judge Fay explained: "The moment the Coast Guard absent probable cause enlarges the scope of its inquiry beyond that of a safety and documentary inspection, the seizure is no longer constitutional, and all evidence derived from inquiries as a result of the expanded intrusion is unconstitutionally obtained and inadmissible at trial." *Id.*

200. *Id.* at 1084.

201. *Id.* at 1084-85.

202. *Id.*

203. *Id.* at 1080.

204. 422 U.S. 873 (1975).

205. *Warren*, 578 F.2d at 1081 (Fay, J., dissenting). Judge Fay stated:

The Supreme Court was unwilling to grant a roving border patrol unfettered discretion to seize vehicles, but, for some reason left unexplained by the majority opinion, our Court implies that a grant of similar discretion to a Coast Guard officer on a patrol thousands of miles away from the United States would be constitutional. Perhaps the majority feels that there are greater exigencies involved in a confrontation between the Coast Guard and an American vessel on the high seas than are present in a confrontation between a traveler and a Border Patrol officer near the Mexican border. If so, I disagree.

Id.

those cases presented greater exigent circumstances than could be found in a Coast Guard stop without probable cause.²⁰⁶ According to Judge Fay, this fact justified at least equivalent restrictions on Coast Guard stops.²⁰⁷

The Reasonable Suspicion Standard

*Delaware v. Prouse*²⁰⁸ arose from a random stop of an automobile that occurred only because a patrolman "saw the car in the area and wasn't answering any complaints, so [he] decided to pull them off."²⁰⁹ The police officer asserted that the purpose of the stop was to check the license of the driver and the vehicle registration.²¹⁰ Justice White, writing for the majority, first emphasized that a vehicle stop was a seizure for constitutional purposes and was therefore subject to the applicable standard of reasonableness.²¹¹ In determining whether a law enforcement action met this standard, the Court used a balancing test that weighed the individual's Fourth Amendment privacy interests against legitimate governmental interests furthered by the practice.²¹² The Court then referred to its earlier decision in *Brignoni-Ponce* and found that the stop in question was at least as intrusive of Fourth Amendment rights as the stop in that case:

We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. . . . Both interfere

206. *Id.* at 1082.

207. While the need to inspect for safety and documentation reasons is legitimate, it is no more compelling than the need of a roving patrol to control the influx of aliens. Nor can it be argued that the problem of preventing drug importations is any greater on the high seas than it is at the Mexican border. It is impossible to rationalize under the Fourth Amendment a seizure of an American vessel for an indeterminate amount of time in order to inquire about possible drug violations.

Id. at 1083.

208. 440 U.S. 648 (1979).

209. *Id.* at 650-51.

210. *Id.* at 650.

211. *Id.* at 653-54.

212. *Id.*

with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety.²¹³

After reviewing the State's interests in making discretionary stops for safety, registration checks of vehicles, and license checks of drivers, the Court found that the balance favored individuals' Fourth Amendment interests.²¹⁴ The Court also pointed to the "standardless and unconstrained discretion" of the law enforcement officer in the field as a great threat to Fourth Amendment values.²¹⁵ In order to counter that threat, the Court held that

except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.²¹⁶

The Court's logic would seem to apply equally well to random stops of vessels for documentation and safety checks. In reality, however, the impact of *Prouse* on maritime interdiction was noticeable in only one circuit.

After Prouse: The Standard Is Diluted by Seawater

The decision in *United States v. Piner*²¹⁷ caused considerable concern among Coast Guard officials.²¹⁸ The defendants moved to suppress over two tons of marijuana seized during a random safety inspection stop and boarding of a sailboat at night in San Fran-

213. *Id.* at 657.

214. *Id.* at 661. The court reasoned: "The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials." *Id.*

215. *Id.*

216. *Id.* at 663.

217. 608 F.2d 358 (9th Cir. 1979).

218. *See id.* at 361. The Coast Guard argued that random stops and boarding authority without probable cause or suspicion was the "only practicable means" of ensuring compliance with safety regulations. *Id.*

cisco Bay²¹⁹ In its review of the district court's order granting defendants' motion,²²⁰ The Ninth Circuit first examined the government's need to board recreational vessels while underway to ensure compliance with safety and equipment requirements and conceded that the governmental interest "outweighs the intrusion on privacy encountered in the ordinary boarding."²²¹ The court then looked at the law enforcement stop as a "subjective intrusion" that results in a "particularly unsettling effect upon the ordinary person."²²² Comparing *Piner* to *Prouse*, the court reasoned:

If the stop of an automobile upon a public highway by an identifiable police car is felt to create such subjective intrusion as to require the use of potentially less intrusive alternatives, surely the stop of an isolated boat after dark, followed by a physical intrusion upon the boat itself, would have an unsettling effect immeasurably greater, placing a far greater demand upon the government to come forward with balancing factors.²²³

Given that a less intrusive means of enforcing the safety requirements was available by use of daytime boardings, the stop and boarding at night "must be for cause, requiring at least a reasonable and articulable suspicion of noncompliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer."²²⁴ Applying this standard, the court affirmed the district court's order suppressing the marijuana.²²⁵

Piner is also interesting because it provides insight into the position of a current Supreme Court Justice on the scope of Coast Guard authority under 14 U.S.C. § 89. Then-Judge Anthony Kennedy dissented in *Piner* by first distinguishing *Prouse*, then looking to the history and prior interpretation of section 89.²²⁶ This

219. *Id.* at 359. The boarding officer observed the bags of marijuana in plain view just after stepping aboard the vessel. *Id.*

220. *United States v. Piner*, 452 F. Supp. 1335, 1340-41 (N.D. Cal. 1978), *aff'd*, 608 F.2d 358 (9th Cir. 1979).

221. *Piner*, 608 F.2d at 361.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 361-63 (Kennedy, J., dissenting).

case differed from *Prouse*, Judge Kennedy believed, because statistics showed that random Coast Guard boardings had greater enforcement effectiveness than random automobile stops.²²⁷ Furthermore, the less intrusive alternatives that the Court had advocated in *Prouse*, such as "annual inspections and road block-type stops," were not suitable for vessels.²²⁸ Judge Kennedy considered the majority's daytime boarding requirement a "novel theory [that] ignores the fact that safety violations at night may be more dangerous than those during the day"²²⁹

Judge Kennedy further argued that the long history of congressional and judicial approval of Coast Guard authority to stop and board American vessels without a warrant was "persuasive authority for the reasonableness of such boardings," which the majority had not refuted.²³⁰ Moreover, a history of government regulation in this area allowed these stops and boardings to fit within the administrative inspection exception to the warrant requirement.²³¹ Finally, because the stop was legitimate and contraband was in plain view almost immediately after the officer boarded the vessel, the search implicated no privacy interest.²³² The reasoning of Judge Kennedy's dissent has been validated by the overwhelming majority of other circuits²³³ and by the Supreme Court.²³⁴

The Supreme Court's ruling in *Prouse* precipitated another en banc hearing of the Fifth Circuit to reconsider a previous ruling in a drug smuggling case.²³⁵ Unlike in *United States v. Warren*,²³⁶ the

227. *Id.* at 362.

