

NOTE

FIFTH CIRCUIT CASES CONCERNING SEARCH AND SEIZURE UPON THE HIGH SEAS: THE NEED FOR A LIMITING DOCTRINE

I. INTRODUCTION

In the last few years, illegal smuggling of marijuana into the United States has increased dramatically.¹ As a result, the number of arrests off the coast of the United States by Coast Guard officials has also increased. The Fifth Circuit Court of Appeals has been the primary court to handle appeals arising from cases involving searches and seizures conducted by the Coast Guard upon the high seas.² One statute, 14 U.S.C. § 89a,³ has been

¹ Drug-related seizures by the Coast Guard upon the high seas for the years 1973-1978:

<i>No. of Seizures</i>	<i>Year</i>
5	1973
11	1974
5	1975
17	1976
33	1977
28	1978

Interview with Mr. Leo Loftus, Chief of Media Relations, Editorials Branch of the Coast Guard's public affairs section, March 10, 1980. According to Mr. Loftus, most of the seizures were carried out in the Miami area; however some took place near and around New England.

² Major Coast Guard operations centers are located at Miami, Florida and New Orleans, Louisiana and serve as home port for several Coast Guard cutters patrolling the United States coastline. Venue is appropriate in the district court to which the defendant is first brought after an offense has been committed at sea, 18 USC § 3238 (1976); apparently, the Coast Guard has the authority to carry defendants into any district desired and consequently more defendants are carried into districts near the Coast Guard's home port areas which is Fifth Circuit territory.

Additionally, many of the vessels seized were sailing courses, which if undisturbed, would have landed them without the Fifth Circuit's jurisdictional area.

The term 'high seas' means all parts of the sea that are not included in the territorial or in the external waters of a state. Article I, Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82.

³ The text of 14 U.S.C. § 89 reads:

(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

relied on in support of the Coast Guard's authority to engage in these searches and seizures.

Because the literal text of section 89a purports to authorize the Coast Guard to search and seize any vessel upon the high seas which is subject to the jurisdiction or operation of a law of the United States, without requiring the presence of probable cause or a search warrant, defendants whose presence before the court was secured through the Coast Guard's reliance upon section 89a usually have asserted a two-pronged attack upon the statute. First, defendants have argued that the Coast Guard did not have authority over the particular area in which their vessel was seized, and second, they have maintained that section 89a does not comport with the warrant requirements of the fourth amendment.⁴

This Note examines the course charted for searches and seizures by the Fifth Circuit. The initial focus is on the history of section 89a, followed by a review of the interpretations the Fifth Circuit has rendered concerning the question of whether section 89a is valid in authorizing the Coast Guard to search and seize vessels beyond 12 miles of the United States coastline. Analysis is then made of the Fifth Circuit holdings that section 89a is constitutional even though it purports to authorize searches and seizures

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.

⁴ See *U.S. v. Odom*, 526 F.2d 339 (5th Cir. 1976); *U.S. v. Cadena*, 585 F.2d 1252 (5th Cir. 1978); *U.S. v. One 43 Foot Sailing Vessel*, 538 F.2d (5th Cir. 1976); *U.S. v. Warren*, 578 F.2d 1058 (5th Cir. 1978).

upon the high seas without a search warrant or a showing of probable cause.

II. THE HISTORY OF SECTION 89a

The present-day 14 U.S.C. § 89a was enacted to give the Coast Guard authority to board, search and seize American vessels upon the high seas.⁵ Prior to the enactment of this statute, judicial decisions conflicted sharply over the issue of whether the Coast Guard could lawfully search and seize an American vessel beyond 12 miles of the American coastline.⁶ In 1927, the Supreme Court decided the case of *Maul v. U.S.*⁷ In *Maul*, officers of the Coast Guard seized an American vessel 24 miles from the coast and gave her to the collector of customs claiming liability to forfeiture for violation of United States navigation laws. Libel proceedings filed against the vessel were dismissed by the district court "on the theory that officers of the Coast Guard were without authority to seize the vessel at sea more than 12 miles from the coast."⁸ The Second Circuit Court of Appeals reversed;⁹ since it had been established that reasonable cause existed to believe that a law of the United States was being violated, the Coast Guard could seize the vessel despite the statutory limits of its power.¹⁰ The Supreme

⁵ A BILL TO DEFINE THE JURISDICTION OF THE COAST GUARD, H.R. REP. NO. 2452, 74th Cong., 2d Sess. 1 (1936).

For purposes of the jurisdiction of the courts of the sovereignty whose flag it flies, a vessel is deemed to be a part of the territory of that sovereignty and retains that characteristic even while within the territorial limits of another state. *United States v. Flores*, 289 U.S. 137 (1933). If an offense is committed aboard a vessel while within the territorial limits of another state, American courts can assert jurisdiction over the defendant when he returns or is returned to American jurisdictional territory. This well recognized principle yields to the right of the territorial state to assert jurisdiction over offenses committed on board the vessel which disturbs the peace and tranquility of the port. See *Wildenhus's Case (Mali v. Keeper of Common Jail)*, 120 U.S. 1 (1886).

It should be stressed that the jurisdiction in question is that of the district court once the defendant has returned or has been returned to U.S. territory. It is not a question of whether the Coast Guard or any other federal law enforcer could enter the territorial limits of another state, arrest, seize and return the defendant to the United States. On this point, see also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 44 (1962).

⁶ Cases that allowed jurisdiction beyond the 12 mile limit include: *The Rosalie M.*, 4 F.2d 815 (S.D. Tex. 1925); *United States v. Lee*, 274 U.S. 559 (1927); *The Underwriter*, 6 F.2d 937 (D. Conn. 1925). Cases that did not allow jurisdiction beyond 12 miles include: *The Apollon*, 22 U.S. (9 Wheat) 361 (1824); *United States v. Bentley*, 12 F.2d 466 (D. Mass. 1926); *The Hamilton*, 207 U.S. 398 (1907).

⁷ 274 U.S. 501 (1927).

⁸ 6 F.2d 937 (D. Conn. 1925).

⁹ 13 F.2d 433 (2d Cir. 1926).

¹⁰ *Id.* at 434.

Court affirmed the ruling of the Second Circuit, but relied on section 3072 of the Revised Statutes¹¹ to support its conclusion. That statute stated that "it shall be the duty 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 and within their respective districts." The phrase "as well without and within their respective districts" was given a broad construction to encompass the area of the high seas. Otherwise the Court reasoned, "vessels violating the revenue laws and thereby incurring liability to forfeiture could escape seizure by departing from or avoiding waters within customs districts."¹²

Justice Brandeis, in a concurring opinion,¹³ disagreed with the statutory construction given by the majority. He was concerned that the construction given the Coast Guard's authority by the majority was too limited and failed to accommodate other duties and responsibilities of the Coast Guard which extended beyond the mere enforcement of revenue laws.¹⁴ For Brandeis, instead of searching for express statutory authorization based on the particular law violated, the question for decision was whether the Coast Guard had the power to seize American vessels beyond the 12 mile limit regardless of the particular law violated.¹⁵ He felt that "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."¹⁶

Justice Brandeis launched into a history of the Coast Guard and its authority. He noted that the Coast Guard was established in 1915 by consolidation of the Revenue Cutter and the Life Saving Services and were charged with the duty to enforce all maritime laws of the United States.¹⁷ The duties of the Revenue Cutter Service had been expanded continually into many areas of operation since its establishment and the act of 1915 creating the Coast Guard "did not add or abridge in any respect existing duties of revenue cutters. It merely transferred the duties and powers theretofore possessed."¹⁸ It was noted that certain previously

¹¹ Section 3072, Revised Statutes, 19 U.S.C. § 506 (1799); Act of March 1799, 1 Stat. 627, ch. 22, § 70.

¹² 274 U.S. at 511.

¹³ *Id.* at 512, joined by Justice Holmes.

¹⁴ *Id.* at 512-13.

¹⁵ *Id.* at 513.

¹⁶ *Id.* at 512.

¹⁷ An Act to create the Coast Guard, 38 Stat. 800, ch. 20 (1915).

¹⁸ 274 U.S. at 515.

enacted statutes had provided for the boarding of American vessels beyond the territorial limits¹⁹ and, when it was deemed necessary, American vessels had been seized upon the high seas.²⁰ Justice Brandeis, after this historical overview, concluded that the Coast Guard had authority to arrest American vessels upon the high seas no matter what the law violated or the place of seizure.²¹

After the Supreme Court's decision in *Maul*, Congress thought it necessary to enact a bill defining the jurisdiction of the Coast Guard. Congress was concerned that "in the future it is possible that, based upon some expressions in the majority opinion, the contention will be made that express authority of law is necessary to secure enforcement by the Coast Guard of some laws and also to give jurisdiction to enforce those laws beyond the twelve mile limit."²²

The House Committee on Merchant Marine and Fisheries in charge of the bill readily utilized the concurring opinion of Justice Brandeis in *Maul*. Certain sections of his opinion were reproduced verbatim in the report to the full House.²³ On June 22, 1936, section 89a was enacted into law.²⁴

III. THE JURISDICTIONAL ISSUE²⁵

This Note deals with the following four situations, three of which the Fifth Circuit has already considered concerning the

¹⁹ See e.g., 274 U.S. at 521:

"The express authority to board and search in terms beyond the territorial limits of the United States first appeared in Section 31 and 64 of the Custom-Collection Act of August 4, 1970, c. 35, 1 Stat. 145, 164, 175, which established the Revenue Cutter Service. The authority there conferred upon it was to board and search within 'the United States or within four leagues of the coast.' It applied to all vessels—foreign as well as American; but was limited to in bound vessels."

