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Interdiction Of Narcotics In International Waters

Juliana Gonzalez-Pinto

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**INTERDICTION OF NARCOTICS IN
INTERNATIONAL WATERS**

Juliana Gonzalez-Pinto

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1. INTRODUCTION

This article examines the procedure to interdict narcotics in international waters when the vessels transporting illegal drugs are heading to the United States of America.

Approximately ninety percent of international trade is transported by sea,¹ including illegal drugs smuggled into the United States from foreign countries. The first known drug smugglers were Chinese immigrants who smuggled opium into the United States using merchant ship cargos during the 1870's.²

Within the following century, drug smuggling increased considerably as more and more smugglers began utilizing maritime sea and air routes to transport larger shipments of drugs to the United States.³ Smugglers saw an opportunity to use maritime routes to transport illegal drugs with a low probability of being caught because the Coast Guard was focused on major events such as the two world wars, and the Korean and Vietnam wars.⁴

Smuggling cocaine by sea became the top method of transport in the 1970's.⁵ The lead federal agency for interdiction of drugs in international waters is The United States Coast Guard, who shares this responsibility with the United States Customs Service.⁶ To achieve its drug interdiction objectives, the Coast Guard patrols the coastal waters of the United States as well as a six million square mile area in international waters known as the Transit Zone, which includes the Caribbean, the Gulf of Mexico, and the Eastern Pacific area.⁷

¹ Commemoration of the 20th Anniversary of the Opening for Signature of the 1982 United Nations Convention on the Law of the Sea, Fifty-seventh session of the General Assembly, Dec. 9–10, 2002, *Oceans: The Source of Life*, 13, available at http://www.un.org/Depts/los/convention_agreements/convention_20years/oceansourceoflife.pdf.

² *Coast Guard Drug Interdiction, We are Still in Business*, EVENING COLORS (United States Coast Guard), Apr. 2004, at 2, available at <http://www.uscg.mil/hq/psc/eveningcolors/2004/April2004News.pdf>.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 3.

⁶ *Id.* at 2.

⁷ *Id.*

The first Coast Guard-controlled seizure took place on March 8, 1973, when the USCGC *Dauntless* boarded a thirty-eight foot sports fisherman craft, named the *Big L*, and arrested its master and crew, with more than a ton of marijuana on board.⁸ Since then, interdiction operations have grown considerably, resulting in the seizure of countless tons of marijuana and cocaine. The current average is \$9.6 million in illegal drugs seized per year.⁹

2. SEA ZONES UNDER THE LAW OF THE SEA

Coastal states may exercise varying degrees of jurisdictional power in the different zones of the sea. These zones are the territorial waters, the contiguous zone, the exclusive economic zone, and the high seas or international waters.

a. Territorial Waters

Waters under the sovereign jurisdiction of a nation or state are called territorial waters.¹⁰ The concept of territorial waters stems from a controversy over the status of the sea during the seventeenth century.¹¹ As a result of this controversy, the doctrine that the sea must be free to all was upheld, but a nation's jurisdiction over its coastal waters was also recognized.¹² Those nations that subscribe to the Law of the Sea observe a territorial limit of twelve nautical miles—equivalent to twenty-two kilometers from shore.¹³ A country's exclusive territorial rights over this area also include the airspace above those waters and the seabed below them.¹⁴

Until the latter part of the twentieth century, many countries accepted a limit to the territorial sea of three nautical miles from the

⁸ *Id.* at 3.

⁹ United States Coast Guard, <http://gocoastguard.com/discovering-our-missions/maritime-security> (follow "Discovering Our Mission" tab; then follow "Maritime Security" tab) (last visited Mar. 2, 2008).

¹⁰ United Nations Convention on the Law of the Sea art. (2)(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter U.N.C.L.O.S.].

¹¹ Bo Johnson Theutenberg, *Mare Clausum et Mare Liberum*, ARTIC, Dec. 1984, at 484.

¹² *Id.* at 484–89.

¹³ U.N.C.L.O.S., *supra* note 10, art. 3.

¹⁴ *Id.* art. 2(2).

coast.¹⁵ In 1958, a United Nations–sponsored conference adopted four important multilateral agreements regarding the law of the sea, but failed to secure an international compromise on a limit to the territorial sea.¹⁶ A second United Nations conference that convened in 1960 was similarly unsuccessful.¹⁷

Later, after a decade of negotiations, the United Nations Convention on the Law of the Sea was adopted in Montego Bay, Jamaica on December 10, 1982,¹⁸ confirming a twelve-mile limit to territorial waters for those states that are party to the convention. Although the United States is not a party to this convention, President Ronald Reagan claimed a twelve-mile territorial sea on behalf of the United States in 1988.¹⁹

b. Contiguous Zone

In addition to the territorial sea, the United States and other nations claim limited jurisdiction in an area known as the contiguous zone, comprised of twelve additional miles beyond the territorial sea to enforce customs, fiscal, and immigration laws, and to punish violations of national laws committed within a nation's territory or territorial sea.²⁰

c. Exclusive Economic Zone

Exclusive economic zones govern the use of the water column primarily for the purposes of economic management and exploitation of the natural resources of those waters.²¹ The exclusive economic zone area may extend up to 200 nautical miles from a coastal state's baseline. President Ronald Reagan claimed an exclusive economic zone of 200 nautical miles on behalf of the United States in 1983.

Pursuant the United Nations Convention on the Law of the Sea, coastal states have sovereign rights to explore and exploit the natural resources found in their respective exclusive economic zones²² through

¹⁵ The United Nations Convention on the Law of the Sea (A historical perspective), http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited Mar. 2, 2008).

¹⁶ *Oceans: The Source of Life*, *supra* note 1, at 9.

¹⁷ *Id.*

¹⁸ *Id.* at 10.

¹⁹ Proclamation No. 5928, 54 Fed. Reg. 777 (December 27, 1988).

²⁰ U.N.C.L.O.S., *supra* note 10, art. 33.

²¹ *Id.* art. 57.

²² *Id.* art. 56.

activities such as fishing. Coastal states also have the right to use this area for activities such as production of energy from water or currents,²³ the establishment and use of artificial islands, installations, and structures;²⁴ and scientific research.²⁵ Coastal states are further encouraged to protect and preserve the marine environment in their exclusive economic zones.²⁶

d. International Waters or High Seas:

The high seas or international waters are those lying outside the territorial waters of any and all states. In 1609, Hugo Grotius proposed the doctrine that the high seas were open to all nations in times of peace, but this doctrine did not become an accepted principle of international law until the nineteenth century.²⁷

Under international law, a vessel in international waters is subject to only the exclusive jurisdiction of its flag state.²⁸ However, this rule is subject to certain exceptions dealing with stateless vessels and certain international crimes.²⁹ In the case of vessels subject to foreign jurisdiction, the consent of the flag state³⁰ is required for interdictions carried out by coastal states in international waters, exclusive economic zones, and contiguous zones.³¹

The majority of the oceans are international waters, where vessels are subject to only the exclusive jurisdiction of the state where they are registered or whose flag they are entitled to fly by national

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ HUGO GROTIUS, *MARE LIBERUM* [THE FREEDOM OF THE SEA] 7 (Ralph Van Deman Magoffin trans. Oxford University Press 1916) (1608).

²⁸ Convention on the High Seas art. 6, Apr. 29, 1958, 450 U.N.T.S. 82.

²⁹ *Id.* art. 21.