228. *Id.*

229. *Id.* It was also critical in this case that the boat was underway, thus justifying a greater intrusion. *Id.* "Searches at night may be more intrusive because they raise the specter of uniformed officers rousing people from their sleep. But where the boat is underway, it is clear that someone is, or ought to be, awake." *Id.*

230. *Id.* at 364.

231. *Id.*, see *supra* text accompanying note 173. But see *supra* text accompanying notes 175-79 (discussing limitations to the administrative inspection exception).

232. *Piner*, 608 F.2d at 364 (Kennedy, J., dissenting). Kennedy explained: "I do not believe that by merely stepping onto the exposed decks of the boat the Coast Guard officer invaded an area in which the defendants had a legitimate expectation of privacy." *Id.*

233. See, e.g., *infra* notes 255, 266-68, 276, 285-86 and accompanying text.

234. See *infra* notes 300-02 and accompanying text.

235. *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc).

236. 578 F.2d 1058 (5th Cir. 1978) (en banc), *modified en banc*, 612 F.2d 887 (5th Cir.), *cert. denied*, 446 U.S. 956 (1980), *overruled by United States v. Bengivenga*, 845 F.2d 593 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988).

full court in *United States v. Williams* did not reverse the earlier ruling, but reviewed the case to correct improper Fourth Amendment analysis by the panel and provide clear precedent within the circuit.²³⁷ The court applied the *Prouse* reasonable suspicion requirement, but not to United States vessels.²³⁸

Williams arose from the boarding and search and seizure of a Panamanian vessel on the high seas.²³⁹ The Panamanian government granted consent for the boarding and search and seizure.²⁴⁰ Although the consent of Panama made the boarding legitimate, the court discussed Coast Guard authority under 14 U.S.C. § 89 in order to clarify the law within the circuit.²⁴¹

First, the court observed that section 89 provided the sole statutory authority for the stop of a foreign vessel on the high seas.²⁴² The court held that the statutory authority was "not limited on its face to American flag vessels," as U.S. jurisdiction included any offense that had an effect within the United States.²⁴³ Therefore, a conspiracy to smuggle illegal goods into the U.S. aboard a foreign vessel on the high seas would subject that vessel to U.S. jurisdiction and, consequently, Coast Guard boarding.²⁴⁴ Before boarding a foreign vessel outside U.S. territorial waters, however, the court required the Coast Guard to have at least a reasonable suspicion that the vessel was subject to American law.²⁴⁵ In *Williams*, the prior sighting of the vessel, combined with events occurring shortly after the Coast Guard contacted the vessel by radio, provided the

237. *Williams*, 617 F.2d at 1069.

238. *Id.* at 1073-90.

239. *Id.* at 1070-71.

240. *Id.* A Drug Enforcement Administration surveillance plane had sighted the vessel five days before the Coast Guard cutter intercepted it on the high seas. *Id.* When the aircraft sighted it, the vessel was anchored 1.5 miles off the coast of Colombia with several small vessels around it. *Id.* The Coast Guard boarding party found over 10 tons of marijuana on the vessel. *Id.*, see also Lueckenhoff, *supra* note 67, at 154-56 (discussing *Williams*).

241. *Williams*, 617 F.2d at 1071-72.

242. *Id.* at 1075.

243. *Id.* at 1076.

244. *Id.*

245. *Id.*, see also *United States v. Wright-Barker*, 784 F.2d 161, 176 (3d Cir. 1986) (adopting a reasonable suspicion standard for high seas boardings); *United States v. Green*, 671 F.2d 46, 53 (1st Cir.) (same), *cert. denied*, 457 U.S. 1135 (1982).

necessary suspicion.²⁴⁶ The court also validated the authority to stop under section 89 by referring to the history of the statute,²⁴⁷ the difference in the necessity of stops of land vehicles and water vessels,²⁴⁸ and similar authority granted by international law.²⁴⁹

Nonetheless, the Fifth Circuit subjected the search of the vessel to greater scrutiny because it recognized that there are areas of a vessel in which a person could have a reasonable expectation of privacy.²⁵⁰ However, the court noted that a privacy interest could not exist in the hold where the vessel's identification number was displayed.²⁵¹ Therefore, the defendant suffered no violation of his Fourth Amendment rights when the boarding party entered the hold to verify the documentation number and discovered the marijuana; the seizure was constitutional.²⁵²

The Fourth Circuit declined to apply the reasonable suspicion standard in a case involving a seizure of twenty-five tons of mari-

246. *Williams*, 617 F.2d at 1077. A DEA officer had previously observed the vessel engaged in activity that suggested the loading of contraband. *Id.* Moreover, despite the distress flag flown by the vessel, coupled with the numerous attempts by the crew members to summon the Coast Guard, the captain rejected Coast Guard assistance. *Id.*

247. *Id.* at 1079-81.

248. *Id.* at 1081.

249. *Id.* at 1082-84.

250. *Id.* at 1086.

251. The court reasoned:

Because section 89(a) and article 22, section 2, constitutionally authorize the Coast Guard to enter the hold of a vessel to verify the vessel's identity in the complete absence of suspicion of criminal activity or of the presence of contraband, it follows that no one, not even a person with a proprietary interest in the vessel and in the cargo, could conceivably have any legitimate expectation of privacy with regard to any objects that would be in the plain view (or smell) of a person conducting such an identification check.

Id.

252. *Id.* But see 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.5(k), at 783-84 (2d ed. 1987), stating:

This unnecessary departure from the probable cause requirement in *Williams* is unsound. Motor vehicles are also subject to "extensive" regulation, but this has not led to the conclusion that the privacy expectation in such conveyances is so low that they may be searched on "reasonable suspicion." Certainly the expectation of privacy in a vessel is not lower than the expectation vis-a-vis a car; if anything, it is the other way around. As for the law enforcement interest, it is to be doubted that the enforcement problems at sea so significantly exceed those at our land borders as to justify a special Fourth Amendment rule.

Id.

juana from an American fishing vessel during a coordinated operation in which the Coast Guard boarded every U.S. vessel less than 250 feet in length.²⁵³ The court held that the boarding of the vessel was constitutional as a border stop and that the reasonableness of the particular action should be evaluated by the standards of the statute that granted the authority for the action.²⁵⁴

The Fourth Circuit cited *Warren* for the rule that Coast Guard authority to board vessels on the high seas under 14 U.S.C. § 89 is plenary,²⁵⁵ and then gave four reasons why this suspicionless boarding was reasonable.²⁵⁶ First, the court found that the boarding was not made at the "will and whim of the officer in the field,"²⁵⁷ but was part of a multiagency operation in an area known to be travelled by drug smugglers headed for the United States.²⁵⁸ The fact that all vessels of a particular type were boarded in a systematic manner was also important.²⁵⁹ Second, the boarding involved only a "minimal and reasonably necessary intrusion on privacy interests,"²⁶⁰ a conclusion bolstered by the closely regulated industry exception to the warrant requirement.²⁶¹ The excep-

253. *United States v. Harper*, 617 F.2d 35 (4th Cir.), *cert. denied*, 449 U.S. 887 (1980). The case also involved an interesting jurisdictional note. Although the seizure of the vessel occurred in the Mona Pass, between the Dominican Republic and Puerto Rico, the Fourth Circuit had appellate jurisdiction from the District Court for the Eastern District of North Carolina because the law enforcement action was terminated in a controlled delivery of the marijuana in North Carolina in an effort to apprehend the shoreside conspirators. *Id.* at 36-37; *see also United States v. Coats*, 611 F.2d 37 (4th Cir. 1979) (involving the same incident as in *Harper*, but denying a shoreside conspirator standing to contest the Coast Guard's at-sea boarding and search of the vessel), *cert. denied*, 446 U.S. 909 (1980).