²⁰ 274 U.S. at 525-26 and n. 29.

²¹ *Id.* at 531.

²² A BILL TO DEFINE THE JURISDICTION OF COAST GUARD, H.R. REP. NO. 2452, 74th Cong., 2d Sess. 2 (1936). (*hereinafter* HOUSE REPORT 2452).

²³ The deference given the concurring opinion is illustrated by the statement contained in the report: "Your committee concurs in the opinion of Mr. Justice Brandeis that . . . the Coast Guard is authorized to search American vessels subject to forfeiture under our laws, no matter what the place of the seizure and no matter what the law violated." HOUSE REPORT 2452, *supra* note 22.

²⁴ 49 Stat. 1820, ch. 705, sec. 1; 14 U.S.C. §§ 45, 46 (1936).

²⁵ There are two jurisdictional issues: subject matter jurisdiction and personal jurisdiction. Subject matter jurisdiction is discussed within the context of this Note. The question of personal jurisdiction requires only summary treatment from the Fifth Circuit which has long been a proponent of the "Kerr-Frisbie" rule. According to this principle, a defendant in a federal criminal trial whether citizen or alien, whether arrested within or beyond the ter-

Coast Guard's authority pursuant to section 89a: first, the Coast Guard's authority to stop, search and seize any *American* vessel upon the high seas; second, the Coast Guard's authority to stop, search and seize any *foreign* vessel upon the high seas; third, the Coast Guard's authority to stop, search and seize any *American* vessel in *foreign territorial waters*; and fourth, the Coast Guard's authority to stop, search and seize a *foreign* vessel in another *foreign state's territorial waters*. The fourth situation is hypothetical, but the trend established by the Fifth Circuit in deciding the first three situations leaves little doubt that faced with the question, the court would allow such a boarding, despite commonly understood standards of international law.

The United States is a signatory to both the Convention on the High Seas²⁶ and the Convention on the Territorial Sea and the Contiguous Zone.²⁷ Article 2²⁸ of the Convention on the High Seas proclaims the freedom of the seas for all. Accordingly, no nation may exercise sovereignty over them.²⁹ Article 24³⁰ of the Conven-

tion of the United States may not successfully challenge the district court's jurisdiction over his person on the grounds that his presence before the court was unlawfully secured. *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975); *Kerr v. Ill.*, 19 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

²⁶ Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82.

²⁷ Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 1516 U.N.T.S. 205.

²⁸ Article 2 states:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

²⁹ *Id.*

³⁰ Article 24 states:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. *The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.*

3. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the con-

tion on the Territorial Sea and the Contiguous Zone limits a country's contiguous zone to 12 miles. Within the 12 mile limit, a country exercises plenary jurisdiction over all vessels, subject only to the requirement that passage by foreign vessels may not be interfered with unreasonably.³¹

A. *United States Vessels on the High Seas*

Defendants arrested outside the contiguous zone frequently argue that the United States Coast Guard does not possess the authority to board and seize vessels past the 12 mile limit in violation of international law. In *U.S. v. Odom*,³² the Coast Guard observed a vessel 200 miles from shore traveling toward the United States. After determining that the vessel was registered in the United States, a routine safety and documentations examined was ordered. In the vessel's hatch, several unmarked burlap bags containing marijuana were found. Although the government contended that the "search should be governed by border search standards"³³ and held permissible as long as "reasonable suspicion existed to believe that contraband was on board,"³⁴ the Fifth Circuit found it unnecessary to rule on that contention. Under section 89a, authority was found for the Coast Guard to make examinations, seizures and arrests of American vessels upon the high seas even in the absence of reasonable suspicion.³⁵

In *U.S. v. Warren*,³⁶ the Coast Guard stopped another American vessel 700 miles from shore headed away from the United States. A routine inspection uncovered firearms, large amounts of unregistered currency and a small amount of marijuana. The majority opinion held that pursuant to the authority conferred by

trary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured. (Emphasis added).

³¹ *United States v. Warren*, 578 F.2d 1058, 1065 and n. 4 (5th Cir. 1978).

³² 526 F.2d 339 (5th Cir. 1976).

³³ *Id.* at 341.

Although the government contended that the search should be treated using border patrol standards, the type of random search conducted by the Coast Guard is more akin to the roving patrol which the Supreme Court held violative of the Constitution in *Almedia-Sanchez v. United States*, 413 U.S. 266 (1973). The place of the search was neither a *permanent* nor a *permanent-temporary* checkpoint within the territorial limits of the United States as discussed in *United States v. Hart*, 506 F.2d 887 (5th Cir. 1975). Instead the search took place 200 miles outside of the United States territorial limits.

³⁴ *Id.* at 341-42.

³⁵ *Id.* at 342.

³⁶ 578 F.2d 1058 (5th Cir. 1978).

section 89a, the Coast Guard could apprehend and board any vessel under the American flag. The court held that this authority is plenary when exercised beyond the 12 mile limit.³⁷ From these interpretations, it is clear that section 89a will be read to reach across the high seas to any American vessel.³⁸

B. *Foreign Vessels on the High Seas*

Article 6 of the Convention on the High Seas³⁹ states that every nation exercises *exclusive jurisdiction* over its flag vessels on the high seas; therefore, no other nation has authority under international law to search and seize an American vessel on the high seas, and officials of the United States are subject to the same restrictions on the seizure of foreign vessels on the high seas. However, this reasoning was undermined by the Fifth Circuit's decision in *U.S. v. Cadena*.⁴⁰

In *Cadena*, the Coast Guard boarded a Canadian freighter in international waters and arrested its Colombian crew after finding marijuana aboard.⁴¹ The vessel was sailing in the direction of the United States. The Fifth Circuit refused to apply the provisions of the Convention on the High Seas, which explicitly prohibited the Coast Guard's seizure of a foreign vessel at sea. The court held that although both Canada and Colombia signed the treaty, neither country had ratified it, and that article 32 of the treaty required each country to ratify the treaty.⁴² Therefore, citizens of

³⁷ *Id.* at 1064. In addition, under international law, registration alone makes a vessel subject to all of the rules and regulations of the country of registration. Convention on the High Seas, *supra* note 26 at article 5.

³⁸ 578 F.2d at 1064.

³⁹ The full text of article 6 reads:

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

⁴⁰ 585 F.2d 1252 (5th Cir. 1979).

⁴¹ The crew was Colombian and there was a Colombian certificate indicating that the ship had been inspected for rates in 1976, but the ship's registration was Canadian.

⁴² 585 F.2d at 1261. The Court also rejected the defendants' contentions that since the treaty simply restated principles of international law, they had standing to assert the underlying doctrines of the treaty.

It can be argued that the court committed a non sequitur in its reasoning. It does not follow from the fact that Colombia and Canada have not ratified the Convention that the United States, which has ratified it, is not constrained from exercising authority over a Canadian vessel and Colombian crew on the high seas.

these countries were not entitled to the protections of the treaty. However, in looking to national law to decide the case, the Fifth Circuit conceded that it could find no statute that expressly extended the Coast Guard's authority to a foreign vessel over 200 miles from the American shore, and recognized that if the Coast Guard possessed such authority, it must be implicitly embodied within section 89a.⁴³ In finding this authority, the panel observed that for a number of years, the United States has adhered to the objective view of jurisdiction.⁴⁴ The objective view of jurisdiction holds that the jurisdiction of United States courts extends to persons whose acts have an effect within the territorial United States even though most of the overt acts take place outside of the United States. The defendants aboard the foreign freighter had been engaged in conspiracy to violate federal narcotics statutes 21 U.S.C. §§ 952 and 963 by attempting to import marijuana into the United States. Importation, by definition, must begin in another country; therefore, the panel reasoned, Congress must have intended 21 U.S.C. §§ 952 and 963 to apply to persons who engaged in activities commenced extraterritorially.⁴⁵ Because such activity is within the operation of a law of the United States, a foreign vessel may be searched and seized 200 miles from the American shore.⁴⁶ Jurisdiction over the offense confers authority on the Coast Guard under section 89a.⁴⁷

Due to previous constructions of section 89a and article 6 of the Convention on the High Seas, the Coast Guard already possessed authority to search and seize American vessels any place upon the high seas. The Fifth Circuit's opinion in *Cadena* made it clear that since jurisdiction over the offense would confer authority under section 89a, foreign vessels would no longer enjoy immunities from searches and seizures upon the high seas despite the mandate of article 6, due to the application of the objective view of jurisdiction.

⁴³ *Id.* at 1259.

⁴⁴ The jurisdiction of the United States courts extends to persons whose acts have an effect within the territorial United States even though most of the overt acts take place outside of the United States. However, at least one overt act within the United States must be proved. *U.S. v. Winter*, 509 F.2d 975, 982-83 (5th Cir. 1975).

⁴⁵ 585 F.2d at 1259.

In *United States v. Johnson*, 578 F.2d 1347, 1366 (5th Cir. 1978) it was said that an overt act within the United States is not necessarily a condition to the application of 21 U.S.C. § 963 (1970). Arguably, then, proof of an overt act within the United States is no longer required for jurisdictional purposes and that mere proof of intended territorial effects is sufficient.

⁴⁶ 585 F.2d at 1259.

⁴⁷ *United States v. Cortes*, 588 F.2d 106, 109 (5th Cir. 1979).