³⁰ The United States Coast Guard regards international cooperation as key to the success of their narcotics interdiction operations, pricing the cooperation of countries such as Central and South American governments, including Colombia, Mexico, Guatemala, Costa Rica and Panama. See Roger Gayman, *Coast Guard Takes on Drug Smugglers in the Eastern Pacific*, <http://www.uscg-sanfrancisco.com/go/doc/823/65657/> (last visited Mar. 2, 2008).

³¹ Douglas Guilfoyle, *Maritime Interdiction of Weapons of Mass Destruction*, 12 J. CONFLICT AND SEC. L. 1, 4-5 (2007).

law.³² Thus, most efforts to control the illegal drug trade in the high seas involve international treaties that allow coastal nations to enforce their respective laws by interdicting foreign vessels that would otherwise be subject to foreign jurisdictions.³³ For instance, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, signed by 172 state parties, provides that drug trafficking is an international crime and its eradication is a collective responsibility.³⁴

3. INTERNATIONAL WATERS

Under the United Nations Convention on the Law of the Sea, freedom is the fundamental principle underlying the legal concept of the high seas. This convention provides that the general freedom of the high seas includes, among others, the freedom of navigation, of overflight, to lay submarine cables and pipelines, to construct artificial islands, to fish, and to engage in marine scientific research.³⁵ The convention further provides that “no State may validly purport to subject any part of the high seas to its sovereignty.”³⁶

Every state has the right to navigate its vessels on the high seas.³⁷ Therefore, as mentioned before, a flag state has exclusive jurisdiction over vessels flying its flag.³⁸ Further, article 97 states that “no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state.”³⁹ A vessel is entitled to have only one nationality, and each State liberally determines how it will grant nationality to a vessel.⁴⁰ As a general rule, obtaining nationality entails at least the presentation of the original bill of sale of the vessel or the vessel’s builder certificate if it is newly built, and a certification that the vessel does not currently belong to another registry and is free of any tax duties.

³² U.N.C.L.O.S., *supra* note 10, arts. 91 and 92.

³³ Guilfoyle, *supra* note 31, at 2.

³⁴ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances pmble., Dec 20, 1988, 1582 U.N.T.S. 165.

³⁵ U.N.C.L.O.S., *supra* note 10, arts. 87, 115–20.

³⁶ *Id.* art. 89.

³⁷ *Id.* art. 90.

³⁸ *Id.* art. 92.

³⁹ *Id.* art. 97.

⁴⁰ *Id.* arts. 90–92.

The exclusive jurisdiction of the flag state over its vessels is not absolute. There are certain situations in which other states are granted a share of jurisdiction with the flag state. For instance, every State must take adequate measures to prevent and punish the transport of slaves in vessels flying its flag.⁴¹ Further, all vessels are prohibited from conducting any acts of piracy, which is defined in article 101 of the United Nations Convention on the Law of the Sea as any of the following acts:

- a. any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - i. on the high seas, against another ship or aircraft, or against persons or property on board of such ship or aircraft;
 - ii. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- b. any act of voluntary participation in the operation of a ship or of any aircraft with knowledge of facts making it a pirate ship or aircraft;
- c. any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁴²

When these acts of piracy are committed by a warship or a governmental vessel, no distinction is made from acts of piracy committed by a private ship; therefore, the warship or government vessel loses its immunity from prosecution. Pirate vessels may be seized on the high seas by any state, and an arresting state may arrest the persons controlling the vessel and seize any property on board.⁴³

Moreover, all States have a duty to "cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas."⁴⁴ Further, according to the right of hot pursuit, a government vessel of a coastal State may pursue a foreign vessel if the coastal state's vessel has good reason to believe that the foreign vessel has violated the coastal state's laws and regulations.⁴⁵

⁴¹ *Id.* art. 99.

⁴² *Id.* art. 101.

⁴³ *Id.* art. 105.

⁴⁴ *Id.* art. 108.

⁴⁵ *Id.* art. 111.

Lastly, other than the exceptional situations resulting from slavery, piracy, drug trafficking, and unauthorized broadcasting, States can exercise a right of visit only to identify the flag of the vessel.⁴⁶

4. UNITED STATES' STATUTORY AUTHORITY TO INTERDICT VESSELS IN THE HIGH SEAS

Article I, section 8, clause 10 of the United States Constitution provides that Congress has the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”

Pursuant to this authority, Congress enacted the Controlled Substance Act, which makes it a crime to import into the territory of the United States, from any place outside of the United States, any controlled substance or narcotic drugs as described in the act.⁴⁷

Another statute enacted under the aforementioned constitutional authority is the Maritime Drug Law Enforcement Act,⁴⁸ which seeks to deter all acts of possession, manufacture, and distribution of controlled substances on board vessels. Pursuant to this act, it is unlawful for any person on board a vessel of the United States, or subject to the jurisdiction of the United States, to “knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance.”⁴⁹

The Maritime Drug Law Enforcement Act specifically extends its jurisdictional reach to any violation committed outside the territorial jurisdiction of the United States.⁵⁰ Violators of this statute can be tried in the United States district court at the point of entry, or in the United States District Court of the District of Columbia.⁵¹

The Coast Guard’s law enforcement mission is to protect the public, the environment, and the United States economic and security interests in any maritime region in which those interests may be at risk, including international waters and America’s coasts, ports, and inland

⁴⁶ *Id.* art. 110. *See also id.* arts. 99–109 (Outlining the right to board a vessel to prevent slavery, piracy, drug trafficking, and unauthorized broadcasting).

⁴⁷ 21 U.S.C. § 952(a) (2000).

⁴⁸ Maritime Drug Law Enforcement, 46 U.S.C. §§ 70501–70507 (West 2008) (formerly cited as 46 U.S.C. App. §§ 1901–1903).

⁴⁹ 46 U.S.C. § 70503 (West 2008).

⁵⁰ *Id.*

⁵¹ 46 U.S.C. § 70504 (West 2008).

waterways.⁵² This mission is expressed in 14 U.S.C. §2, which provides that “[t]he Coast Guard shall enforce or assist in the enforcement of all applicable laws on, *under and over the high seas and waters subject to the jurisdiction of the United States.*”⁵³

The Coast Guard traces its origins to 1790 when Congress authorized the President to build and equip boats to collect revenue.⁵⁴ One of the Coast Guard’s predecessors was known as the Revenue Marine and later as the Revenue Cutter Service.⁵⁵ The Coast Guard received its present name in 1915 when Congress combined, its other predecessor, the existing Life-Saving Service with the Revenue Cutter Service to form a new agency.⁵⁶ The Act expressly continued the applicability of preexisting statutes and provided that “[a]ll duties now performed by the Revenue Cutter Service and Life-Saving Service shall continue to be performed by the Coast Guard....”⁵⁷

In 1936, Congress enacted 14 U.S.C. §89, the Coast Guard’s statutory authority over international waters. This provision allows the Coast Guard to 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. Additionally, Section 89 provides the ability for the Coast Guard’s officers to enforce applicable United States’ law, and it permits Coast Guard personnel to enforce federal law on waters that are subject to the jurisdiction of the United States and in international waters, as well as on all vessels subject to United States jurisdiction.⁵⁸ Section 89 did not enlarge the authority of the Coast Guard. It merely reaffirmed the jurisdiction that the Coast Guard had exercised for many years under its predecessor, the Act of June 22, 1936, chapter 705, 49 stat. 1820, which was enacted in response to *Maul v. United States*,⁵⁹ a case in which the United States Supreme Court upheld

⁵² 14 U.S.C. § 2 (2000).

⁵³ Emphasis added.

⁵⁴ Maritime Law Enforcement Overview, <http://www.uscg.mil/lantarea/aole/overview.htm> (last visited Mar. 2, 2008).