254. *Harper*, 617 F.2d at 37.

255. *Id.* at 38 (citing *United States v. Warren*, 578 F.2d 1058, 1064 (5th Cir. 1978) (en banc), *modified en banc*, 612 F.2d 887 (5th Cir.), *cert. denied*, 446 U.S. 956 (1980), *overruled by United States v. Bengivenga*, 845 F.2d 593 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988)).

256. *Id.* at 38-39.

257. *Id.* at 38.

258. *Id.*

259. *Id.* The court also saw no reason to prevent boardings at sea in light of the fact that they are routinely done in port without particularized suspicion. *Id.*

260. *Id.*

261. *Id.* The Supreme Court has displayed a willingness to tolerate warrantless inspections of commercial enterprises that are engaged in businesses licensed and closely regulated and monitored by the federal government. *See, e.g., United States v. Biswell*, 406 U.S. 311, 314-15 (1972) (involving a search of a gun dealer who was subject to strict federal licensing and reporting regulations); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75

tion came into play in the stops because of the closely regulated nature of the fishing industry.²⁶² Third, law enforcement involving the stopping and boarding of vessels at sea required "special considerations."²⁶³ For example, because of the inherent mobility of a vessel, a requirement of reasonable suspicion before boarding a vessel in a blanket boarding operation "would encourage outright flaunting of the navigation, safety and administrative laws of the United States at the expense of our government's sovereign obligation under international law to police its flag ships."²⁶⁴ Fourth, the court analogized these systematic vessel stops to "roadside truck weigh-stations and inspection points" that the Supreme Court has held constitutional under the Fourth Amendment.²⁶⁵

The First Circuit, in *United States v. Hilton*,²⁶⁶ held that suspicionless stopping and boarding of American vessels on the high seas was constitutional if limited to "the necessary task of conducting safety and document inspections."²⁶⁷ After placing this limit on the Coast Guard's authority, however, the court stated that such stops constitute an exception to the warrant requirement.²⁶⁸ The court considered the rule of *Marshall v. Barlow's, Inc.*²⁶⁹ that administrative agencies might require warrants to conduct safety inspections²⁷⁰ but held that the boardings were "more analogous to the exception recognized for industries 'long subject

(1970) (involving a search of a business engaged in the manufacture and sale of liquor, an industry heavily regulated and taxed by the government). "Businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade

The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973).

262. *Harper*, 617 F.2d at 38.

263. *Id.* at 39.

264. *Id.*

265. *Id.*

266. 619 F.2d 127 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980).

267. *Id.* at 131.

268. *Id.* at 132. The court reasoned that the exception was necessary

[b]ecause of the unique circumstances existing on the high seas, the long history of regulatory stops and inspections of ocean-going vessels, the heavy overlay of maritime and international law, the concern of the nation for policing its ocean borders, even beyond the 12-mile customs zone, and the strong interest in regulating the conduct of vessels protected by our flag.

Id.

269. 436 U.S. 307 (1978).

270. See *supra* notes 175-79 and accompanying text.

to close supervision and inspection.’ ”²⁷¹ Therefore, the warrant requirement of *Marshall* did not apply.²⁷² Finally, the court discussed the reasonable suspicion requirement of *Delaware v. Prouse*²⁷³ and found that the differences between automobile and vessel stops and the lack of less intrusive alternatives available for sea vessels made the rule of *Prouse* unworkable at sea.²⁷⁴

The Third Circuit joined the debate in a case involving the seizure of over ten tons of marijuana from a U.S. fishing vessel in the territorial waters of the United States.²⁷⁵ The court held the stop of the vessel constitutional as a necessary part of the “federal documentation scheme.”²⁷⁶ However, the court did not broadly authorize all Coast Guard boarding practices, limiting its holding to the facts of the case.²⁷⁷ The court was cautious in its discussion of the reasonable suspicion standard of *Prouse*²⁷⁸ but found that the standard was satisfied in this case, whether it was required or not.²⁷⁹ Thus, it concluded that in light of the reasonable suspicion

271. *Hilton*, 619 F.2d at 132 (quoting *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970)).

272. *Id.*

273. 440 U.S. 648 (1979).

274. *Hilton*, 619 F.2d at 133. (“While the Coast Guard is thus left with considerable discretion in deciding which vessels to stop, we believe such discretion is virtually unavoidable in a scheme of regulation that depends on stops conducted at sea, far from courts and magistrates.”).

275. *United States v. Demanett*, 629 F.2d 862 (3d Cir. 1980), *cert. denied*, 450 U.S. 910 (1981). The contraband was discovered when a tarpaulin covering the hold was removed to permit an inspection of the main-beam number to verify the documentation of the vessel. *Id.* at 865.

276. *Id.* at 866-67. The court also concluded that because of the documentation laws and their applicability to fishing vessels, there could be no expectation “that a warrant would be required before such a boarding could take place.” *Id.* at 867.

277. *Id.* The court was very specific:

We have no occasion to consider whether section 89(a) is a valid authorization for warrantless boarding for other purposes, such as safety inspections and customs enforcement. Moreover, we hold that the statute is valid only insofar as it involves the limited invasion of expectations of privacy on a vessel which are necessary for documentation and main beam number examination.

Id.

278. *Id.* at 868. The court responded to the government’s argument that the articulable and reasonable suspicion standard should not apply at sea: “But certainly there are alternatives other than unbridled discretion,” *Id.*

279. *Id.* The court also limited this holding: “Since, for a documentation inspection, the seizure satisfied the articulable and reasonable suspicion standard, we have no occasion to address what circumstances would justify a more intrusive safety inspection.” *Id.*

for the boarding and the plain view discovery of the contraband, no constitutional violations had occurred.²⁸⁰

The seizure of a Panamanian freighter on the high seas with a cargo of marijuana presented the Second Circuit with the usual questions regarding the scope of Coast Guard authority to stop a foreign vessel and the propriety of its methods of effecting the stop.²⁸¹ In spite of permission from Panamanian officials for a Coast Guard boarding, the vessel refused to stop until the Coast Guard cutter fired warning shots.²⁸² After the stop, the boarding party inspected the cargo hold of the ship and found "hundreds of bales of marijuana."²⁸³ In upholding the stop and boarding, the court first rejected the government's contention that the history of Coast Guard boarding statutes demonstrated that the Fourth Amendment did not apply at sea.²⁸⁴ According to the court, the stop at issue was investigatory and the principles of *Terry v. Ohio* applied.²⁸⁵ The court found reasonable suspicion to believe that the vessel was engaged in illegal activity and that the stop and boarding did not amount to "an unreasonably intrusive means of investigating further."²⁸⁶ The court also found the firing of warning shots reasonable as "the least drastic way to force the ship to stop."²⁸⁷

280. *Id.* at 869.