One question left by the Fifth Circuit's conclusion in *Cadena* was how this interpretation would actually affect subsequent constructions of the terms of the Convention on the High Seas and the Convention on the Territorial Sea and Contiguous Zone by the Fifth Circuit. In early 1979, the Fifth Circuit was given an opportunity to pass on that question. In *United States v. Postal*,⁴⁸ the Coast Guard, apparently in violation of article 6 of the Convention on the High Seas, searched and seized a foreign vessel outside of the United States' 12 mile limit as the vessel was sailing away from the United States. The ship was found to be carrying over 80,000 pounds of marijuana. The defendants asserted two arguments. First, they contended that the boarding of their vessel,⁴⁹ which violated treaty obligations of the United States, operated to deny the district court jurisdiction because the United States had imposed a territorial limitation upon its own authority by entering into the treaty. Therefore, the United States lacked the power to subject the vessel to its laws.⁵⁰ The second argument

⁴⁸ 589 F.2d 862 (5th Cir. 1979).

⁴⁹ The Coast Guard boarded the vessel twice. The first boarding was held authorized by article 22 of the Convention on the High Seas. Article 22 states that when there is reasonable ground for suspecting:

- 1 . . .
- (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
- 2 . . . If suspicion remains after the documents have been checked, it [the warship through its officers] may proceed to further examination on board the ship, which must be carried out with all possible consideration.

The court felt that ample grounds for the Coast Guard to suspect the vessel's nationality existed here. The vessel was flying no flag and exhibited no name or home port on her stern. An officer of the Coast Guard boarded and was given documents he requested, among which was a certificate of Grand Cayman registry. The Officer having determined the nationality of the vessel was ordered to return to his ship. 589 F.2d at 867.

The second boarding took place as a customs search two and a half to three hours after the first boarding and at about a distance of 16.3 miles from the nearest United States coastline. Since at this time the Coast Guard knew the vessel to be of foreign nationality, the boarding was in disregard of article 6 of the Convention on the High Seas. *See* n. 39.

⁵⁰ This argument is premised on the results reached by the Supreme Court in the case of *Cook v. United States* 288 U.S. 102 (1933) and *Ford v. United States* 273 U.S. 593 (1927). In those cases, as in *Postal*, there was a treaty containing provisions which were violated by law enforcement officials. In *Cook*, the Supreme Court dismissed jurisdiction over a British vessel seized for smuggling liquor into the United States in violation of a treaty with Great Britain. The Court held that the United States had imposed a territorial limitation upon its own authority by entering the treaty and therefore lacked power to subject the vessel to its laws.

Ford involved prosecution for conspiracy to violate the same liquor smuggling statutes. Had the defendants raised timely objections to the Court's jurisdiction, the court hinted that the result would have been the same as was reached later in *Cook*.

was that the Coast Guard lacked statutory authority to seize their foreign vessel past the 12 mile limit.

The Fifth Circuit acknowledged that where the terms of a treaty are involved, such violations by enforcement officials may deprive the United States courts of jurisdiction over persons and property. However, the court noted that only self-executing treaties could operate to limit jurisdiction.⁵¹ The court took notice of the domestic law of the states which signed the treaty,⁵² the history of the United States assertion of jurisdiction over vessels on the high seas,⁵³ case authority,⁵⁴ and congressional hearings on the ratification of the treaty,⁵⁵ and concluded that the treaty was not self-executing and the United States in adopting article 6 did not intend to limit its traditionally asserted jurisdiction over vessels upon the high seas.⁵⁶

Addressing the Coast Guard's authority to board a foreign vessel beyond 12 miles of the coast, the panel cited *Cadena* and its holding that vessels become subject to the jurisdiction or to the operation of any law of the United States if they are engaged in a conspiracy to violate federal narcotics statutes.⁵⁷

Under the authority of 14 U.S.C. § 89a, the Coast Guard may apprehend and board any vessel of the American flag upon the high seas.⁵⁸ This authority is plenary when exercised beyond the 12 mile limit and need not be founded on any particularized suspi-

⁵¹ 589 F.2d at 875.

⁵² *Id.* at 878.

⁵³ *Id.* at 879.

⁵⁴ *Id.* at 879-80.

⁵⁵ *Id.* at 881.

⁵⁶ *Id.* at 884.

However, the information analyzed by the court falls far short of establishing American control over foreign vessels at sea. The authority cited shows searches of foreign vessels only within twelve miles of the coast: An Act To Provide More Effectually For The Collection of Duties, ch. 35, 1 Stat. 145 (1790) (foreign vessels bound for the United States could be boarded and manifests examined and cargoes inspected). *Church v. Hubbard*, 6 U.S. (2 Cranch) 187 (1804) (approving the language of the preceding act). *The Betsy* 3 F.Cas. 303,304 (C.C.D. Mass. 1818) (interpreting a later, but similar statute).

The court also noted that the President may designate customs enforcement zones which extend beyond United States territory. These zones may be temporarily designated by the President only after a vessel has been sighted in a particular area and may extend only 62 miles from the coast. 19 U.S.C. §§1701-1711 (1976).

See also *United States v. Cadena*, 585 F.2d 1252, 1259 (5th Cir. 1978) where the court, citing *United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1820), said that the special maritime and territorial jurisdiction of the United States set forth in 18 U.S.C. § 7 (1976) extends to the high seas, but does not cover foreign vessels.

⁵⁷ *Id.*

⁵⁸ *United States v. Odom*, 526 F.2d 339 (5th Cir. 1976).

cion.⁶⁰ Section 89a also confers authority over foreign vessels because at certain times they, too, are subject to the jurisdiction of the United States, given the application of the objective view of jurisdiction and a showing of the violation of United States narcotics law.⁶⁰

After initially construing section 89a to apply to any American vessel, the Fifth Circuit has now extended that construction to apply to foreign vessels upon the high seas as well. In reviewing the history of section 89a, there can be little doubt that in *Maul* Justice Brandeis concerned himself specifically with the power of the Coast Guard to seize American vessels beyond the 12 mile limit.⁶¹ Although he found implicit authority to board American vessels upon the high seas, in analyzing section 3059⁶² which read like a nascent section 89a, Justice Brandeis wrote that "Congress cannot have intended to confer the general authority to seize *foreign* vessels upon the high seas."⁶³

A year before Justice Brandeis delivered his concurrence in *Maul*, the Second Circuit Court of Appeals, while recognizing the Coast Guard's authority over domestic vessels beyond the 12 mile limit, wrote:

[u]nder ordinary conditions, the United States would have no authority in times of peace to search or seize a foreign vessel beyond its territorial limitations, which is three miles, but where treaties recognize or permit search and seizure to the twelve mile limit, and this explanation is acquiesced in by other nations . . . it is clearly the intent of Congress . . . to permit the Coast Guard . . . to make search and seizure for violation of the law within the twelve mile limit.⁶⁴

While both the Supreme Court and the Second Circuit Court of Appeals were willing to recognize the Coast Guard's authority to board, search, and seize an American vessel beyond the 12 mile limit, neither court was willing to ascribe to Congress the power to authorize the Coast Guard to search and seize foreign vessels beyond the 12 mile limit.

⁶⁰ United States v. Warren, 578 F.2d 1058 (5th Cir. 1978).

⁶⁰ United States v. Cadena, 585 F.2d 1252 (5th Cir. 1979).

⁶¹ United States v. Maul, 274 U.S. 501 at 513 (1927).

⁶² Section 3059, Revised Statutes, ch. 201, 14 Stat. 178 (1866).

⁶³ 274 U.S. at 523. A footnote to that statement read:

Even under hovering laws, a sovereign may not seize a foreign vessel until it enters the territorial waters. These do not extend beyond the three mile limit (citations omitted). 274 U.S. at 523, n. 26.

⁶⁴ The Underwriter, 13 F.2d 433, 434 (2d Cir. 1926).

C. *United States Vessels in Foreign Waters*

Section 89a speaks in terms of the high seas. The term "high seas" means all parts of the sea that are not included in the territorial sea or in the external waters of a state.⁶⁵ By definition, it does not include the territorial waters of another sovereign state.

In *U.S. v. Conroy*,⁶⁶ a Coast Guard cutter pursued an American vessel into Haitian territorial waters and upon reaching the vessel found 7,000 pounds of marijuana. The vessel and its crew were seized.⁶⁷ The panel hearing the appeal found the search and seizure in Haitian waters did not exceed statutory authority. Although section 89a does not reach the territorial waters of another country, the panel accepted the government's interpretation that "the phrase 'over which the U.S. had jurisdiction' was not intended to be restrictive and the Coast Guard has *implicit power* to search an American vessel in foreign waters even in the absence of express authorization."⁶⁸

The panel reached its conclusion after taking a historical look at section 89a beginning with Justice Brandeis' concurring opinion in *Maul*. While acknowledging that section 89a did not address the issue of arrest in foreign territorial waters, the panel concluded that considering the broad language of the statute and the congressional action subsequent to *Maul*, Congress did intend for the Coast Guard to stop American vessels in foreign territorial waters, absent objection from the foreign sovereign power.⁶⁹

The court buttressed its argument by citing language from the debate by the participants to the Convention on the Territorial Sea and Contiguous Zone, noting that the draftsmen rejected any

⁶⁵ See note 26 *supra*, at article I.

⁶⁶ 589 F.2d 1258 (5th Cir. 1979).

⁶⁷ The Coast Guard requested and received the authorization of the Haitian Chief of Staff to enter Haitian territorial waters. However, as the court noted, the mere consent of foreign authorities to a seizure that would be unconstitutional in the United States does not dissipate its illegality even though the search would be valid under local law. *Id.* at 1265.