⁵⁵ *Id.*

⁵⁶ Act of Jan. 28, 1915, ch. 20, 38 Stat. 800 (codified as amended at 14 U.S.C. §1 (1994)).

⁵⁷ *Id.* at 801.

⁵⁸ 14 U.S.C. § 89 (2000).

⁵⁹ *See Maul v. United States*, 274 U.S. 501 (1927).

the Coast Guard's seizure of an American vessel in international waters based upon a narrow grant of statutory authority.

A "vessel subject to the jurisdiction of the United States" includes national vessels, vessels without nationality, those assimilated to vessels without nationality, foreign vessels where the flag nation has consented or waived objection to the enforcement of United States law by the United States, vessels located within the customs waters of the United States, and vessels located in the territorial waters of another nation when the nation consents to the enforcement of United States law by the United States.⁶⁰ Consent from a flag state, by agreements or otherwise, automatically confer jurisdiction over foreign vessels flying the flag state's colors.⁶¹

A national vessel, in terms of the United States, is one belonging in whole or in part to the United States, to any of its citizens, to any corporation created by or under the laws of the United States or any of its states or territories.⁶² A "vessel without nationality" includes one whose claim of registry is denied by a flag nation and any vessel that fails to

⁶⁰ 46 U.S.C. § 70502(c)(1) (West 2008).

⁶¹ See 46 U.S.C. § 70502(c)(1)(C) (West 2008) (defining "vessel subject to the jurisdiction of the United States" to include foreign vessels of which flag state has consented or waived objection to enforcement of U.S. law by U.S.); *United States v. Guerrero*, 114 F.3d 332, 340 (1st Cir. 1997) (Secretary of State's certification of request to Honduran government to board vessel of Honduran registry and permission granted sufficient to establish vessel as subject to U.S. jurisdiction); *United States v. Rojas*, 53 F.3d 1212, 1214-15 (11th Cir. 1995) (executive branch's certification of consent by Panamanian government to search Panamanian vessel is not an unconstitutional intrusion on power of judiciary to determine jurisdiction); *United States v. Davis*, 905 F.2d 245, 250 (9th Cir. 1990) (informal or verbal consent of flag state sufficient to "bring the vessel within the definition of customs waters"; telex from United Kingdom sufficient to bring vessel within U.S. jurisdiction); *United States v. Quemener*, 789 F.2d 145, 153-54 (2d Cir. 1986) (agreement with Great Britain allowed U.S. officials to board British ship within 150 miles of U.S. coast); *United States v. Wright-Barker*, 784 F.2d 161, 176 (3d Cir. 1986) (consents of Panamanian government and vessel's captain allowed Coast Guard officials to seize marijuana from Panamanian coastal freighter); *United States v. Pena-Jessie*, 763 F.2d 618, 621 (4th Cir. 1985) (consent of Panamanian government allowed Coast Guard to board Panamanian vessel).

⁶² 46 U.S.C. § 70502(b)(2) (West 2008).

make a claim of nationality or registry.⁶³ A "claim of nationality or registry" includes possession on board the vessel and production of documents evidencing the vessel's nationality, flying its flag nation's ensign or flag, or a verbal claim of nationality or registry by the master or person in charge of the vessel.⁶⁴

In conjunction with the Coast Guard, the United States Customs Service is also authorized to enforce the national laws, on certain occasions, upon vessels located in international waters. For instance, the Anti-Smuggling Act allows the President to declare a customs-enforcement area around a vessel present on the high seas but outside customs waters, when the presence of such vessel may occasion or promote the unlawful introduction of merchandise into the United States.⁶⁵ This customs-enforcement area is limited to waters no more than one-hundred nautical miles from the place or immediate area where the vessels are kept, and does not include waters more than fifty nautical miles outward from the outer limit of customs waters.⁶⁶ Customs officers may board and examine any vessel placed within this customs-enforcement area.⁶⁷ In doing so, customs officers must adhere to all treaties with foreign governments that enable the United States to board a subject foreign vessel.⁶⁸

5. MARITIME COUNTER-DRUG BILATERAL AGREEMENTS

During the past few years, the United States has entered into a series of bilateral agreements with several countries for the purpose of combating drug smuggling, including Antigua, Argentina, Bahamas, Belize, Bolivia, Brazil, Barbados, Barbuda, Chile, Canada, Colombia, Costa Rica, Dominican Republic, Dominica, Ecuador, El Salvador, Guatemala,

⁶³ § 70502(d)(1)(A) & (C).

⁶⁴ § 70502(e).

⁶⁵ 19 U.S.C. §1701(a) (2000).

⁶⁶ § 1701(a).

⁶⁷ § 1701(b).

⁶⁸ § 1701(b). The United States has signed counter-drug bilateral agreements with Antigua, Argentina, Bahamas, Belize, Bolivia, Brazil, Barbados, Barbuda, Chile, Canada, Colombia, Costa Rica, Dominican Republic, Dominica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Jamaica, Trinidad and Tobago, St. Kitts, St. Vincent, St. Lucia, Grenada, United Kingdom, among others.

Honduras, Mexico, Nicaragua, Panama, Jamaica, Trinidad and Tobago, St. Kitts, St. Vincent, St. Lucia, Grenada, United Kingdom, among others. These agreements contain processes for obtaining consent from foreign nations to enter their territorial seas or to board one of their ships in international waters.

These processes for obtaining consent are shaped after the provisions of the six-part model maritime agreement.⁶⁹ The model agreement includes standing authority to take the following enforcement actions:

- “Shipboarding,” which permits the Coast Guard to board and search vessels claiming the flag of a signatory nation;
- “Entry to Investigate,” which permits the Coast Guard to enter into another nation’s sovereign waters to investigate suspect vessels and aircraft, also with permission to stop, board, and search;
- “Shipriders,” is a provision authorizing a law enforcement officer of one State to board a law enforcement plane or ship of another state;
- “Pursuit,” permits the Coast Guard to pursue suspect vessels into sovereign waters with permission to stop, board, and search;
- “Overflight,” permits state aircraft that support counter-drug operations to enter into sovereign airspace; and
- “Order to Land,” grants the authority to the Coast Guard to order an aircraft suspected of illicit traffic to land in the territory of a signatory nation.

The model agreement also contains provisions regarding disposition of assets seized in interdictions, including the transfer of forfeited assets or proceeds of their sale. These agreements enhance counter-drug operations and the Coast Guard’s ability to respond immediately to threats, without the need to await authorizations through lengthy diplomatic channels, thereby increasing operational effectiveness.

6. PROCEDURE FOR INTERDICTION OF VESSELS IN THE HIGH SEAS

The legal authority for interdictions of narcotics is found in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psycho-

⁶⁹ See Appendix C.

tropic Substances of 1988.⁷⁰ This agreement allows for “appropriate measures” to be taken, contingent on reasonable grounds for suspecting that a vessel in international waters is engaged in illicit traffic and consent of the flag state.⁷¹

This convention also authorizes signatory members to enter into bilateral or regional agreements to carry out or enhance the effectiveness of the provisions of the convention.⁷² The United States has entered into numerous agreements with those nations whose vessels are of drug trafficking concern, creating a variety of options to facilitate interdiction operations.