281. *United States v. Streifel*, 665 F.2d 414 (2d Cir. 1981). A patrol aircraft sighted the vessel loitering approximately 50 miles off the coast of Cape Cod. *Id.* at 416. The vessel then began to move, and the Coast Guard diverted a cutter to investigate and sought permission from the Panamanian government to board the vessel. *Id.* at 417. By the time permission was received and the boarding took place, the vessel had proceeded to a point approximately 200 miles offshore. *Id.* at 418.

282. *Id.* at 417-18. Warning shots consist of live ammunition fired from the deck gun of the Coast Guard cutter into the water in front of the vessel to be stopped. *Id.* at 424.

283. *Id.* at 418.

284. *Id.* at 419 n.8 (reviewing statutes since 1789).

285. *Id.* at 419-23. The court concluded "that any land-sea difference in governmental need or in intrusiveness affects only how the principles are applied, not their applicability." *Id.* at 423.

286. *Id.* at 424.

287. *Id.* The court did not discuss the statutory authority of the Coast Guard to use warning shots or disabling fire. However, § 637(a) of 14 U.S.C. provides:

Whenever any vessel liable to seizure or examination does not stop on being ordered to do so or on being pursued by an authorized vessel or authorized aircraft, the person in command or in charge of the authorized vessel or authorized aircraft may, after a gun has been fired by the authorized vessel or

In dissent, Judge Oakes argued against extending *Terry* beyond its facts, preferring a "regulatory" approach to the Fourth Amendment.²⁸⁸ He interpreted 14 U.S.C. § 89(b) as requiring that the government promulgate specific regulations covering Coast Guard activities such as those in the instant case.²⁸⁹ Because the stop here was without a warrant or probable cause and the required regulations did not exist, Judge Oakes viewed the stop and search as unconstitutional.²⁹⁰

Although the Supreme Court has not addressed the constitutionality of section 89 directly,²⁹¹ it validated the statute by reference in *United States v. Villamonte-Marquez*.²⁹² In *Villamonte-*

authorized aircraft as a warning signal, fire at or into the vessel which does not stop.

14 U.S.C. § 637(a) (1988). Other subsections provide immunity to persons who order warning or disabling fire and define authorized vessels and aircraft. See *id.* § 637(a)-(b). Disabling fire has been used to stop suspected smuggling vessels on 15 different occasions. See LAW ENFORCEMENT STATISTICS, *supra* note 145, at 24-25.

288. *Streifel*, 665 F.2d at 425-26 (Oakes, J., dissenting).

289. *Id.* at 426-27.

290. *Id.* at 427.

291. The only Supreme Court references to the modern statute have been by way of illustrating the jurisdiction of the United States on the high seas, or by analogy to another statute. See *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1235-36 (1991) (citing 14 U.S.C. § 89(a)'s authorization of Coast Guard searches and seizures upon the high seas, as an example of Congress' intent to legislate the "extraterritorial application of a statute"); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 n.7 (1989) (recognizing 14 U.S.C. § 89(a) as an example of Congress' desire and ability "to place the high seas within the jurisdictional reach of a statute"); *United States v. Villamonte-Marquez*, 462 U.S. 579, 580 n.1 (1983) (comparing 14 U.S.C. § 89(a) to 19 U.S.C. § 1581(a), which empowers customs officers to stop and board any vessel in order to examine its manifest and other documentation).

However, Chief Justice Burger tacitly endorsed the statute in a concurring opinion in *Florida v. Casal*, 462 U.S. 637, 638-39 (1983) (*per curiam*) (Burger, C.J., concurring). Florida's enforcement statute required probable cause or consent for a state marine patrol officer to go aboard a private vessel. *FLA. STAT. ANN.* § 327.56 (West 1975 & Supp. 1992). Chief Justice Burger advocated changing the law to parallel 14 U.S.C. § 89 more closely:

But when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement. The people of Florida have now done so with respect to Art. I, § 12, of the State Constitution; they have it within their power to do so with respect to Fla. Stat. § 327.56 (1981).

Casal, 462 U.S. at 639. The people of Florida have not, however, adopted the suggestion.

292. 462 U.S. 579, 580 n.1 (1983). Beyond the citation of 14 U.S.C. § 89 in the footnote, the case was significant because Coast Guard personnel are also deemed officers of the Cus-

Marquez, the Court examined a boarding by Customs agents to inspect the documentation of a foreign vessel anchored within territorial waters of the United States.²⁹³ Prior to boarding, the agents had no suspicion of wrongdoing, but after going aboard the vessel, a Customs officer detected the odor of marijuana and observed through an open hatch what appeared to be bales of marijuana.²⁹⁴ A search of the vessel after the arrest of the occupants revealed 5,800 pounds of marijuana, and the defendants were subsequently convicted of possession and importation of marijuana.²⁹⁵ The Fifth Circuit, however, reversed the convictions because, under *Williams*, the officers did not have a reasonable suspicion of illegal activity prior to boarding the foreign vessel.²⁹⁶

The Supreme Court reversed the Fifth Circuit in an opinion by Justice Rehnquist.²⁹⁷ After tracing the history of Customs statutes and the Court's decisions in this area, Rehnquist admitted that the stop in question would be unconstitutional under the standard announced in *Brignoni-Ponce*.²⁹⁸ However, he viewed the differences between automobiles and vessels as constitutionally significant, therefore justifying a different analysis.²⁹⁹ The Court noted that the possibility of checkpoints or roadblocks, which factored significantly in the automobile cases, was not reasonably available on the water.³⁰⁰ Moreover, it pointed out that the extensive regulation of vessel documentation was much more complex than vehicle licensing laws and served several valid governmental interests;³⁰¹ unlike vehicle licensing, in which an officer could observe evidence of compliance without stopping the vehicle, ensuring compliance with

toms under 14 U.S.C. § 143 (1988). See *supra* note 22. Therefore, a judicial construction of Customs authority is also a statement of Coast Guard authority in situations in which Customs statutes apply—generally, within the territorial sea and customs waters.

293. *Villamonte-Marquez*, 462 U.S. at 580-81. The vessel was anchored 18 miles from the Gulf of Mexico in a waterway connecting the Gulf to Lake Charles, Louisiana. *Id.* at 582.

294. *Id.* at 581-83.

295. *Id.* at 583.

296. *Id.* at 583-84; see *supra* notes 242-51 and accompanying text.

297. *Villamonte-Marquez*, 462 U.S. at 584.

298. *Id.* at 584-88; see *supra* notes 160-68 and accompanying text.

299. *Villamonte-Marquez*, 462 U.S. at 588.

300. *Id.* at 589.