⁶⁸ 589 F.2d at 1265. The court could not utilize the provisions of the Convention on the High Seas dealing with hot pursuit in making its decision. Article 23 of The Convention on the High Seas delineates the right of hot pursuit. This right is applicable to a state's pursuit of a foreign vessel. The pursuit must be commenced when the ship or one of its boats is "within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted."

"The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third state." *Id.* In this case, the Coast Guard was not pursuing a foreign vessel, and if it had been, the right of hot pursuit ended as soon as the pursued ship entered Haitian waters.

⁶⁹ 589 F.2d at 1267.

requirement of previous authorization by a coastal state for the entry of a foreign warship into territorial waters for innocent purposes.⁷⁰ It was determined from that rejection that among parties to the Convention, a warship of one nation may enter the territorial waters of another nation for innocent purposes without first giving notification or receiving authorization.⁷¹

The clear implication here is that even if the Coast Guard had not sought and received the authorization of Haitian officials, the entry into and the subsequent search and seizure within Haitian waters would have been authorized by international law. If consent by Haiti to a lawfully authorized search within their ter-

⁷⁰ *Id.*

In international law, Coast Guard vessels are classified as warships. See note 26 *supra*. Article 8 § 2 provides:

For the purposes of these articles, the term "warship" means a ship belonging to the naval force of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

⁷¹ The court's conclusion here can be controverted. It is true that prior to the codification of the Convention On The Territorial Sea and Contiguous Zone, there existed in international law no right of innocent passage for warships. However, the actions of the drafters do not support a conclusion that implicitly contained within the treaty is a right of innocent passage for warships.

The International Law Commission (Commission) prepared a version article 24 to be considered for inclusion into the treaty on the territorial sea and contiguous zone. That article stated that: "The coastal state may make the passage of warships through the territorial sea subject to previous authorization or notification." 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW §18 at 411 (1965). The wording of the article was in direct response to international dissatisfaction over the position taken by the Commission in the sixth session of 1954, where the view was adopted that passage should be granted to warships without prior authorization or notification. Therefore, in its seventh session of 1955, the Commission amended article 24 to stress the right of the coastal state to make the right of passage of warships through territorial waters subject to previous authorization or notification. *Id.* at 411-412.

In the eighth session, the Commission reconsidered the issue in light of comments from other governments pointing out that in practice, passage was effected without formality and without objection from the coastal state. However, the Commission saw no reason to change its opinion. While it was a "laudable" attitude not to require previous authorization or notification and a large number of states have dispensed with such a requirement, "this does not mean that a state would not be entitled to require such notification or authorization if it deemed it necessary to take this precautionary measure." *Id.* at 412.

When article 24 was submitted to the plenary meeting for its adoption, an amendment successfully passed which removed the words "authorization or" from the section. This new wording, if adopted on final vote, would have meant that no previous authorization would be necessary for a warship to enter territorial waters. However, on final vote, article 24 was defeated and did not become a part of the Treaty of the Convention on the Territorial Sea and Contiguous Zone. *Id.* at 416. This effectively left international law on the question of innocent passage for warships in the same position it had previously enjoyed. Therefore, since the rejection of previous authorization was followed by the rejection of the entire article which specifically governed passage of warships, the court's finding of an implicit right of passage is open to question.

ritorial waters would be sufficient to properly subject an American vessel to the Coast Guard's authority, there still exist two points of contention: first, whether, as the Fifth Circuit has concluded, the international principle of entry for innocent passage, standing alone, would have sanctioned the Coast Guard's actions had it not received the express permission of Haiti; and second, whether lawful authorization for the search and seizure within Haitian waters can be found within or inferred from section 89a.

The court's discussion of innocent passage is immediately succeeded by the court's recognition that innocent passage has nothing to do with the authority of the Coast Guard to seize a vessel in foreign territorial waters, but rather relates to the rights between two nations. Citing *The Richmond*,⁷² the court stated that "the seizure of an American vessel within the territorial jurisdiction of a foreign power, is certainly an offense against that power, which must be adjusted between the two governments."⁷³ Furthermore, the grant of the right of innocent passage does not carry as a corollary the right to exercise sovereign power within those territorial waters. The grant of innocent passage is for the limited purpose of passage. Passage may include stopping and anchoring, but only when such actions are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.⁷⁴ Therefore, although a warship (*e.g.*, a Coast Guard cutter) of another state may be allowed to traverse territorial waters, that warship is not given authority to exercise sovereign powers while within those waters. Generally speaking, one state may not enforce its rules of law by taking action within the territory of another state.⁷⁵

Current international law contains few provisions allowing one state to exercise authority in the territorial waters of another state. Article 19⁷⁶ of the Convention on the High Seas authorizes

⁷² *The Ship Richmond v. United States*, 13 U.S. (9 Cranch) 102 (1815).

⁷³ 589 F.2d at 1268, *citing* *The Ship Richmond* at 103.

⁷⁴ *See* Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 1516 U.N.T.S. 205, at article 14, sec. 4.

⁷⁵ *The SS "Lotus,"* [1927] P.C.I.J., Ser. A, No. 10.

⁷⁶ Article 19 reads:

Article 19

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with

every nation to seize a pirate ship or aircraft upon the high seas or any other place outside the jurisdiction of any state. Article 23⁷⁷ recognizes a right of hot pursuit upon the high seas, but this right ceases as soon as the pursued vessel enters the territorial waters of another country. These articles illustrate the sanctity with which the drafters (and signatories) of these international treaties regarded territorial waters.

Even assuming *arguendo* that Congress has the authority to permit the Coast Guard to conduct searches and seizures within the territorial waters of another nation, it is important to determine when, if at all, Congress granted this authority to the Coast Guard. The wording of the statute is unambiguous and Congress in its modifications of section 89a appeared more concerned with refining phraseology than expanding jurisdictional authority.⁷⁸ It

regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

⁷⁷ Article 23 reads:

Article 23

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

⁷⁸ Except for minor revisions and amendments, the ambit of section 89a has remained substantially unchanged.

In an Act of July 11, 1941, the proviso at the end of the first sentence was omitted. It read: "Provided, that nothing herein contained shall apply to the inland waters of the U.S., its Territories, and possessions, other than the Great Lakes and the connecting waters thereof" 55, Stat. 585, ch. 290, Sec. 7.

In 1946, the "phrase 'except the Philippine Islands' following 'possessions' in the first

is difficult to accept the Fifth Circuit's conclusion in *Conroy* that Congress would have intended that the Coast Guard have the authority to enter foreign territorial waters to search and seize American vessels. In reading both the present and the original versions of section 89a, the unmistakable intent is that Congress intended to give the Coast Guard absolute authority to search American vessels upon the high seas. If Congress had intended to confer the authority to board in foreign territorial waters, it could have easily done so within the broad coverage of section 89a by simply adding a few additional words. In fact, prior to 1959 a naval regulation prohibited naval vessels from operating near or in "claimed territorial waters without first obtaining permission from higher authority."⁷⁹ As previously stated, there existed in international law no right of innocent passage for warships through the territorial waters of another state at the time of that regulation. Since there was no right to pass through another nation's territorial waters for even innocent purposes, Congress could not have intended to authorize the Coast Guard's entry into such waters for purposes of questionable innocence contrary to national and international law.⁸⁰ There has been no indication that the original congressional authorization of jurisdiction has been expanded by Congress.

D. *Foreign Vessels in Foreign Waters*

Even more important than whether Congress intended the interpretation espoused by the Fifth Circuit is the extreme to which these interpretations might be extended. Under *Conroy*, the Coast Guard has authority to stop American vessels anywhere upon the high seas and even within the territorial waters of

sentence was omitted on the authority of 1946 Proc. No. 2695, cited to text and set out as a note under section 1240 of title 48, Territories and Insular Possessions, which proclaimed the independence of the Philippines." 14 U.S.C. § 45 (1946).

In August, 1949, 14 U.S.C. §§ 45-47, 51, 52, 66, 67, 107 and 33 U.S.C. § 755 were, for the first time, combined and labeled section 89a. "The words 'or such merchandise' [were] inserted in the last clause of subsection (a) to provide for situations where it may be desirable to seize merchandise without seizing the vessel."

"Changes were made in phraseology." H.R. REP. No. 557, 81st Cong., ch. 5, at 1551 (1952).

"The Act of August 3, 1950 amended subsection (a) to strike out the word 'to' preceding 'examine' in the second sentence." *Id.*

⁷⁹ 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, § 18 at 417 (1965).

⁸⁰ International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination . . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations The Paquete Habana/The Lola, 175 U.S. 677 (1900).

another state. When *United States v. Cadena* is read in conjunction with *Conroy*, the proposition is raised that the Coast Guard is authorized to go into territorial waters of another state to search and seize both American and foreign vessels.⁸¹ A foreign vessel becomes subject to the jurisdiction or operation of a law of the United States when it engages in a conspiracy to violate federal narcotics law. Given the application of the objective view of jurisdiction, the Coast Guard, acting in accordance with section 89a, would have authority to apprehend, search and seize the vessel. If the vessel set sail for the territorial waters of a nearby state, the Coast Guard, under the Fifth Circuit's construction of the Coast Guard's "incidental powers," could also traverse that state's territorial waters. At this point, the question of American treaty obligations, both bilateral and multilateral, come into focus. However, unless there exists a self-executing bilateral treaty with the flag vessel's home state forbidding such a seizure in foreign territorial waters, there is no good reason to believe that any multilateral treaty would receive consideration different from that given to the Convention on the High Seas and to the Convention on the Territorial Sea and Contiguous Zone.