The procedure to interdict vessels in the high seas varies depending upon whether the vessel is national, foreign, or stateless.

a. National Vessels

The United Nations Convention on the Law of the Sea permits any state to determine the conditions for granting nationality to its ships.⁷³ National ships are subject to their respective nations' exclusive jurisdiction on the high seas, except for certain cases for which international treaties expressly provide. These treaty exceptions often include acts of piracy, the slave trade, unauthorized broadcasting, or ships without nationality.⁷⁴ Therefore, the flag state has the authority to intercept and board any of its vessels that are suspected of trafficking whether they are located on the high seas or in the flag state's territorial waters.⁷⁵ Consequently, in the case of the United States, the Coast Guard or Customs agents are authorized to board any national vessel that is subject to the jurisdiction of the United States.

b. Foreign Vessels

Generally, a foreign vessel in international waters is subject to the jurisdiction of the foreign vessel's flag state.⁷⁶ Therefore, before boarding a

⁷⁰ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 165.

⁷¹ *Id.* art. 17(3).

⁷² *Id.* art. 17(9).

⁷³ U.N.C.L.O.S., *supra* note 10, art. 91. For a list of total ships by nationality, see Appendix B.

⁷⁴ *Id.* arts. 92 and 110.

⁷⁵ *Id.* arts. 3, 21, and 94.

⁷⁶ *Id.* art. 92.

foreign vessel, the United States must contact the flag state to request either consent to board the foreign vessel or a waiver of any objections to the enforcement of United States' law by the United States.⁷⁷ If valid permission from the flag state exists, the Coast Guard has authority to stop, search, and seize a foreign vessel on the high seas, provide that the Coast Guard has reasonable suspicion that the vessel is involved in a violation of United States law.⁷⁸ Consent or waiver may be obtained by radio, telephone, or other similar oral or electronic means.⁷⁹ Once a flag state consents to a search or waives any objection to a search, the State Department issues a "statement of no objection," indicating that the country of registry of the vessel granted American officials permission to enforce United States laws aboard that vessel.⁸⁰

An exception to the requirement of having to obtain permission of the flag nation to board one of its vessels is consent obtained from the master of the vessel. In *Vale v. Louisiana*,⁸¹ the court held that a search pursuant to consent is constitutionally permissible.⁸² The master of a foreign vessel can orally consent to the United States Coast Guard boarding the vessel.⁸³ The scope of the boarding is limited to the master's consent, which can be withdrawn at any time by the master's request that the boarding team disembark.⁸⁴

c. Stateless Vessels

Article 110 of the United Nations Convention on the Law of the Sea provides a right of visit pursuant to which the naval vessels of any state may intercept and board ships on the high seas if there are reasonable grounds to suspect that the ship is engaged in piracy, slave trade,

⁷⁷ *Id.* art. 2. See also *supra* note 61 on agreements or consent from the flag state to confer jurisdiction over foreign vessels.

⁷⁸ 46 U.S.C. §§ 70501–70507 (West 2008). See also *United States v. Cortes*, 588 F.2d 106 (5th Cir. 1979). See also *supra* note 61 on agreements or consent from the flag state to confer jurisdiction over foreign vessels.

⁷⁹ 46 U.S.C. §70502(c) (West 2008).

⁸⁰ *United States v. Romero*, 32 F.3d 641, 644 (1st Cir. 1994).

⁸¹ *Vale v. Louisiana*, 399 U.S. 30 (1970).

⁸² *Id.* at 35.

⁸³ Joseph E. Kramek, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is this the World of the Future?*, 31 U MIAMI INTER-AM. L. REV. 121, 132 (2000).

⁸⁴ *Id.*

unauthorized broadcasting, or if the ship is without proper nationality.⁸⁵ The flag flown by a foreign vessel does not necessarily determine that the vessel is registered in that country. A party inspecting under authority of Article 110 must first verify the vessel's right to fly the flag that the vessel has adopted. The investigation may continue only if suspicion as to nationality remains after the initial verification of the flag state.⁸⁶ The only conclusive determination of a vessel's nationality can be found in the documents that every ship is required to carry under international law and customs.⁸⁷

A vessel may be classified as stateless when it is unable to meet the burden of proving its nationality. These circumstances may occur, for example, when a vessel displays the flag of one state but produces another state's registration documents, expired documents, or no documents at all.⁸⁸ Another situation that raises suspicion is when the flag state is contacted to confirm the vessel's registration and the flag state denies affiliation with the vessel.⁸⁹ Another problem is when a vessel tries to change its nationality in international waters or fails to claim any nationality at all.⁹⁰

7. FOURTH AMENDMENT AND WARRANTLESS SEARCHES AT SEA

The Fourth Amendment of the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁹¹

⁸⁵ U.N.C.L.O.S., *supra* note 10, art. 110(1).

⁸⁶ *Id.* art. 110(2).

⁸⁷ 46 U.S.C. §70502(e) (West 2008).

⁸⁸ Kyle Salvador Sclafani, *If the United States Doesn't Prosecute Them, Who Will? The Role of the United States as the 'World's Police' and its Jurisdiction over Stateless Vessels*, 26 TUL. MAR. L.J. 373, 375 (2001).

⁸⁹ *Id.* at 376.

⁹⁰ *Id.*

⁹¹ U.S. CONST. amend. IV.

The Supreme Court held in *Katz v. United States*,⁹² that the Fourth Amendment protects people and not places; and as such, it protects individuals from unreasonable searches in any place where they have a reasonable expectation of privacy.⁹³

The Supreme Court has also stated that the Fourth Amendment requires a warrant based upon probable cause, “subject only to a few specifically established and well-delineated exceptions.”⁹⁴ The government has justified its authority to search vessels mainly under the three following exceptions: 1) exigent circumstances, 2) border searches, and 3) administrative searches.

a. Exigent Circumstances Exception

The narrowest justification for a warrantless search of a vessel at sea is the exigent circumstances exception to the Fourth Amendment. As a general rule, the exigent circumstances exception permits warrantless searches when probable cause develops to believe that a law is being violated without prior warning, and the delay in securing a warrant might result in the loss or destruction of the evidence.⁹⁵ In *Chambers v. Maro*⁹⁶, the court held that exigent circumstances applied to certain automobile searches when “the car is movable, the occupants are alerted, and the car’s contents may never be found if a warrant must be obtained.” As applied to the search of a vessel at sea, those considerations expressed by the court in *Chambers* justify a warrantless search. A vessel is mobile, its occupants are probably aware of detection by law enforcement officers, and evidence may be easily destroyed or concealed before a warrant can be obtained.

b. Border Search Exception

Persons and property may be searched without a warrant or probable cause upon their entry into the United States.⁹⁷ The justification for this exception is the need for sovereign border control.⁹⁸ The limitation of the border search exception is that the search must be conducted at the actual

⁹² *Katz v. United States*, 389 U.S. 347 (1967).

⁹³ *Id.* at 351–52.

⁹⁴ *Id.* at 357.

⁹⁵ *Chambers v. Maroney*, 399 U.S. 42 (1970).

⁹⁶ *Id.* at 51.

⁹⁷ *United States v. Ramsey*, 431 U.S. 606, 620–22 (1977).

⁹⁸ *Id.* at 620.

borderline or at its functional equivalent.⁹⁹ Pursuant to this doctrine, a search that occurs at the border does not require a warrant or any level of reasonable suspicion.¹⁰⁰ Because they occur at the border, searches made at the border pursuant to the nation's sovereign right to protect itself, by stopping and examining persons and property that cross into the country, are reasonable.¹⁰¹

A border search does not have to take place at the actual border. The border search may be conducted at any place that may be considered an equivalent of the border.¹⁰² The *Almeida-Sanchez* case recognized international air terminals and highway junctions near borders as examples of functional equivalents to borders.¹⁰³ By analogy, a vessel's port of entry is a functional equivalent of a border; thus, the United States can search any vessels that arrive at any of its ports.

c. Administrative Search Exception

The Coast Guard has the authority to board a vessel for the purpose of conducting an administrative vessel safety inspection pursuant to 14 U.S.C. §89(a), which provides the following:

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed,

⁹⁹ *Almeida-Sanchez v. United States*, 413 U.S. 266, 272–73 (1973).