301. *Id.* at 589-91.

documentation law required boarding the vessel.³⁰² To support the reasonableness of the Customs boarding, the Court found that “[w]hile the need to make document checks is great, the resultant intrusion on Fourth Amendment interests is quite limited.”³⁰³

Justice Brennan dissented, arguing that either a suspicion standard or a “discretion-limiting feature such as fixed checkpoints instead of roving patrols” was required by the Court’s precedents.³⁰⁴ He disagreed with the majority on three grounds. First, he feared the “ ‘standardless and unconstrained discretion’ ”³⁰⁵ of enforcement officers that the majority rule would allow, and he argued that the Court’s precedents in the area consistently had required limits to that discretion.³⁰⁶ Second, he did not agree that law enforcement problems in the maritime setting justified the majority’s standard.³⁰⁷ He also argued that reasonable alternatives, similar to vehicle markings, were available for vessels, thus eliminating the requirement to stop and board.³⁰⁸ Finally, Justice Brennan presented a policy objection: “It simply does not follow that, because the police in particular situations dislike limitations placed on their powers of search and seizure, we may therefore sanction an unprecedented invasion of constitutionally protected liberties.”³⁰⁹

Soon after *Villamonte-Marquez*, the Ninth Circuit had occasion in *United States v. Humphrey*³¹⁰ to examine 14 U.S.C. § 89 in the

302. *Id.* at 591. Justice Rehnquist reasoned: “Requests to check certificates of inspection play an obvious role in ensuring safety on American waterways. While inspection of a vessel’s documents might not always conclusively establish compliance with United States shipping laws, more often than not it will.” *Id.*

303. *Id.* at 592 (footnote omitted).

304. *Id.* at 598-99 (Brennan, J., dissenting) (citing *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)).

305. *Id.* at 601 (quoting *Prouse*, 440 U.S. at 661).

306. *Id.* at 601-07.

307. *Id.* at 607-09. “Checkpoints aside, there is no apparent reason why random stops are really necessary for adequate law enforcement.” *Id.* at 608.

308. *Id.* at 609.

309. *Id.*, see also 4 LAFAVE, *supra* note 252, § 10.8(f), at 99 (agreeing with the dissent in *Villamonte-Marquez*).

310. 759 F.2d 743 (9th Cir. 1985), *cert. denied*, 480 U.S. 917 (1987). A Coast Guard cutter sighted the Orca, a 39-foot sailboat, over 700 miles from the nearest landfall in the Aleutian Islands, and over 2,000 miles from the continental United States. *Id.* at 745. After boarding

context of a daytime boarding and seizure of a U.S. vessel on the high seas. The court cited *Villamonte-Marquez* as authority for finding the boarding constitutional³¹¹ and affirmed the convictions of the defendants for conspiracy and possession,³¹² favoring the governmental interests involved over the minimal invasion of privacy³¹³. The principal governmental interests were promotion of safety at sea and enforcement of documentation laws required under international law.³¹⁴ The interest in safety was relevant, said the court, "because of the course and location of the *Orca* in the North Pacific."³¹⁵ The court, however, stressed that its holding was "highly fact specific [and did not] establish a general rule that approves all warrantless, suspicionless, and discretionary boardings of noncommercial vessels on the high seas."³¹⁶ Even this limiting language was soon cast aside, however.³¹⁷

The Current Situation. A Steady Course

In the latter half of the 1980s and thus far in the 1990s, the circuit courts have followed their precedents in determining the lawfulness of Coast Guard actions under 14 U.S.C. § 89. The most recent circuit court opinion construing the validity of section 89 reflects both the settled nature of the law in this area and the substitution of cocaine as the drug of choice for maritime smugglers.

the vessel, and while looking for the marine sanitation device (a vessel's sewage holding tank), the boarding officer discovered approximately fifty foil packages containing what was later determined to be 3,100 pounds of marijuana. *Id.*

311. *Id.* at 746.

312. *Id.* at 751.

313. *Id.* at 746-47.

314. *Id.*

315. *Id.* at 747. The court also ruled that

[t]he Magistrate's finding that the commander of the *Boutwell* decided to board the *Orca* to determine whether the sailboat was capable of making the journey home is supported by the testimony of the commander of the *Boutwell* that he would have been remiss in his duty to insure the safety of United States citizens at sea if he had not made a safety inspection of the *Orca* under the circumstances.

Id.

316. *Id.*

317. "[W]e have held that an administrative plan limiting officer discretion is no longer needed to validate a document and safety inspection by the Coast Guard. Our decision in *Piner* has been substantially eroded following the U.S. Supreme Court decision in *United States v. Villamonte-Marquez*." *United States v. Troise*, 796 F.2d 310, 312 (9th Cir. 1986).

In *United States v. Thompson*,³¹⁸ a Coast Guard boarding party seized an American registered forty-one-foot cabin cruiser-trawler after a suspicionless stop and boarding in the Windward Passage,³¹⁹ approximately five hundred miles from the United States.³²⁰ The Eleventh Circuit affirmed denial of the defendant's motion to suppress the cocaine,³²¹ holding that the defendant had no reasonable expectation of privacy in a concealed compartment.³²² The court determined that generally the expectation of privacy at sea is lower than on land and that the decreased expectation extends to any area of the vessel where a safety and documentation inspection would reasonably take a Coast Guardsman.³²³ The court then found that inspection of the area before holes were drilled into the concealed compartment provided probable cause to believe a violation of law was occurring, thus justifying the intrusive search of the concealed compartment.³²⁴

Thompson indicates that the debate over the constitutionality of the initial stop under section 89 is largely over. Present courts focus solely on the actions of the boarding party after the stop has occurred. Additionally, the balance between government interest and individual privacy in recent cases clearly rests on the premise

318. 928 F.2d 1060 (11th Cir.), *cert. denied*, 112 S. Ct. 270 (1991).

319. *Id.* at 1061. "The district court took judicial notice that the Windward Passage is the most common route taken by drug smugglers in the Western Hemisphere." *Id.* at 1061 n.2.

320. *Id.* at 1061-63. During the safety inspection of the vessel, the boarding party noticed several areas of new fibreglassing, parts of walls that did not match the surrounding area, and unaccounted-for space. *Id.* at 1062. The owner of the vessel had recently purchased it and claimed ignorance of the concealed compartment or its contents. *Id.* The boarding party then drilled a small hole in the compartment and inserted a fiber optic scope to examine the interior visually. *Id.* When this method proved unsuccessful because a white object blocked the view, they drilled a larger hole so that a hand could be inserted into the compartment. *Id.* This search revealed bricks of cocaine, and a subsequent search produced a total of 412 kilograms of the substance. *Id.*

321. *Id.* at 1066.

322. *Id.* at 1064.

323. *Id.* at 1064-65. As justification, the court stated: "One reason for this lower expectation of privacy at sea is that the Coast Guard is statutorily authorized to board a United States vessel and conduct a documents and safety inspection pursuant to 14 U.S.C. § 89(a)." *Id.* at 1064; *see also* *United States v. Meadows*, 839 F.2d 1489, 1491 n.2 (11th Cir. 1988) ("Indeed, the authority to board and conduct such an inspection is so absolute that it can scarcely be argued that one has a reasonable expectation of privacy in the common areas of a ship that would be plainly visible during such an inspection.").