In addition to its ability to go into foreign territorial waters under its incidental powers, the Coast Guard, in accordance with the Fifth Circuit's reasoning in *Conroy*, could enter the foreign territorial waters consistent with international law under the principle of innocent passage. Even though the Coast Guard in reality would be in pursuit of a vessel, under the Fifth Circuit's interpretation, that foreign state should not object to the entrance because the denial of the right of innocent passage must be to exclude warships threatening or prejudicing the "peace, good order, or security" of its coast.⁸²

When questions of international law are involved, the issues go beyond discovery of congressional intent to considerations of the customs and laws of nations. The boarding of a vessel on the high seas by its flag state is not an international event and the ramifications and consequences remain essentially a domestic matter. However, the boarding of a foreign vessel is a matter of international concern calling for more restraint, or at least more circumspection, on the part of the boarding state.⁸³ Whether the

⁸¹ Under the Court's reasoning in *Conroy*, if the state was a signatory to the Convention on the Territorial Sea and Contiguous Zone, that state has given its prior implied permission not to object to a warship entering into its territorial waters. *But see* note 21 *supra*.

⁸² 4 M. Whiteman, *DIGEST OF INTERNATIONAL LAW* § 18 at 353 (1965).

⁸³ *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953).

United States is willing to have another state's coastal police enter its territorial waters to apprehend vessels pursuant to incidental powers conferred by some foreign statute is a question which must be considered. It is at least questionable whether the signatories to the Convention on the Territorial Sea and Contiguous Zone meant to give other signatories the right to apprehend and seize vessels in their territorial waters without their express permission. The reciprocal interpretation of the Fifth Circuit's decisions lead only to the result that other states are able to seize their own flag vessels and even foreign vessels within American territorial waters.⁸⁴

IV. THE FOURTH AMENDMENT ISSUE

A. *Fifth Circuit Cases*

Apart from the question of whether Congress could grant or has granted the Coast Guard authority to board foreign vessels upon the high seas or American vessels within the territorial waters of another state, is the constitutional issue of whether section 89a is valid, inasmuch as it purports to authorize boardings, inspections, examinations, searches and seizures of any vessel without requiring the Coast Guard to obtain a search warrant or establish probable cause that a law of the United States is being or has been violated. The Fifth Circuit's response has been to construe section 89a to give the Coast Guard authority to board vessels to conduct routine safety and documentation inspections and to look for obvious customs violations.⁸⁵ For such purposes, the Coast Guard may board a vessel at any time, regardless of the distance from the American shore or the direction in which the vessel is traveling, without a search warrant or probable cause.⁸⁶

In *United States v. One 43 Foot Sailing Vessel*,⁸⁷ the Coast Guard observed a vessel near the Yucatan Channel proceeding without lights. The Coast Guard, having decided to inspect the vessel for safety and fishing violations, boarded the vessel and was met with an "overpowering smell of marijuana."⁸⁸ Officers

⁸⁴ Under international law, all states are equal. If State A is able to enter into the territorial waters of another state in pursuit of its vessels or State B's vessels, other states can likewise enter into State A's territorial waters in pursuit of its vessels or in pursuit of State B's vessels.

⁸⁵ *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978).

⁸⁶ *Id.*

⁸⁷ 405 F. Supp. 879 (S.D. Fla. 1975).

⁸⁸ *Id.* at 881.

seized marijuana in plain view. The trial judge noted that the violation of safety laws "by proceeding without lights at night was sufficient cause and authority to board the vessel, and once aboard, 'the overpowering aroma' of marijuana justified a search of the vessel."⁸⁹ The Court then stated that, notwithstanding these facts, no probable cause was required in order for the Coast Guard to board and search the vessel pursuant to section 89a.⁹⁰ The boarding was characterized as an "inspection . . . limited to the vessel's safety equipment and other administrative details."⁹¹ The "direct and special interest of the United States in safety and administrative control of vessels" operating under its authority "justified administrative measures such as limited warrantless inspections and searches."⁹² The defendants appealed to the Fifth Circuit, which, without elaboration, held section 89a to be constitutional and expressly adopted the opinion of the court below.⁹³

One year later, in *United States v. Hillstrom*,⁹⁴ Coast Guard officials and a United States customs agent, in a random stop, went aboard a sailboat sighted in the Windward Passage between Cuba and Haiti, some 500 miles from the United States coast, to conduct a safety and documentation inspection. The facts reported do not reveal probable cause for the boarding.⁹⁵ During the course of the documentation inspection the Coast Guard, in order to ascertain the identification number on the frame of the vessel, dislodged several bales of marijuana in the hull. On appeal, the defendants contended that the Coast Guard had prior suspicions of drug law violations and sufficient time to obtain a search warrant before boarding the vessel.⁹⁶ The defendants also argued that the presence of a drug enforcement agent during the inspection tainted the validity of the alleged inspection, and that the Coast Guard and the drug enforcement agent actually boarded the vessel to search for narcotics violations and not to render a safety inspection. The defendants pointed to the fact that the vessel was 500 miles from the United States shore and, being a sailing vessel, was incapable of traveling great distances quickly, which il-

⁸⁹ *Id.* at 882.

⁹⁰ *Id.*

⁹¹ *Id.* at 883.

⁹² *Id.*

⁹³ *United States v. One 43 Foot Sailing Vessel*, 538 F.2d 694 (5th Cir. 1976).

⁹⁴ 533 F.2d 209 (5th Cir. 1976).

⁹⁵ 533 F.2d at 209-10. *See also* Brief for Appellants at 13-16, *United States v. Hillstrom*, 533 F.2d 209 (5th Cir. 1976).

⁹⁶ Brief for Appellants at 18-19, *United States v. Hillstrom*, 533 F.2d 209 (5th Cir. 1976).

lustrated the absence of "exigent circumstances" which would have justified a warrantless search of the vessel.⁹⁷ The Fifth Circuit in its opinion simply stated that these contentions were "entirely unwarranted" and that the Coast Guard acted under its statutory authority pursuant to 89a to make inquiries and seizures upon the high seas.⁹⁸

The current policy of the Fifth Circuit concerning the fourth amendment issue is summarized in *U.S. v. Warren*,⁹⁹ an *en banc* hearing reversing a previous panel's decision which overturned convictions of conspiracy to import marijuana and illegal transportation of more than \$5,000 out of the United States.¹⁰⁰ The Coast Guard sighted the defendant's vessel some 700 miles from the American shore heading away from the United States and decided to conduct a random inspection and to look for obvious customs violations.¹⁰¹ In addition to Coast Guard personnel, a special agent of the Drug Enforcement Agency (DEA) and a customs patrol officer were present. The drug agent had been assigned to assist the Coast Guard in enforcement of federal narcotics laws and the customs officer to look for customs violations.¹⁰² In boarding the vessel (without probable cause to believe that a violation of U.S. law had occurred) the boarding party asserted that the purpose was to conduct a "Coast Guard inspection."¹⁰³ The drug agent and customs officer accompanied the Coast Guard officers and while the Coast Guard proceeded with their safety inspection, the agent and officer conducted an inspection of their own.¹⁰⁴ Neither set of inspections uncovered anything more than "a small amount of

⁹⁷ *Id.* at 13-16.

Compare *Carroll v. United States*, 267 U.S. 132 (1925); *Chambers v. Maroney*, 399 U.S. 42 (1970). In *Chambers*, while denoting the presence of probable cause, the Court justified the search of a car, absent a warrant, which was stopped on the highway, relying on the exigent circumstances that the car was a "fleeting target." In response to the argument that the car could be followed until a warrant was obtained, the Court noted that the car might be taken out of the jurisdiction. *Id.* at 51 and n. 9. This does not seem to be a valid concern with respect to vessels at sea since the jurisdiction of the Coast Guard is apparently limitless. *See* Part I *supra*.

⁹⁸ 533 F.2d at 210-11.

⁹⁹ 578 F.2d 1058 (5th Cir. 1978).

¹⁰⁰ The panel's decision is reported at 550 F.2d 219 (1977).

¹⁰¹ 550 F.2d at 222, 223. For the statement that the Coast Guard also boarded the vessel to look for obvious customs violations, *see* 578 F.2d 1058, 1068 and n. 9 (5th Cir. 1978).

¹⁰² 550 F.2d at 223.

¹⁰³ *Id.* The government contended on appeal that probable cause existed in that the vessel, a shrimp boat, was in an area where no shrimping was done and did not have shrimping nets out for use. The panel found this argument to be without merit. *Id.* at 225 and n. 5.

¹⁰⁴ 550 F.2d at 223.

marijuana" in defendant Cruse's nightstand.¹⁰⁵ After this, the customs officer removed the defendants to the fantail of the vessel and began to interrogate them to determine the purpose of their trip and the amount of money aboard. Defendant Warren, after a series of questions, finally admitting having \$7000 aboard and turned an envelope over to the customs officer. Warren claimed that the envelope contained all the money aboard; however, the DEA agent lifted a mattress and found several other envelopes containing a total of \$41,500 in U.S. currency and 46,800 Colombian pesos.¹⁰⁶ Thereafter, defendant Cruse admitted that the vessel was on its way to Colombia to pick up marijuana; at that point, the defendants were arrested.¹⁰⁷

After conviction in the district court, the defendants appealed, arguing that the warrantless search violated their fourth amendment rights. The panel hearing the appeal agreed with the defendants and reversed their convictions.¹⁰⁸ The panel wrote that the Coast Guard may stop vessels upon the high seas when it has probable cause to believe a crime is being or has been committed. It also stated that if during a valid safety inspection, evidence is discovered which provides probable cause to believe a crime is being or has been committed, the Coast Guard may extend the search. However, "what is proscribed . . . is extending for no reason a search for safety purposes beyond that which is reasonably needed to determine if the safety and documentary regulations have been followed."¹⁰⁹ The search was declared unconstitutional because the Coast Guard, pursuant to 14 U.S.C. § 89a, is not authorized to delegate its authority to members of other branches of the federal government. The two agents who participated in the search and procured all the evidence had no authority to board the vessel, interrogate its crew, or search any part of it. In addition, "the search of the vessel went beyond the scope of a permissible safety inspection. Once aboard the vessel, even the Coast Guard had no authority to interrogate the crew on any subject other than the safety and documentary inspection."¹¹⁰

In reversing the earlier panel, the Fifth Circuit, *en banc*, held that the participation of the two agents was authorized by 14 U.S.C.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The agent lifted the same mattress which defendant Warren had earlier lifted to get the first envelope.