¹⁰⁰ *United States v. Carter*, 760 F.2d 1568, 1576 (11th Cir. 1985).

¹⁰¹ *See Ramsey*, 431 U.S. at 616.

¹⁰² *United States v. Garcia*, 672 F.2d 1349, 1363–64 (11th Cir. 1982).

¹⁰³ *Id.* at 1364.

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.

In conducting safety inspections, the Coast Guard may board a vessel and search it until the Coast Guard locates all safety equipment, which may include searching the hull for the main beam number, the engine, bilges, and all closed compartments.¹⁰⁴ The Coast Guard possesses broad discretion to board any vessels that are subject to the jurisdiction of the United States, without any limitation on their discretion to choose which vessels to board or how frequently to board a particular vessel.¹⁰⁵

8. ILLUSTRATIVE CASES

a. 14 U.S.C. § 89

Courts analyzing the Coast Guard's authority to board and search vessels under 14 U.S.C. § 89(a) have often refrained from traditional Fourth Amendment analysis. In the majority of decisions, Courts have declared the statute constitutional and have commonly cited as authority *United States v. One 43 Foot Sailing Vessel*.¹⁰⁶ That case consisted of only one paragraph in which the court, *per curiam*, simply stated that the statute was constitutional without discussing any constitutional problems.¹⁰⁷

¹⁰⁴ *United States v. Piner*, 608 F.2d 358, 359 (9th Cir. 1979).

¹⁰⁵ *United States v. Willis*, 639 F.2d 1335, 1337 (5th Cir. 1981), *reh'g denied*, 646 F.2d 189 (5th Cir. 1981).

¹⁰⁶ *United States v. One 43 Foot Sailing Vessel*, 538 F.2d 694 (5th Cir. 1976).

¹⁰⁷ *Id.*

b. Fourth Amendment

Other Fourth Amendment challenges to vessel searches have resulted in similar decisions. For instance, in *United States v. Williams*,¹⁰⁸ the Fifth Circuit reasoned that section 24 of the Act of July 31, 1789, “granted customs officials ‘full power and authority’ to enter and search ‘any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed...’”¹⁰⁹ The court continued its analysis by emphasizing that this customs power was broad in comparison to the more limited authority to enter and search a home, store, or building where a warrant was required upon cause to suspect.¹¹⁰ Two years later, a Ninth Circuit decision in *United States v. Watson*,¹¹¹ emphasized that Congress’ involvement in enacting the predecessor and current statute demonstrates that searches in the high seas are not unreasonable under the Fourth Amendment.¹¹²

In *United States v. Cadena*,¹¹³ the Fifth Circuit held that there is a greater expectation of privacy by those aboard vessels than by those driving automobiles.¹¹⁴ The court reasoned that vehicles and vessels are used for different purposes, and that normally vehicles are not designed to be residences, whereas vessels are the “sailor’s home.”¹¹⁵ The court acknowledged that the particular characteristics of a ship at sea make it difficult to require a warrant to conduct a search.¹¹⁶ Nevertheless, it concluded that the increased expectation of privacy onboard vessels mandates that vessel searches be permitted under probable cause.¹¹⁷ The court went on to expressly find that probable cause had existed for

¹⁰⁸ *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980).

¹⁰⁹ *Id.* at 1079.

¹¹⁰ *Id.*

¹¹¹ *United States v. Watson*, 678 F.2d 765 (9th Cir. 1982), *cert. denied*, 459 U.S. 1038, 103 S. Ct. 451, 74 L. Ed.2d 605 (1982).

¹¹² *See, e.g., id.*; *United States v. Villamonte-Marquez*, 462 U.S. 579, 587 (1983) (holding that in enacting 14 U.S.C. §89(a) Congress did not regard searches and seizures on the high seas as unreasonable).

¹¹³ *United States v. Cadena*, 588 F.2d 100 (5th Cir. 1979).

¹¹⁴ *Id.* at 101.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 102.

¹¹⁷ *Id.*

several days prior to the search, and that the boarding without a warrant was justified on the basis of exigent circumstances.¹¹⁸

As mentioned before, upon boarding a vessel, the Coast Guard may search the vessel until the Coast Guard locates all safety equipment.¹¹⁹ However, a full stem-to-stern search is proper only if circumstances arise during the safety inspection that give rise to probable cause that there is a violation of United States law.¹²⁰ Nonetheless, the Coast Guard often conducts searches of vessels on the high seas under the guise of safety inspections, while intending to search for narcotics. The Fifth Circuit, while not specifically upholding these pretextual searches, concluded that the Coast Guard's power to stop and board, on the high seas, vessels that are subject to the jurisdiction of the United States includes not only safety inspections but also searches for "obvious customs and narcotics violations."¹²¹

The Coast Guard has taken advantage of the seemingly unlimited powers of the safety inspection exception and has conducted searches and seizures where no apparent violation has occurred. For example, in *United States v. Warren*,¹²² the court upheld the constitutionality of a safety inspection of a shrimp boat 700 miles from the United States by agents of the Drug Enforcement Administration and Customs Service, as well as the Coast Guard, despite an apparent lack of factual basis for suspecting a safety violation.¹²³ The Fifth Circuit found that the search and seizure of contraband was constitutional when the initial boarding was for a safety inspection, and the officers subsequently searched the vessel's closets, drawers, and crew's personal items.¹²⁴

The court confirmed its ruling three years later in *United States v. Mazyak*,¹²⁵ where the defendants argued that the search of the sailbag and engine room in which the Coast Guard discovered the contraband had

¹¹⁸ *Id.* at 101.

¹¹⁹ *United States v. Piner*, 608 F.2d 358, 359 (9th Cir. 1979).

¹²⁰ *United States v. Stuart-Caballero*, 686 F.2d 890, 892 (11th Cir. 1982), *cert. denied*, 459 U.S. 1209, 103 S. Ct. 1202, 75 L. Ed.2d 444 (1983).

¹²¹ *United States v. Jonas*, 639 F.2d 200, 203 (5th Cir. 1981).

¹²² *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978), *cert. denied*, 446 U.S. 956, 100 S. Ct. 2928, 64 L. Ed.2d 815 (1980).

¹²³ *Id.* at 1065–66.

¹²⁴ *Id.* at 1062, 1084.

¹²⁵ *United States v. Mazyak*, 650 F.2d 788 (5th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982).

exceeded the scope of 14 U.S.C. § 89(a).¹²⁶ The court rejected the defendants' arguments, holding that the contraband was found inside a bag discovered in the course of a normal search for safety, documentation, and "obvious narcotics violations."¹²⁷

c. Stateless Vessels

With regards to "stateless vessels," the powers of the Coast Guard are very broad. However, some courts reject such powers and instead require a "reasonable nexus" finding in which the Coast Guard must have evidence of the intent to smuggle illicit drugs on board a vessel into the United States in order for the search to be lawful. For example, in *United States v. Egan*¹²⁸ and *United States v. May May*,¹²⁹ the courts deciding these cases required some degree of evidence of a "reasonable nexus" to the United States in order to convict foreign nationals.¹³⁰

However, other courts have concluded that "stateless vessels" are not protected by principles of international law; thus, the Coast Guard has the authority to board, search, and seize a stateless vessel even where there is no evidence that the vessel is heading to the United States. A case that illustrates this more liberal doctrine is *United States v. Caicedo*,¹³¹ where the Coast guard located a stateless 35-foot power boat floating in the water located 200 miles off the coast of Nicaragua.¹³² Upon reaching the vessel, the Coast Guard officer noticed bales of cocaine floating in the waters next to the vessel.¹³³ The Coast Guard arrested the crew for drug trafficking and brought them to the United States to stand trial, even though there was no evidence that the vessel was heading for the United States.¹³⁴ The court held that because the boat was a stateless vessel that was not registered with any nation, it was proper to punish the defendants under the laws of the United States against drug trafficking.¹³⁵

¹²⁶ *Id.* at 790.