324. *Thompson*, 928 F.2d at 1066.

that there is no general expectation of privacy in a vessel sufficient to prevent suspicionless stops. Otherwise, the analysis would be circular; an expectation of privacy could not prevent random stops by the Coast Guard because the statute empowering the Coast Guard to conduct such stops is predicated upon an absence of a legitimate expectation of privacy

QUESTIONING BROAD ENFORCEMENT AUTHORITY AT SEA

The development of the Coast Guard's enforcement power and the focus of that power have evolved, like the development of many government agencies, in response to perceived—or actual—crises. From the founding of the Coast Guard as a tool to help pay the new nation's debt,³²⁵ through the embargo of British goods in the early-nineteenth century³²⁶ and Prohibition in this century,³²⁷ to the present "war" against illegal substances,³²⁸ each successive crisis has resulted in increased Coast Guard authority. Notably, the greatest expansion of power resulted from the adoption of 14 U.S.C. § 89 *after* Prohibition had ended. That legislation has remained virtually unaltered into the period of drug interdiction.

In the last twenty years, Congress has enacted laws to facilitate strong drug enforcement and has even recruited the military into the effort.³²⁹ Such initiatives however, have not required any change in the Coast Guard's underlying enforcement authority. The judiciary's endorsement of the statute's broad language has allowed for full utility of the law.

At first glance, the full extent of the Coast Guard's authority to stop and board vessels on any federal waterway at any time for any reason is surprising. This surprise is heightened by the realization that this authority is unique to the Coast Guard; land-based law enforcement officers have operated under a reasonable suspicion

325. See *supra* text accompanying notes 23-28.

326. See *supra* text accompanying notes 35-38.

327. See *supra* notes 61-66 and accompanying text.

328. See *supra* text accompanying notes 67-72.

329. See Christopher A. Abel, Note, *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445 (1990).

standard for fifteen years of the drug war.³³⁰ The struggle to keep drugs from our streets and homes has fostered a judicial tolerance for the exercise of Coast Guard authority that hardly qualifies as Fourth Amendment analysis.³³¹ Indeed, the trend in court cases analyzing Coast Guard boardings demonstrates that deference has increased over time.³³² This trend stands in stark contrast to the increase in restrictions upon land-based enforcement methods in this century.³³³

American society continues to favor fighting drug smuggling and drug use in America.³³⁴ The Coast Guard has a major impact on maritime smuggling,³³⁵ but gauging its success is virtually impossible; statistics indicate the quantity of drugs interdicted but do not measure how much gets through the net.³³⁶ It is clear that smugglers will respond to every advance in interdiction efforts or technology with new techniques to elude detection.³³⁷ The supply of illicit drugs continues to be very high,³³⁸ as indicated by the low

330. See *supra* text accompanying notes 208-16.

331. Interview with Professor Paul Marcus, Marshall-Wythe School of Law, College of William and Mary (Dec. 4, 1991). Professor Marcus explained that federal judges generally view drug interdiction at sea as another area of the law not really subject to strict Fourth Amendment analysis. *Id.* The nature of the setting in a vessel stop, border concerns, and the drug smuggling problem in general contribute to a very limited application of the Fourth Amendment. *Id.*, see also 4 LAFAYETTE, *supra* note 252, § 10.8(f) (comparing *Prouse* with *Vilamonte-Marquez*).

332. See *supra* notes 253-303 and accompanying text.

333. See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979) (holding that the stop of an automobile must be based on reasonable and articulable suspicion); *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that investigatory stops must be justified by reasonable suspicion).

334. See, e.g., Richard Lacayo, *A Threat to Freedom?*, TIME, Sept. 18, 1989, at 28, 28.

[T]here are indications that Americans are in a mood to fight drugs, even if that means sacrificing some constitutional guarantees. In a Washington Post-ABC News poll last week, 62% of those questioned said they would be willing to give up "a few of the freedoms we have in this country" to reduce illegal drug use significantly.

Id.

335. See *supra* note 6.

336. *But see* *United States v. May May*, 470 F. Supp. 384, 387 (S.D. Tex. 1979) (stating that the best intelligence estimates for 1978 were that only 10% to 15% of the marijuana coming into the United States was interdicted by the Coast Guard).

337. See *FBI devises drug test*, DAILY PRESS (Newport News), Oct. 25, 1991, at C5; *Feds seize 11 tons of cocaine in fence posts in Fla. business*, DAILY PRESS (Newport News), Dec. 3, 1991, at A3.

338. *U.S. agency reports more coca leaf, opium*, DAILY PRESS (Newport News), Mar. 1, 1992, at A3.

retail prices in many areas.³³⁹ The domestic production of marijuana appears to have increased sufficiently to balance the decreased importation as source countries switched to coca production.³⁴⁰ Arguably, questioning the war may no longer be frivolous.³⁴¹

Support for legalization or decriminalization of drugs has increased.³⁴² The primary impetus for this movement is the violence that accompanies the drug trade in American cities, but another factor is a belief that the government's approach to the national hysteria has trampled certain freedoms,³⁴³ one of them being the freedom to enjoy a day on the water without the interruption of a Coast Guard boarding.³⁴⁴

Coast Guard officials acknowledge that members of the boating public are generally law abiding and cooperate in Coast Guard enforcement efforts.³⁴⁵ However, as the methods of enforcement be-

339. See NNICC REPORT, *supra* note 143, at 6.

340. *Id.* at 3, 44; see also 1991 Budget Hearings, *supra* note 11, at 479, 497 (testimony of Admiral Paul A. Yost, Jr., Commandant, U.S. Coast Guard) (documenting the increase in Coast Guard cocaine seizures and the decrease in marijuana seizures from foreign vessels from 1983-1989); Ralph A. Weisheit, *The Intangible Rewards from Crime: The Case of Domestic Marijuana Cultivation*, 37 CRIME & DELINQUENCY 506 (1991) (discussing the incentives and rewards of domestic production of marijuana).

341. See generally Mark Gibney, *Policing the World: The Long Reach of U.S. Law and the Short Arm of the Constitution*, 6 CONN. J. INT'L L. 103 (1990) (criticizing the increased militarization of drug enforcement and the use of unconstitutional tactics in fighting the drug war abroad); Sandi R. Murphy, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259 (1990) (questioning the effectiveness of U.S. efforts to curb the supply of drugs through intervention in drug-producing countries); Stieb, *supra* note 14 (asserting that expanding the extraterritorial jurisdiction of U.S. courts with regard to drug traffickers at sea violates international law).

342. See, e.g., Steven Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305 (arguing that the war on cocaine can never succeed).

343. "The real victim [in the drug war] is going to be the constitutional rights of the majority of citizens." Lacayo, *supra* note 334, at 28 (quoting Harvey Gittler, Executive Director of Ohio's ACLU); see also *supra* notes 196-207 and accompanying text (summarizing the dissent in *Warren*).

344. See Barry Vrevich, Comment, *Treating a Vessel Like a Home for Purposes of Conducting a Search*, 21 SAN DIEGO L. REV. 751 (1984) (arguing that when a vessel is being used as a home, Fourth Amendment search and seizure requirements should apply).