¹⁰⁷ *Id.*

¹⁰⁸ 550 F.2d 219 (5th Cir. 1977).

¹⁰⁹ *Id.* at 225.

¹¹⁰ *Id.*

§ 141b,¹¹¹ which provides that the Coast Guard may avail itself of officers or employees of other federal agencies to assist in the performance of its duty. Alternatively, the agents' actions were conducted jointly with the Coast Guard's; there was sufficient connection "to bring the agents under the aegis of the Coast Guard."¹¹² The court held the search permissible as a valid safety and documentations inspection under section 89a and asserted that under that statute the Coast Guard is also authorized to look for obvious customs violations.¹¹³ Answers received to various questions during the inspection amounted to probable cause to believe that a crime was being or had been committed. The court also rejected all arguments of the defendants which would have subjected the Coast Guard to Treasury Department regulations that required probable cause before such a search could be undertaken.¹¹⁴ Judge Fay, the writer of the original panel's opinion, dissented on much the same grounds as he had relied upon in his first opinion, noting

¹¹¹ The text of 14 U.S.C. § 141b (1976) reads:

(b) The Coast Guard, with the consent of the head of the agency concerned, may avail itself of such officers and employees, advice, information, and facilities of any Federal agency, State, Territory, possession, or political subdivision thereof, or the District of Columbia as may be helpful in the performance of its duties. In connection with the utilization of personal services of employees of state or local governments, the Coast Guard may make payments for necessary traveling and per diem expenses as prescribed for Federal employees by the standardized Government travel regulations.

¹¹² 578 F.2d 1058, 1067 (5th Cir. 1978).

¹¹³ *Id.* at 1065.

¹¹⁴ *Id.* at 1067-1069. Under 14 U.S.C. § 89b (1976) Coast Guard officers are deemed to be agents of the particular executive department whose laws they are enforcing and therefore subject to the rules and regulations of that department. In enforcing customs law, the Coast Guard, then, acts as agents of the Treasury Department. The Treasury Department has promulgated regulation 19 C.F.R. § 162.3 (1977), which allows customs officials to go on board American vessels upon the high seas at anytime, where there is *probable cause to believe that a law of the United States is being or has been violated*. The court rejected the defendant's argument that this regulation mandated that the Coast Guard at least establish probable cause before boarding. Relying upon section 89c which states that the provisions of section 89 are in addition to any powers conferred by law, and not in limitation of any powers already conferred upon Coast Guard officers, the court said that since the Coast Guard is empowered to seize and board vessels of the American flag on the high seas without probable cause or any particularized suspicion, the customs regulation could not restrict its already existent powers. *Id.* at 1067.

The defendants next contended that 14 U.S.C. § 143 which declared Coast Guard officers to be customs officials and charged them with the responsibility of submitting to customs and treasury regulations, subjects the Coast Guard to the probable cause requirements of 19 C.F.R. § 162.3. The court stated that section 143 should not be read as a limitation on the Coast Guard's powers to board American vessels beyond the 12 mile limit.

[a] close examination of section 89a reveals that it would authorize the Coast Guard to seize any American vessel anywhere in the world without probable cause and for no purpose whatsoever than to conduct a full scale search for possible drug or other criminal violation.¹¹⁵

Judge Fay also questioned the majority's opinion in light of *Marshall v. Barlow's Inc.*¹¹⁶ Other courts have also analogized these Coast Guard inspections to administrative inspections.¹¹⁷ A brief discussion of analyses by courts outside of the Fifth Circuit is instructive.

B. *Vessel Cases outside the Fifth Circuit*

The Fifth Circuit appears to be the only circuit to have sanctioned these warrantless searches pursuant to section 89a. Several jurists both within and without the Fifth Circuit have questioned the legality of this interpretation.

Judge Rubin, in *U.S. v. Whitmire*,¹¹⁸ a case involving a check by customs officials of a boat after it had docked, wrote in his concurring opinion that the decision in *Warren* must be re-examined in light of the Supreme Court's decision in *Delaware v. Prouse*.¹¹⁹ In the Ninth Circuit, the case of *U.S. v. Piner*¹²⁰ concerned the Coast Guard's random stop and boarding of a vessel for a safety and regulation inspection without probable cause to believe that a violation of United States law was occurring. The stop, made after dark, resulted in the discovery of two tons of marijuana found in plain view.¹²¹ Judge Schwarzer of the United States District Court for the Northern District of California ordered suppression of the evidence seized, and stated:

[a] series of decisions by the Fifth Circuit Court of Appeals relied upon by the government appears to have treated vessel

¹¹⁵ 578 F.2d at 1080.

¹¹⁶ Judge Fay wrote: "It would be interesting to consider the effect the Supreme Court's recent opinion in *Marshall v. Barlow's, Inc.* (1978) has on the propriety of even an administrative stopping for the limited purpose of a safety and documentary check Is it possible that a warrantless search limited in scope to safety violations is not justified under the fourth amendment?" 578 F.2d at 1083, n. 3.

¹¹⁷ See, e.g., *United States v. One 43 Foot Sailing Vessel*, 405 F. Supp. 879 (S.D. Fla. 1975) *aff'd* 538 F.2d 694 (5th Cir. 1976); *United States v. Keller*, 451 F. Supp. 631 (D.P.R. 1978); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978).

¹¹⁸ 595 F.2d 1303 (5th Cir. 1979).

¹¹⁹ *Id.* at 1320, n. 6.

¹²⁰ 452 F. Supp. 1335 (N.D. Cal. 1978).

¹²¹ *Id.* at 1337.

safety as beyond the purview of the fourth amendment . . . Although the earlier of the cited decisions imply a view that these safety inspections are not subject to fourth amendment scrutiny, the quoted statement in *Warren* as well as Supreme Court decisions hereinafter discussed, compel the conclusion that Coast Guard safety inspections must pass muster under the fourth amendment.¹²²

On appeal to the Ninth Circuit Court of Appeals,¹²³ the decision of the district court was upheld primarily on the strength of *Marshall v. Barlows, Inc.*¹²⁴ and *Delaware v. Prouse*.¹²⁵

C. Analogous Search and Seizure Cases

Neither *Marshall v. Barlows, Inc.* nor *Delaware v. Prouse* dealt specifically with the question of search and seizure upon the high seas. However, as the aforementioned jurists have noted, contained within each case is critical fourth amendment analysis in areas closely analogous to search and seizure of vessels upon the high seas.¹²⁶

In *Marshall*, the Secretary of Labor sought to enforce section 8a¹²⁷ of the Occupational Safety and Health Act of 1970 (OSHA), which provided for inspections checking for OSHA violations without explicitly requiring a "search warrant or other process"¹²⁸ in much the same manner as section 89a. An agent of the Labor

¹²²*Id.* at 1338 and n. 5. The quoted statement in *Piner* was from the first panel's decision in the *Warren* case which was later overruled by the Fifth Circuit sitting *en banc*.

¹²³ 608 F.2d 358 (9th Cir. 1979).

¹²⁴ 436 U.S. 307 (1978).

¹²⁵ ___ U.S. ___, 99 S. Ct. 1391 (1979).

¹²⁶ See denial of rehearing, *United States v. Cadena*, 588 F.2d 100, 102 (5th Cir. 1979), where the court said: "The inherent mobility of a vessel on the seas justifies the analogy we have drawn from the automobile cases."

See also 452 F. Supp. 1335 (N.D. Cal. 1979); 608 F.2d 358 (9th Cir. 1979).

¹²⁷ The text of section 8 reads:

1. "In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

"(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

"(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee." 84 Stat. 1598, 29 U.S.C. § 657(a).

¹²⁸ 436 U.S. 302, 310 (1978).

Department called upon Mr. Barlow at his business and requested an opportunity to inspect. Mr. Barlow was told that no complaints had been made against him or his shop and that he had simply turned up in the "agency's selection process."¹²⁹ Mr. Barlow, in reliance upon the fourth amendment guarantees, refused to allow the inspection when he learned the agent had no warrant. An order was subsequently obtained from the district court compelling Mr. Barlow to allow the inspection, but again Mr. Barlow refused permission for the search. Mr. Barlow then sought injunctive relief against the warrantless searches permitted by OSHA. A three judge district court panel ruled in favor of Mr. Barlow.¹³⁰ The Secretary of Labor appealed the decision claiming warrantless inspections to enforce OSHA to be reasonable within the meaning of the fourth amendment.