¹²⁷ *Id.*

¹²⁸ *United States v. Egan*, 501 F. Supp. 1252 (S.D.N.Y. 1980).

¹²⁹ *United States v. May May*, 470 F. Supp. 384 (S.D. Tex. 1979).

¹³⁰ *Egan*, 501 F. Supp. at 1252-56, *See also May May*, 470 F. Supp. at 392-96.

¹³¹ *United States v. Caicedo*, 47 F.3d 370 (9th Cir. 1995).

¹³² *Id.* at 371.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 372.

The court held that a stateless vessel forfeits any protection under international law.¹³⁶

Another case that exemplifies broad power over stateless vessels is *United States v. Marino Garcia*,¹³⁷ where the Coast Guard cutter *Dependable* seized a small freighter and its cargo of 57,000 pounds of marijuana 65 miles off the coast of Cuba and 300 miles from Florida.¹³⁸ The vessel was registered under a different name in Honduras and produced a false registration, which under international law is sufficient evidence to render the vessel stateless.¹³⁹ All of the crewmen were foreign nationals, none of them were aware of the Honduran registry, and the boat did not fly a Honduran flag.¹⁴⁰ Also, the evidence showed no indication that the cargo was intended for the United States.¹⁴¹ The court held that stateless vessels are “international pariahs,” open to inspection and seizure by any state, and persons onboard are subject to prosecution by the seizing state.¹⁴² The court further found that no “reasonable nexus” to the United States was required.¹⁴³ Lastly, the court held that international law did not restrict the right of the United States to assert jurisdiction over stateless vessels on the high seas, and that 21 U.S.C. § 955(a) properly extends the criminal jurisdiction of the United States to any stateless vessel, which is engaged in the distribution of controlled substances in international waters.¹⁴⁴

Also, in *United States v. Suerte*,¹⁴⁵ the Fifth Circuit held that the Due Process Clause of the Fifth Amendment of the United States Constitution does not require a nexus between a foreign citizen charged under the Maritime Drug Law Enforcement Act and the United States, when the foreign citizen’s flag nation has waived objection to the enforcement of United States law.¹⁴⁶

¹³⁶ *Id.*

¹³⁷ *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1983).

¹³⁸ *Id.* at 1378.

¹³⁹ *Id.* n.3.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1382–83.

¹⁴³ *Id.* at 1383.

¹⁴⁴ *Id.*

¹⁴⁵ *United States v. Suerte*, 291 F.3d 366 (5th Cir. 2002).

¹⁴⁶ *Id.* at 372.

Up until 1985, the Second, Fourth, and Eleventh Circuits had merely assumed that jurisdiction over a stateless vessel carried with it jurisdiction over the non-resident alien crew. The Fifth Circuit, in the 1986 case of *United States v. Alvarez-Mena*,¹⁴⁷ considered for the first time the issue of whether such an assumption was warranted.¹⁴⁸ The court ultimately held that the vessel's statelessness subjects both the ship and its crew to any nation's jurisdiction.¹⁴⁹

d. Customs Service

Customs officers also have certain authority to conduct searches of vessels. In *United States v. One 1972 44' Striker, Bonanza*,¹⁵⁰ United States customs agents went to check on the vessel *Bonanza*.¹⁵¹ The agents boarded the vessel and proceeded to its stern to observe its name.¹⁵² At that time, the customs agents noted several marijuana seeds on the deck and in other places on the vessel.¹⁵³ The officers left and returned the following day with additional agents to search the boat and found marijuana below the deck.¹⁵⁴ The defendants argued that the boarding was unlawful because the agents had no probable cause to search the *Bonanza*.¹⁵⁵ The court held that customs officers lacking suspicion may board any vessel located in waters that offer ready access to open sea to perform document or safety checks.¹⁵⁶

Also, in *United States v. Gonzalez*,¹⁵⁷ the District of Columbia held that a customs officer can board any vessel at any place in the United States or within customs waters or within the customs-enforcement area established under the Anti-Smuggling Act.¹⁵⁸ The court further

¹⁴⁷ *United States v. Alvarez-Mena*, 765 F.2d 1259 (5th Cir. 1986).

¹⁴⁸ *Id.* at 1264.

¹⁴⁹ *Id.* at 1266.

¹⁵⁰ *United States v. One 1972 44' Striker, Bonanza*, 753 F.2d 867 (11th Cir. 1985).

¹⁵¹ *Id.* at 868.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *United States v. Gonzalez*, 688 F. Supp. 658 (D.C. Cir. 1988).

¹⁵⁸ *Id.* at 661. "Customs waters" are those adjacent to four leagues off the coast. 19 U.S.C. §1401(j). The customs-enforcement area is determined by the President of the United States. 19 U.S.C. §1701(a).

held that customs officers need not have even a modicum of suspicion to either stop or search vessels under 19 U.S.C. § 1581(a).¹⁵⁹ The *Gonzalez* court also analyzed the Fourth Amendment reasonableness standard for searches and seizures and held that under the Fourth Amendment, exercise of the authority to check for safety documentation and obvious customs and narcotics violations is reasonable even in the absence of any suspicion of criminal activity or probable cause.¹⁶⁰ In reaching its decision, the court reasoned that brief and routine customs detention prompted by the legitimate governmental concerns for the safe and lawful operation of vessels does not intrude upon the privacy of boaters.¹⁶¹

In *United States v. Albano*,¹⁶² the Eleventh Circuit reviewed an appeal from a district court's decision granting defendant's motion to suppress 3,000 pounds of marijuana on board a vessel on open waters.¹⁶³ The court concluded that the law enforcement officers had conducted a valid search pursuant to 19 U.S.C. § 1581(a) based on reasonable suspicion of illegal activities aboard the vessel.¹⁶⁴ The court further held that under the Supreme Court case of *United States v. Villamonte-Marquez*,¹⁶⁵ the officer's actions would have been justified even in the absence of reasonable suspicion.¹⁶⁶

In *United States v. Villamonte-Marquez*,¹⁶⁷ customs officers and state policemen were patrolling a waterway connected to the Gulf of Mexico in search of two vessels believed to be carrying marijuana from the Gulf to Louisiana.¹⁶⁸ The officers observed that a 40-foot sailboat rocked violently in the wake of a freighter, so the officers approached the sailboat twice and asked the crewmen if they were all right.¹⁶⁹ The crewmember on deck shrugged his shoulders in response both times.¹⁷⁰

¹⁵⁹ *Gonzalez*, 688 F. Supp. at 661 (citing *United States v. One 1972 44' Striker, Bonanza*, 753 F.2d 867 (11th Cir. 1985)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *United States v. Albano*, 722 F.2d 690 (11th Cir. 1984), *reh'g denied*, 734 F.2d 1481 (11th Cir. 1984).

¹⁶³ *Id.* at 691, 693.

¹⁶⁴ *Id.* at 694.