345. See *Recreational Boat User Fees: Hearing on H.R. 534 and H.R. 388 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 102d Cong., 1st Sess. 32 (1991) (statement of Robert T. Nelson, Rear Admiral, U.S. Coast Guard).

come more intrusive, public acceptance decreases. As more law-abiding boaters have voyages interrupted for increasingly long periods or have holes drilled into their vessels in a search for concealed drugs, the balance between endorsement of drug enforcement and individual rights tilts more toward a feeling of outrage.³⁴⁶ Among the recreational boating community, the desire for change is growing strong.³⁴⁷

Support has also developed for a change in Coast Guard law enforcement procedures used in the drug war. In 1988, the Customs Service and Coast Guard implemented the President's "Zero Tolerance" program, which was designed to decrease demand for drugs by targeting enforcement efforts at drug users; the initial implementation of "Zero Tolerance" authorized the seizure of any vessel on which a detectable amount of illegal drugs was found.³⁴⁸ Numerous vessels were seized with minute amounts of marijuana or cocaine, prompting commercial vessel owners—primarily commercial fishermen—to complain that innocent owners and crewmembers were being penalized and deprived of a living because of the indiscretion of one member of a nine- or ten-man crew.³⁴⁹ In response, Congress investigated the matter³⁵⁰ and the

346. See *Recreational Boating Safety: Hearing Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 114-18 (1989) (statement of Michael Sciuella, Vice President, Boat Owners Association of the United States) (describing four instances of "abuse" of law enforcement authority by Coast Guard or Customs officers that occurred during searches of vessels for drugs that ultimately found nothing).

347. See, e.g., "Zero Tolerance" *Drug Policy and Confiscation of Property: Hearing Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 2d Sess. 83, 93 (1988) (statement of Antonio J. Califa, Legislative Counsel, ACLU) [hereinafter *Zero Tolerance Hearings*]; Ben Brown, *Murky Waters for Boaters*, USA TODAY, Aug. 16, 1990, at 12C; Arthur S. Hayes, *Searches for Drugs Roil Boaters*, WALL ST. J., Apr. 30, 1990, at B1; Dave Knickerbocker, *Who Wants the Vote of Boaters?*, NEWSDAY, Sept. 15, 1988, at 168.

348. See *Zero Tolerance Hearings*, supra note 347, at 98-100, 116-18.

349. See, e.g., Jon Nordheimer, *Tighter Federal Drug Dagnet Yields Cars, Boats and Protests*, N.Y. TIMES, May 22, 1988, at 1, 16 (describing, among other instances, how Coast Guard and customs officials seized a shrimp boat and sold off its haul of shrimp worth almost \$6,000 after finding three grams of marijuana seeds and stems aboard the boat).

350. See *Zero Tolerance Hearings*, supra note 347.

Coast Guard subsequently changed its procedures.³⁵¹ At present, personal-use amounts of illegal drugs found aboard commercial vessels will result in a summons to appear in court and possible administrative action against the owner at a later date, but no interruption of the vessel's work.³⁵² This compromise facilitates effective enforcement of the law and allows for a fairer assessment of penalties against the wrongdoer. This change in policy to accommodate law enforcement and individual rights begs the question whether a similar compromise could address the current Coast Guard policy regarding random, suspicionless boardings.³⁵³ The argument for change must be placed in context, however. The pervasive regulation of the commercial maritime industry, particularly commercial fishing vessels, logically requires sea boardings to ensure compliance with catch limits, equipment restrictions, area closures, and other laws and regulations that cannot effectively be enforced at the dock.³⁵⁴ The need for investigation of recreational boaters is not so compelling.³⁵⁵

Boardings at sea are designed to enforce laws requiring documentation and safety equipment; courts have held that the invasion of privacy in these boardings is limited and sufficiently balanced by the government interest in enforcement.³⁵⁶ The scope of regulation of recreational vessels,³⁵⁷ however, may require Coast

351. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6079, 102 Stat. 4181, 4325; 33 C.F.R. § 1.07-100 (1992); see also *Nomination Hearing*, *supra* note 10, at 16 (describing revised enforcement policy).

352. 33 C.F.R. § 1.07-100.

353. In what can only be described as an accident of the concept of sovereignty applied, foreign vessels cannot be stopped or boarded by the Coast Guard without reasonable suspicion of a violation of U.S. law, but U.S. vessels get less constitutional protection as they are liable to be boarded with no basis for suspicion. See *supra* notes 245, 252-317 and accompanying text.

354. See, e.g., 50 C.F.R. §§ 600-695 (1991) (fishery conservation and management regulations).

355. See Howard S. Marks, *The Fourth Amendment: Rusting on the High Seas?*, 34 MERCER L. REV. 1537 (1983) (arguing that vessel boardings for safety and documentation inspections are often merely a pretext to searches for evidence of drug trafficking and that the Fourth Amendment should apply); Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725 (1980) (advocating regular and mandatory dockside safety inspections rather than boardings at sea, and arguing for judicial enforcement of the Fourth Amendment for any searches).

356. See *supra* note 221 and accompanying text.

357. See *supra* note 17 and accompanying text.

Guard personnel to examine virtually the entire vessel. Even the restroom must be checked to ensure that raw sewage is not dumped into the sea.³⁵⁸ The storage of life jackets and other safety equipment in cabinets under bunks often requires a visit to sleeping areas.³⁵⁹ Most significantly, the search for the main-beam, or documentation, number of the vessel may encompass every area of the vessel to which a person can physically gain access.³⁶⁰ A comparable "inspection" of a home would require a search warrant under all but the most extreme circumstances.³⁶¹ Courts have recognized that there are areas aboard even commercial ships where a reasonable expectation of privacy exists;³⁶² thus, it is difficult to imagine any area of a recreational vessel where similar expectations do not exist.³⁶³

The government argues that investigations conducted while the vessel is underway more effectively ensure that required equipment is aboard the vessel while in use.³⁶⁴ The necessity for such intrusive enforcement, however, is further suspect³⁶⁵ considering the role of the Coast Guard Auxiliary³⁶⁶ Courtesy Marine Examination program. The program enforces these same regulations at

358. See 33 C.F.R. § 159.7 (1992).

359. See *id.* §§ 175.11-.21 (requiring life preservers to be easily accessible and properly maintained).

360. See *supra* note 171.

361. See *generally* *Boyd v. United States*, 116 U.S. 616 (1886) (discussing at length the origins of the Fourth Amendment's prohibition of unreasonable searches and seizures and the necessity of the proper execution of search warrants).

362. *United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir. 1980) (en banc) ("We are assuming that there may be areas in the holds of vessels where someone could have a legitimate privacy interest.").

363. See 3 LAFAVE, *supra* note 252, § 10.5(k), at 783-84.

364. See, e.g., *United States v. Piner*, 608 F.2d 358, 359-61 (9th Cir. 1979). The persuasiveness of this argument is reduced by the Coast Guard's practice of inspecting large commercial vessels while docked. For example, dockside inspections are implemented on commercial fishing vessels of all sizes as a means of enforcing statutes requiring increased safety and survival equipment aboard these vessels. 46 U.S.C. §§ 4501-4508 (1988). At-sea boarding of these vessels may still be necessary to verify compliance with many fishery regulations, but if dockside boardings would be sufficient to inspect all required equipment, then officers will no longer need to conduct equipment inspections during at-sea boardings unless they observe an obvious violation.