The Supreme Court affirmed. Quoting *Camera v. Municipal Court*,¹³¹ the Supreme Court said: "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."¹³² The prohibition against unreasonable searches was said to protect citizens from warrantless intrusions during civil and criminal investigations. "If the government intrudes upon private property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards."¹³³

The Court then acknowledged the Secretary's contention that an exclusion from the search warrant mandate exists for "pervasively regulated business" and "closely regulated industries long subject to close supervision and inspection."¹³⁴ This principle, known as the Biswell-Colonnade exception, applies in industries which have such a history of governmental oversight and regulation that "no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise."¹³⁵

In *Delaware v. Prouse*, the Supreme Court addressed the issue of stopping and searching an automobile without a warrant or probable cause. Though he had observed neither traffic or equip-

¹²⁹ *Id.*

¹³⁰ 424 F. Supp. 437 (D. Idaho, 1977).

¹³¹ 387 U.S. 523 (1967).

¹³² 436 U.S. 307, 311 (1978).

¹³³ *Id.* at 312.

¹³⁴ *Id.* at 313.

¹³⁵ *Id.* United States v. Biswell, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

ment violations nor suspicious activity, a patrolman initiated a "routine" traffic stop to check the driver's license and registration. The patrolman testified at trial, "I saw the car in the area and was answering no complaints so I decided to pull them off."¹³⁶ Upon reaching the car, the patrolman seized marijuana in plain view on the car floor. The trial court in granting a motion to suppress the evidence found the stop and detention to be wholly capricious and violative of the fourth amendment. The Delaware Supreme Court affirmed.¹³⁷ The state appealed to the United States Supreme Court, which, in quoting from *United States v. Brignoni-Ponce*¹³⁸ upholding roving patrols searching for illegal aliens near international borders, wrote: "[e]xcept 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."¹³⁹ The Court declared that passengers and operators of automobiles do not lose their "reasonable expectations of privacy simply because the automobile and its use are subject to government regulation."¹⁴⁰ In conclusion that Court held that:

[e]xcept in those situations in which there is at least an articulate 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 violations of law, stopping an automobile and detaining the driver in order to check the driver's license and the registration of the automobile are unreasonable under the fourth amendment.¹⁴¹

The rationale used in these cases is that, except in certain unusual circumstances involving "closely regulated industries long subject to close supervision and inspection," an enforcement officer is not justified in initiating a routine search or seizure unless he has probable cause, a warrant, or the functional equivalent of a warrant. The Fifth Circuit, on the other hand, has reached the conclusion that an initial stop by the Coast Guard upon the high seas is constitutional if made pursuant to the

¹³⁶ ___ U.S. ___, 99 S. Ct. 1391, 1394 (1979).

¹³⁷ 382 A.2d 1359 (Del. 1978).

¹³⁸ 422 U.S. 873 (1975).

¹³⁹ ___ U.S. ___, 99 S. Ct. 1391, 1397 (1979).

¹⁴⁰ ___ U.S. ___, 99 S. Ct., 1394-1400.

¹⁴¹ ___ U.S. ___, 99 S. Ct., 1404.

authority of section 89a. No probable cause, warrant, or its equivalent is necessary under its construction of the statute.

D. *The Fifth Circuit, Administration Necessity and Biswell*

The Fifth Circuit has couched the Coast Guard's inspections in terms of administrative necessity.¹⁴² However, it has overlooked the essential prerequisites articulated in the cases which initially established the exception for administrative inspections. The Supreme Court held in *U.S. v. Biswell*¹⁴³ that "where . . . regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions the inspection may proceed without a warrant where specifically authorized by statute."¹⁴⁴

Considering the Fifth Circuit's interpretations of the authority granted by section 89a, articulable doubts surface concerning all four of the Biswell requirements. Because the boardings can be accomplished without a warrant or probable cause, the possibilities of abuse of authority by the Coast Guard are tremendous and the privacy expectation that mariners rightfully carry suffers. Although section 89a does authorize searches of vessels upon the high seas, these searches do not meet either fourth amendment or administrative warrant standards. In addition, the government does not appear historically to have exercised such pervasive control over ships at sea to now justify an application of the Biswell-Colonnade exception.

1. *Federal interest*

If there is an urgent federal interest to be protected when the Coast Guard boards to conduct safety and documentary inspections, it should be safety of vessels.¹⁴⁵ But, when vessels are boarded

¹⁴² See note 117, *supra*. Also, for a forceful argument that an administrative exception should be made for searches of vessels upon the high seas, see Carmichael, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51 (1977).

¹⁴³ 406 U.S. 311 (1972).

¹⁴⁴ 406 U.S. at 317.

¹⁴⁵ In each of the following cases, the Coast Guard told the defendants aboard the vessel that the purpose of the visit was to make a Coast Guard inspection: *United States v. One 43 Foot Sailing Vessel*, 405 F. Supp. 879 (S.D. Fla. 1975) *aff'd* at 538 F.2d 694 (5th Cir. 1976); *United States v. Hillstrom*, 533 F.2d 209 (5th Cir. 1976); *United States v. Odom*, 526 F.2d 339 (5th Cir. 1976); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978).

200,¹⁴⁶ 500,¹⁴⁷ and 700¹⁴⁸ miles from the closest American shore, or when traveling away from the United States,¹⁴⁹ one must ask what urgent federal interests are furthered by the Coast Guard's inspection for safety and documentary violations. It is doubtful that the government's interest in vessel safety is so high that if a vessel 700 miles at sea were found to be in substantial violation, the Coast Guard would immediately remove the occupants from the vessel and tow the vessel back to shore. After all, it seems that if the Coast Guard adopted a system of mandatory stops of all American vessels within the 12 mile limit for safety and documentary inspections, it could more effectively insure the safety of American flag vessels upon the high seas. Or, perhaps the government's urgent interest lies in an area other than vessel safety. The many cases cited within this Note in which the Coast Guard boarded a vessel to conduct inspections pursuant to section 89a have involved situations where marijuana was being smuggled into the United States. If the true interest behind the inspections is to look for narcotics, this is an abuse of even the administrative inspection.

2. Possibilities of abuse

Upon boarding of the vessel, it is the general practice of the Coast Guard, to tell the crew that its purpose is to conduct a routine Coast Guard inspection.¹⁵⁰ As a result, according to the Fifth Circuit, no search warrant or probable cause is necessary prior to boarding. Theoretically, once aboard the vessel, the Coast Guard has no authority to extend the search into any other areas unrelated to the safety and documentation inspection unless circumstances arise during the course of the inspection that create probable cause.¹⁵¹ However, the Coast Guard engages in activity which generates probable cause for expanded searching when it carries agents of other law enforcement departments to sea with its vessels and as part of the documentary inspection it goes into the hull of the vessels to ascertain their identification numbers. This appears to be a clear abuse of the administrative inspection and a violation of the constitutional rights of mariners.

¹⁴⁶ United States v. One 43 Foot Sailing Vessel, 405 F. Supp. 879 (S.D. Fla., 1975).

¹⁴⁷ United States v. Hillstrom, 533 F.2d 209 (5th Cir., 1976).

¹⁴⁸ United States v. Warren, 578 F.2d 1058 (5th Cir., 1978).

¹⁴⁹ *Id.*

¹⁵⁰ See note 145 *supra*.

¹⁵¹ United States v. Warren, 550 F.2d 219 (5th Cir. 1977).

The Coast Guard is authorized by statute to carry with it other agents or officers of other federal departments to assist in the enforcement of its duties. As a result of this authorization, agents of customs and narcotics enforcement departments may accompany the Coast Guard to sea.¹⁵² These agents can board vessels with the Coast Guard inspection teams and conduct independent searches of their own, for violations which their departments will handle, under the guise of the Coast Guard's safety and documentary inspection.¹⁵³ Sometimes, as in the *Warren* case, it is the enforcement agents who actually uncover damaging evidence. Nonetheless, the Fifth Circuit has not demanded that the agents identify themselves or possess search warrants before they are allowed to pursue their independent searches. For the Fifth Circuit, the fact that these agents boarded the vessels with the Coast Guard has been sufficient to bring their actions within the aegis of the Coast Guard's authority to inspect.¹⁵⁴ It has not mattered that the agents' actions have deviated far beyond the legitimate needs of a safety and documentary inspection.

Even if additional law enforcement agents are present, their services may not be necessary. As part of the Coast Guard's documentations inspection, officers go into the hull of the vessel to check the identification number on the frame. The hull of the vessel is the place where cargo of any substantial quantity is normally kept. Therefore, in checking the hull, anything suspicious and in plain view would give rise to probable cause for the Coast Guard to search further under the plain view doctrine.¹⁵⁵ Quantities of marijuana, like any other substance, controlled or otherwise, are kept in the hull of the vessel. By always checking the hull, the Coast Guard will nearly always uncover the hidden substance. Then the Coast Guard has license to search further for incriminating evidence.

3. *Expectation of privacy*

The most abhorrent aspect to this continuum of circumstance is the manner in which the Coast Guard is initially able to procure

¹⁵² See note 111 *supra*.

¹⁵³ *United States v. Warren*, 578 F.2d 1058 (5th Cir., 1978). *United States v. Hillstrom*, 533 F.2d 209 (5th Cir., 1976).

¹⁵⁴ *United States v. Warren*, 578 F.2d 1058, 1067 (5th Cir., 1978).

¹⁵⁵ The plain view doctrine holds that if the law enforcement official was lawful in his initial intrusion, other damaging or other incriminating evidence discovered during the intrusion is admissible into a court of law. *Coolidge v. N. Hampshire*, 403 U.S. 443, 466 (1971).

access to the vessel. All that it has to do is to decide to conduct a routine safety and documentation inspection—an inspection that the Fifth Circuit has characterized as administrative and therefore requiring no warrant or probable cause. There are no safeguards to prevent the Coast Guard from randomly selecting a vessel and under the guise of an administrative inspection initiating a safety inspection with the ulterior motive of searching for narcotics violations. This procedure allows the Coast Guard to circumvent fourth amendment requirements and, in the process, injures the expectations of privacy that mariners have while aboard their vessels.