¹⁶⁵ *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

¹⁶⁶ *Albano*, 722 F.2d at 692.

¹⁶⁷ *Villamonte-Marquez*, 462 U.S. at 579.

¹⁶⁸ *Id.* at 582.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

This unresponsiveness about the safety of the other crew onboard led the officers to believe that sailboat was one of the smuggling vessels for which looking.¹⁷¹ The officers boarded the vessel and requested documentation.¹⁷² While on board, the officers could smell burning marijuana and observed bales of marijuana.¹⁷³ The district court held that the officers lacked reasonable suspicion of any illegal activities onboard the sailboat.¹⁷⁴ Therefore, it concluded that the boarding had been carried out in violation of the Fourth Amendment.¹⁷⁵

The Supreme Court reversed the district court's decision, finding that the court's interpretation of 19 U.S.C. § 1581(a) was too restrictive.¹⁷⁶ Section 1581(a) reads:

Boarding Vessels. Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

The Supreme Court held that the First Congress authorized the suspicionless boarding of vessels, which reflects the First Congress' view that suspicionless boarding of vessels is not contrary to Fourth Amendment provisions.¹⁷⁷ The court also rejected the notion that customs officers who suspect a vessel of carrying contraband may not rely on 19 U.S.C. § 1581(a) to inspect a vessel's documentation.¹⁷⁸ The Court reasoned that the government has a substantial interest in assuring

¹⁷¹ *Id.* at 582–83.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 588.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 592.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 585.

compliance with documentation requirements, particularly in waters where the need to deter or apprehend smugglers is great.¹⁷⁹

Conclusion

The drug problem in the United States is bigger than ever. Every day more and more drugs make their way into the country and to consumers, and drug consumption is directly linked to the increase of criminal activity. Because most drugs come into the United States from abroad, it is important to have a strong policy to stop illegal drug importation. The Coast Guard lacks sufficient resources to patrol the immense area of waters used by smugglers to import narcotics into the country. Therefore, any statutes regulating the importation of illicit narcotics into the country must be strong enough to allow the Coast Guard to fulfill its mission of drug interdiction. Of course, legislation cannot intrude into matters of international law or the rights of other nations.

Bilateral maritime counter-drug agreements provide great assistance to the Coast Guard's law enforcement activities in the high seas. These agreements reduce delays in the traditional boarding process and promote consistent decisions, by signatory states, to grant permission to enforce United States law. The United States Government should continue to make critical efforts to promote entering into these bilateral maritime counter-drug agreements as an efficient tool for drug control.

All searches, seizures, and arrests of vessel, which are conducted by the Coast Guard on the high seas, are subject to revision by the courts of the United States. These courts have the power to limit the powers of the government in conducting such actions and to protect the rights of those charged with violations of anti-drug legislation. However, the courts rarely overturn the Coast Guard's actions. The courts' reluctance to severely limit the Coast Guard's power to stop, board, and search vessels in international waters is probably explained by the fact that the risk to the United States that is posed by smugglers is very high. Without broad powers, the Coast Guard would be substantially limited in stopping the massive flow of illicit drugs into the United States.

¹⁷⁹ *Id.* at 593.

APPENDIX A

Coast Guard Drug Seizure Statistics (in pounds) ¹⁸⁰						
FY-to-Date Snapshot						
	Events	Vessels	Arrests	Marijuana	Cocaine	Percentage
PACIFIC	2	0	5	0	4,750	100%
ATLANTIC	0	0	0	0	0	0%
TACLET	2	0	5	0	4,750	100%
Fiscal Year	Events	Vessels	Arrests	Marijuana	Cocaine	
2008	2	0	5	0	4,750	
YTD 2007	9	1	34	0	38,046	
Coast Guard Drug Seizure Statistics by Fiscal Year *						
Fiscal Year	Events	Vessels	Arrests	Marijuana	Cocaine	Cocaine's Imported Value, in Billion USD
2008	2	0	5	0	4750	-
2007	65	37	188	10385	238040	-
2006	64	23	200	9059	234,337	3.1
2005	87	66	364	10,026	303,662	9.7
2004	104	71	326	25,915	242,435	7.7
2003	65	56	283	14,059	136,865	4.4
2002	58	40	207	40,316	117,780	3.5
2001	65	30	114	34,520	138,393	4.5
2000	92	56	204	50,463	132,480	4.4
1999	118	74	304	61,506	111,689	3.7
1998	129	75	297	31,390	82,623	3.0

¹⁸⁰ <http://www.uscg.mil/hq/g-o/g-opl/Drugs/Statswww.htm>.

1997	122	64	233	102,538	103,617	4.0
1996	36	41	112	42,063	44,462	1.1
1995	44	34	56	40,164	33,629	1.3
1994	67	28	73	33,895	47,333	1.8
			10/29/07			

APPENDIX B

Top 20 Merchant Fleets of the World¹⁸¹

Flag of Registry	Total Number
Panama	4,860
Liberia	1,454
Greece	735
Bahamas	1,036
Malta	1,258
Cyprus	1,157
Singapore	854
Norway (NIS)	611
Hong Kong	517
China	1,480
Marshall Islands	324
United States	426
Japan	593
Korea (South)	499
India	284
Italy	429
Denmark (DIS)	280
ST. Vincent & The Grenadines	714
Isle of Man	214
Turkey	521
All Other	10,515
Grand Total	28,761

¹⁸¹ http://www.marad.dot.gov/Marad_Statistics/MFW-01-03.htm.

APPENDIX C

U.S. Model Maritime Agreement
 AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED
 STATES OF AMERICA

AND

THE GOVERNMENT OF _____ CONCERNING COOPERATION
 TO SUPPRESS ILLICIT TRAFFIC BY SEA PREAMBLE

The Government of the United States of America and the Government of _____ (hereafter, the “parties”);

Bearing in mind the special nature of the problem of illicit maritime drug traffic;

Having regard to the urgent need for international cooperation in suppressing illicit maritime drug traffic which is recognized in the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol in the 1971 Convention on Psychotropic Substances, and in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, the “1988 Convention”), and in the 1982 United Nations Convention on the Law of the Sea;

Recalling that paragraph 9 of Article 17 of the 1988 Convention requires the Parties to consider entering into bilateral agreements to carry out, or enhance the effectiveness of, its provisions;

Desiring to promote greater cooperation between the parties, and thereby enhance their effectiveness in combating illicit traffic by sea;

Have agreed as follows:

NATURE AND SCOPE OF AGREEMENT

1. The parties shall cooperate in combating illicit maritime drug traffic to the fullest extent possible, consistent with available law enforcement resources and related priorities.

2. DEFINITIONS. In this agreement, unless the context otherwise requires:

a. “illicit traffic” has the same meaning as that term is defined in the 1988 Convention.

b. “_____ territory” means the land [and islands] under the sovereignty of _____.

c. “_____ waters” means the territorial sea (insert archipelagic waters, if applicable) and internal waters of _____.

d. “_____ airspace” means the airspace over _____ territory and waters.

e. "law enforcement vessels" means warships and other ships, of the Parties or of third States, aboard which law enforcement officials are embarked, clearly marked and identifiable as being on government service and authorized to that effect, including any embarked boat or aircraft.

f. "law enforcement authority" means: for the Government of the United States of America, the United States Coast Guard; and for the Government of _____, the _____.

g. "law enforcement officials" means: for the Government of the United States of America, uniformed members of the United States Coast Guard; and for the Government of _____, uniformed members of _____.