365. See *United States v. Demanett*, 629 F.2d 862, 868 (3d Cir. 1980) ("[C]ertainly there are alternatives other than unbridled discretion."), *cert. denied*, 450 U.S. 910 (1981).

366. The Auxiliary is a volunteer civilian organization of approximately 34,000 boat and aircraft owners who assist the Coast Guard in several operational areas, from search and

the dock in a low-key, cordial atmosphere, with no penalties other than a stern admonition of a boater found to lack certain equipment.³⁶⁷ If the vessel is in compliance, an inspection sticker is issued to the owner, to be displayed in a prominent place on the vessel.³⁶⁸ Effectively, this sticker on a recreational vessel institutes a reasonable suspicion requirement for an underway boarding by a Coast Guard patrol by way of an unwritten, but well-known internal policy to encourage voluntary compliance and cooperation with the Auxiliary

Because the Auxiliary inspection process effectively accomplishes the mission of safety at sea, arguably this technique could be adopted for all recreational vessels. Unfortunately, this mission would be removed from the Auxiliary, as the organization cannot implement it for all recreational boaters.³⁶⁹

Implementation of a dockside inspection program would mirror the vehicle inspection programs in many states, in which the vehicle is subject to an annual compliance inspection and issued a sticker indicating compliance. The motorist then is free from such inspections for a year and will not be stopped, for instance, to verify that his brakes function properly. As a result, enforcement resources need not be spent stopping numerous cars to find one or two that are not in compliance. Implementing such a system for recreational vessel boardings would free Coast Guard patrols to concentrate on detecting and boarding vessels for which observation provides reasonable suspicion of unlawful activity. Obvious vi-

rescue patrols, to communication monitoring and recreational vessel inspection. *Overview*, *supra* note 7, at 10; *see also* 14 U.S.C. §§ 821-823; 33 C.F.R. §§ 5.01-.69 (1992).

367. Coast Guard policy states:

Courtesy Marine Examinations may be made only by those Auxiliarists who have been qualified as Vessel Examiners. An examination will be made only with the consent, and in the presence, of the owner or operator. It should be pointed out to everyone connected with the program, and especially to the boat owner or operator, that this is NOT an official Coast Guard boarding, and is made solely as helpful service to the boating public.

UNITED STATES COAST GUARD, COMMANDANT INSTRUCTION M16790.1C, at 2-2 (1991).

368. *Id.* at 2-3.

369. Effective civil penalties similar to those for violations found during boardings at sea are necessary, and civilian members of the Auxiliary cannot exercise this level of enforcement power under current law. *See* 14 U.S.C. §§ 831, 893.

olations would still be checked, as unusual circumstances would provide reasonable suspicion.³⁷⁰

Concerns about the effectiveness of drug interdiction under a reasonable suspicion standard for recreational vessels can be addressed by considering the history of drug cases involving recreational vessels. In the vast majority of cases, observable factors have sufficed to show reasonable suspicion and supported a stop and boarding of the vessel.³⁷¹ Concealed compartments present a more complicated problem, but even in instances in which a vessel has been found smuggling drugs in a concealed compartment, the presence of some external indicator of a violation of law is likely³⁷² The application of new technologies, which is already occurring to a limited degree, would further facilitate use of a reasonable suspicion standard.³⁷³ Similarly, the increase in surveillance and intelligence gathering resulting from the application of Pentagon resources to the drug war should provide a greater quantity and quality of information on specific vessels known to be carrying con-

370. The limited requirements of reasonable suspicion are illustrated by one court's comments:

While presence in a suspect area would not, in and of itself, justify a search, the location of the vessel was certainly a legitimate and important factor for the Coast Guard to consider. When a small vessel is found in an area where the typical traffic is involved in either fishing or drug-related activity, and that vessel lacks the usual earmarks of fishing activity, the Coast Guard may certainly be suspicious.

United States v. Meadows, 839 F.2d 1489, 1490 n.1 (11th Cir. 1988).

371. The types of vessel conduct that have created reasonable suspicion included maneuvering in darkness with no lights, absence of a name or homeport on the exterior of the vessel, use of a removable name board, refutation of the vessel's claimed nationality by the asserted flag country, and prior intelligence information identifying the vessel as a suspect.

A sampling of circuit court opinions since 1977 revealed over forty cases in which reasonable suspicion or probable cause existed to justify the boarding before the boarding party approached the suspect vessel. *See, e.g.*, United States v. Davis, 905 F.2d 245, 250 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 753 (1991); United States v. Roy, 869 F.2d 1427, 1433 (11th Cir.), *cert. denied*, 493 U.S. 818 (1989); United States v. Quemener, 789 F.2d 145, 155 (2d Cir.), *cert. denied*, 479 U.S. 829 (1986); United States v. Wray, 748 F.2d 31, 34 (1st Cir. 1984); United States v. Scott, 678 F.2d 606, 610 (5th Cir.), *cert. denied*, 459 U.S. 972 (1982); Blair v. United States, 665 F.2d 500, 505 (4th Cir. 1981). Admittedly, these cases featured smugglers who were apprehended. Unrepresented are the large majority of cases that were not appealed or were so clear-cut that the defendant accepted a plea bargain and therefore no trial or appeal took place.

372. *See Roy*, 869 F.2d at 1433-34.

373. *See FBI devises drug test, supra* note 337.

traband, or vessels observed in traditional drug on-load areas. Such information would provide reasonable suspicion to stop and board those vessels.

CONCLUSION

In the last twenty years, as national attention has focused on the deleterious effects of drug abuse upon American society, the public has nearly unanimously demanded increased law enforcement, greater prison sentences, and improved education. Congress has obliged this demand for increased law enforcement.³⁷⁴ Recreational boaters are already exposed to the possibility of random, totally discretionary stops and boardings upon the waters. Should Congress perceive a need for increased interdiction efforts, the minimal privacy presently afforded the recreational boater could be in danger.

Unless the national will changes to one of tolerance for drug use, the Coast Guard will continue to play an important role in minimizing the flow of drugs into the country. However, the contribution to this mission by random stops of recreational vessels at sea does not justify the price in individual freedom and privacy that it exacts. A requirement of a reasonable suspicion for these boardings would free significant resources to devote to detecting and stopping the smugglers whose cargoes threaten our society. The uncompromising endorsement of interdiction authority, based in the fear of being perceived as "soft" on drugs,³⁷⁵ must be replaced by a reasoned policy that balances antidrug and privacy interests in order to restore some semblance of Fourth Amendment protection to the maritime world.

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374. See 21 U.S.C. §§ 801-971, 1101-1181 (1988).

375. See *Zero Tolerance Hearings*, *supra* note 347. A general trend in statements at the hearings was for the speaker first to declare that he did not mean his remarks to give the impression that he was soft on drugs; the speaker would then proceed to criticize and question the policy and procedures of Zero Tolerance enforcement as being unduly harsh on his constituent group. See, e.g., *id.* at 45 (statement of David L. Phelps, owner of seized fishing vessel); *id.* at 52, 54 (statement of Jerry Schill, Executive Director, North Carolina Fisheries Ass'n).