Owners and passengers of vessels have reasonable expectations of privacy which are destroyed by routine and random inspections designed to uncover incriminating evidence. "The ship is the sailor's home. There is hardly the expectation of privacy even in the curtained limousine or the stereo-equipped van that every mariner or yachtsman expects aboard his vessel."¹⁵⁶ "The measure of privacy that may be expected by those aboard a vessel mandates careful scrutiny both of probable cause for the search and the exigency of the circumstances excusing the failure to secure a warrant."¹⁵⁷ As the Supreme Court declared while speaking of automobiles in *Prouse*, passengers and operators do not lose their "reasonable expectations of privacy simply because the automobile and its use are subject to government regulation."¹⁵⁸ It would seem that vessels should be treated in a like manner.

4. *Authorization by statute*

The last requirement in *Biswell* was that the warrantless search be specifically authorized by statute. Although searches are specifically authorized by section 89a,¹⁵⁹ there are no guidelines

¹⁵⁶ *United States v. Cadena*, 578 F.2d 100, 101 (1979).

¹⁵⁷ 578 F.2d at 102.

¹⁵⁸ ___ U.S. ___, 99 S.C. 1391, 1394 (1979).

¹⁵⁹ It is not entirely clear whether the *search* or the *warrantless* search is the thing that must be authorized by statute. It is apparent that the *search* aboard American vessels upon the high seas is authorized by section 89a, but that section is silent as to warrant requirements.

For an excellent contrast, see *United States v. Tsuda Maru*, 470 F. Supp. 1223 (D. Alaska 1979) where it was held that the fourth amendment did not bar a warrantless search of a Japanese fishing vessel to protect the fisheries conservation zone established by the Fishery Conservation and Management Act of 1976. In reaching its decision, the court construed 16 U.S.C. §§ 1861(b) (1976), which states:

any officer who is authorized to enforce the provisions of this chapter may—
(1) *With or without a warrant or other process*—

enumerated within that statute for the Coast Guard to adhere to while conducting inspections or searches pursuant to section 89a. The reasonableness of the search necessarily will be decided by the Coast Guard, at high sea, whenever officers decide to board and inspect a vessel.¹⁶⁰ Therefore, in the absence of statutory guidelines, fourth amendment standards should be met. "Where Congress has authorized inspections but made no rules governing the procedure that inspectors must follow, the fourth amendment and its various restrictive rules apply."¹⁶¹

5. *The history of regulation of vessels on the high seas: a tradition of probable cause?*

The history of the government's control over vessels upon the high seas does not support an application of the Biswell-Colonnade exception to searches upon the high seas. Historically there are several statutes dealing with searches of vessels. A statute of 1789 dealing with seizure of vessels stated:

[a]nd when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares or merchandize and judgment shall be given the claimant or claimants; if it shall appear to the court before whom such prosecution shall be tried, that there was a *reasonable cause of seizure*, the same court shall cause a proper certificate of entry to be made thereof, and in such case, the claimant shall not be entitled to costs, nor shall the person who made the seizure or the prosecutor be liable to action, judgment . . . or prosecution.¹⁶²

In an act to provide more effectually for the collection of duties, Congress provided that all collectors, naval officers and surveyors, or other persons specifically appointed would have "full power and authority to enter any ship or vessel, *in which they*

(A) arrest any person, if he has reasonable cause to believe that such person has committed an act prohibited by section 1857 of this title

(B) board, and search or inspect, any fishing vessel . . .

(C) seize any fishing vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) used or employed in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this chapter . . . (emphasis added)

Thus, the statute under construction in *Tsuda Maru*, specifically authorized the *warrantless search* which section 89a is unable to do.

¹⁶⁰ Without the benefit of predetermined standards, Coast Guard officers in the field will be left to make discretionary, arbitrary and erratic searches and seizures upon the high seas. This situation, as it pertains to statutes, has been held violative of the U.S. Constitution in *Papachristou et al v. City of Jacksonville*, 406 U.S. 156, 162 (1971).

¹⁶¹ *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

¹⁶² 1 Stat. 47, ch. 5, sec. 36 (1789) (emphasis added).

shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize and secure any such goods, wares or merchandise . . .”¹⁶³ These statutes enacted by the first Congress required that probable cause be established before action could be initiated by enforcement officials.

However, in 1866, Congress enacted a statute aimed at the prevention of smuggling. The statute applied to activity within 4 leagues (12 miles) of the coast and gave customs officers access to any vessel, person, trunk or envelope on board without an express requirement that probable cause or a warrant be obtained prior to boarding.¹⁶⁴ In 1930, the immediate predecessor to 19 U.S.C. § 1581¹⁶⁵ was enacted, authorizing collectors, naval officers, surveyors, inspectors and officers of the revenue cutters to board and search vessels in any part of the United States or within 4 leagues of the coast if the vessel was bound for the United States. Searching officers were given access to all parts of the vessel, including the cabin, without an express requirement for a warrant or probable cause. Although this expansive authority to search seems, at first glance, to support the *Biswell-Colonnade* exception, we must consider two important limitations on the power conferred by this statute. First, the Coast Guard was only authorized to exercise this power within 4 leagues of the United States’ coastline; and second, the vessel boarded for such purposes had to be bound for or already within the United States. That these latter two statutes were directed toward the protection of the United States’ coast is plausible in view of the limitations placed upon their applications.¹⁶⁶

In *U.S. v. Maul*,¹⁶⁷ Mr. Justice Brandeis wrote in a concurring opinion that “there is no limitation upon the right of the sovereign to seize without a warrant vessels registered under its laws similar to that imposed by common law and the Constitution upon

¹⁶³ 1 Stat. 170, ch. 35, sec. 48 (1790) (emphasis added).

¹⁶⁴ 14 Stat. 178, ch. 201, sec. 2 (1866).

¹⁶⁵ The Tariff Act of 1930, 46 Stat. 590, ch. 497.

¹⁶⁶ Even today, if the Coast Guard were forced to curtail searches and seizures of vessels upon the high seas where it carried neither a valid search warrant or probable cause, the Coast Guard as officers of the customs, 14 U.S.C. § 89b, (1976) could still take advantage of statutes designed to prevent smuggling into the United States. Searches pursuant to these statutes might be conducted under border search standards and as such, might not require a search warrant or probable cause. See 19 U.S.C. § 1581 (1976); *U.S. v. Stanley*, 545 F.2d 661 (9th Cir. 1976); *U.S. v. Ingham*, 502 F.2d 1287 (5th Cir. 1974). Such a search would probably have to be restricted to within the 12 mile limit.

¹⁶⁷ 274 U.S. 501, 512 (1927).

the arrest of persons and upon the seizure of papers and effects."¹⁶⁸ However, that statement falls short of addressing the issue of probable cause. In *U.S. v. Lee*,¹⁶⁹ decided the same day as *Maul*, the government argued that the Coast Guard had authority to search and seize an American vessel on the high seas beyond the 12 mile limit *when probable cause exists* that a law of the United States has been violated.¹⁷⁰ Mr. Justice Brandeis, this time writing for a unanimous court, said "it is fairly to be inferred that officers are likewise authorized to board and search vessels *when there is probable cause to believe them subject to seizure for violation of revenue laws*, and to arrest persons thereon engaged in such violation."¹⁷¹ These cases illustrate that while the government contended and the Court accepted the idea that no warrant was required for the search and seizure of an American vessel by the Coast Guard, both the government and the Court acknowledged the fact that probable cause to believe that a law of the United States was being or had been violated must be established before an otherwise warrantless search would be valid.

V. CONCLUSION

This Note has examined the two-pronged attack often asserted by defendants in Fifth Circuit cases involving vessel searches: that the Coast Guard lacked authority over the particular area where their vessel was searched; and that the search conducted did not comport with the warrant requirement of the fourth amendment. Fifth Circuit decisions, though consistent, are open to criticism on both issues. The case law of that circuit reveals an increasingly expansive interpretation of the Coast Guard's authority to search vessels: from United States vessels on the high seas to foreign vessels thereon, and from United States vessels in foreign waters possibly, it is suggested, to foreign vessels in foreign waters. These expansions do not have a sound basis in the language or legislative history of section 89a, nor in the pertinent treaties.

The constitutional attack on the manner in which the Coast Guard searches have been carried out has been rejected on the grounds of administrative necessity and broad authority under section 89a. Even if such authority is assumed, however, the

¹⁶⁸ *Id.* at 524.

¹⁶⁹ 274 U.S. 559 (1927).

¹⁷⁰ *Id.* at 562, (emphasis added).

¹⁷¹ *Id.*, (emphasis added).

absence of statutory guidelines for searches suggests that guidelines must be found in the fourth amendment. The court created rules found in the cases involving administrative searches would appear to be applicable to Coast Guard searches of vessels as well. Lack of an urgent federal interest, the possibilities for abuse where criminal investigations are carried out under the guise of administrative searches, the expectation by mariners of their right of privacy, and the lack of either express statutory authorization or guidelines for warrantless searches are reasons which suggest the need for a more careful fourth amendment analysis by the Fifth Circuit. Underlying these reasons is a credible United States tradition of probable cause standards for vessel searches. If the Fifth Circuit, with its case law of expanded jurisdiction and restricted fourth amendment analysis, is to avoid the charge that it is more concerned with suppressing narcotics traffic than with properly interpreting statutes, treaties and the Constitution, then some limitations on jurisdiction and searches must be found.

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