SHIPRIDER PROGRAM AND ENFORCEMENT IN AND OVER WATERS

3. Maritime counter-drug operations in _____ waters are the responsibility of, and subject to the authority of, the Government of _____.

4. The parties shall establish a joint law enforcement shiprider program between their respective law enforcement authorities. Each Party may designate a coordinator to organize its program activities and to identify the vessels and officials involved in the program to the other Party.

5. The Government of _____ may designate qualified law enforcement officials to act as law enforcement shipriders. Subject to _____ law, these shipriders may in appropriate circumstances:

- a. embark on U. S. law enforcement vessels;
- b. authorize the pursuit, by the U.S. law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into _____ waters;
- c. authorize the U.S. law enforcement vessels on which they are embarked to conduct counter-drug patrols in _____ waters;
- d. enforce the laws of _____ in _____ waters or seaward therefrom in the exercise of the right of hot pursuit or otherwise in accordance with international law; and
- e. authorize the U.S. law enforcement officials to assist in the enforcement of the laws of _____.

6. The Government of the United States of America may designate qualified law enforcement officials to act as law enforcement shipriders. Subject to United States law, these shipriders may, in appropriate circumstances:

- a. embark on _____ law enforcement vessels;
- b. advise and assist _____ law enforcement officials in the conduct of boardings of vessels to enforce the laws of _____.
- c. enforce, seaward of the territorial sea of _____, the laws of the United States where authorized to do so; and
- d. authorize the _____ law enforcement vessels on which they are embarked to assist in the enforcement of the laws of the United States seaward of the territorial sea of _____.

7. When a shiprider is embarked on the other Party's vessel, and the enforcement action being carried out is pursuant to the shiprider's authority, any search or seizure of property, and detention of a person, and any use of force pursuant to this agreement whether or not involving weapons, shall be carried out by the shiprider except as follows:

- a. crew members of the other Party's vessel may assist in any such action if expressly requested to do so by the shiprider and only to the extent and in the manner requested. Such request may only be made, agreed to and acted upon in accordance with the applicable laws and policies of both parties; and
- b. such crew members may use force in self-defense in accordance with the applicable laws and policies of their government.

8. The Government of the United States of America shall not conduct maritime counter-drug operations in _____ waters without the permission of the Government of _____ granted by this agreement or otherwise. This agreement constitutes permission by the Government of _____ for United States maritime counter-drug operations in any of the following circumstances:

- a. an embarked _____ shiprider so authorizes;
- b. a suspect vessel or aircraft, detected seaward of the territorial sea of _____ enters _____ waters or airspace and no _____ shiprider is embarked on a U.S. law enforcement vessel in the vicinity, and no _____ law enforcement vessel is immediately available to investigate, the U.S. law enforcement vessel may follow the suspect vessel or aircraft into _____ waters in order to investigate, and board and search the vessel, and, if the evidence warrants, detain the vessel and the persons on board pending expeditious disposition instructions from _____ authorities; and
- c. no _____ shiprider is embarked on a U.S. law enforcement vessel in the vicinity, and no _____ law enforcement vessel is immediately available to investigate, in which case the U.S. law

enforcement vessel may enter _____ waters in order to investigate a suspect vessel or aircraft located therein, and board and search the suspect vessel. If the evidence warrants, U.S. law enforcement officials may detain the suspect vessel and persons on board pending disposition instructions from _____ authorities.

9. Nothing in this agreement precludes the Government of _____ from otherwise expressly authorizing United States maritime counter-drug operations in _____ waters or involving _____ flag vessels suspected of illicit traffic.

10. The Government of _____ shall permit aircraft of the Government of the United States of America (hereafter, "U.S. aircraft") when engaged in law enforcement operations or operations in support of law enforcement agencies to:

a. overfly the territory and waters of _____ subject to Article 10 and with due regard for the laws and regulations for its laws and regulations for the flight and maneuver of aircraft; and

b. relay, subject to the laws of each Party, orders from the competent authorities to aircraft suspected of trafficking in illegal drugs to land in _____.

11. The Government of the United States of America shall, in the interest of flight safety, observe the following institute procedures for facilitating flights by U.S. aircraft within _____ airspace.

a. In the event of planned bilateral or multilateral law enforcement operations, the U. S. Shall provide reasonable notice and communications channels to the appropriate _____ aviation authorities of planned flights by its aircraft over _____ territory or waters.

b. In the event of unplanned operations, which may include the pursuit of suspect aircraft into _____ airspace pursuant to this Agreement, the law enforcement and appropriate aviation authorities of the Parties may exchange information concerning the appropriate communications channels and other information pertinent to flight safety.

c. Any aircraft engaged in law enforcement operations or operations in support of law enforcement activities in accordance with this Agreement shall comply with such air navigation and flight safety directions as may be required by the _____ aviation authorities, and with any written operating procedures developed by _____ for flight operations within its airspace under this Agreement.

OPERATIONS SEAWARD OF THE TERRITORIAL SEA

12. Whenever U. S. law enforcement officials encounter a vessel flying the _____ flag or claiming to be registered in _____, located seaward of any nation's territorial sea and have reasonable grounds to suspect that the vessel is engaged in illicit traffic, this Agreement constitutes the authorization of the Government of _____ for the boarding and search of the suspect vessel and the persons found on board by such officials. If evidence of illicit traffic is found, United States law enforcement officials may detain the vessel, persons on board, evidence and cargo pending expeditious disposition instructions from the Government of _____.

13. Except as expressly provided herein, this agreement does not apply to or limit boarding of vessels conducted by either Party in accordance with international law, seaward of any nation's territorial sea, whether based, inter alia, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, the consent of the vessel master, or an authorization from the flag state to take law enforcement action.

JURISDICTION OVER DETAINED VESSELS

14. In all cases arising in _____ waters or concerning _____ flag vessels seaward of any nation's territorial sea the Government of _____ shall have the primary right to exercise jurisdiction over a detained vessel and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the Government of _____ ***158** may, subject to its constitution and laws, waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel and/or persons on board.

IMPLEMENTATION

15. Counter-drug operations pursuant to this agreement shall be carried out only against vessels and aircraft used for commercial or private purposes and which either of the Parties has reasonable grounds suspect are involved in illicit traffic, including vessels and aircraft without nationality.

16. A Party conducting a boarding and search pursuant to this agreement shall promptly notify the other Party of the results thereof. The relevant Party shall timely report to the other Party, consistent with its laws, on the status of all investigations, prosecutions and judicial proceedings resulting from enforcement action taken pursuant to this agreement where evidence of illicit traffic was found.

17. Each Party shall ensure that its law enforcement officials, when conducting boardings and searches pursuant to this agreement act in accordance with the applicable national laws and policies of that Party and with international law and accepted international practices.

18. Boardings and searches pursuant to this agreement shall be carried out by law enforcement officials from law enforcement vessels. The boarding and search team may carry standard law enforcement small arms.

19. All use of force by a Party pursuant to this agreement shall be in strict accordance with applicable laws and policies of the respective Party and shall in all cases be the minimum reasonably necessary under the circumstances. Nothing in this agreement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of either Party.

20. To facilitate implementation of this agreement, each Party shall ensure the other Party is fully informed concerning its applicable laws and policies, particularly those pertaining to the use of force. Each Party has the corresponding responsibility to ensure that all of its officials engaging in law enforcement operations pursuant to this agreement are knowledgeable concerning the applicable laws and policies of both parties.

21. Unless their status is specifically provided for in another agreement, all law enforcement and other officials of the Government of the United States of America present in _____ waters or territory or on _____ vessels in connection with this agreement shall be accorded the privileges and immunities equivalent to those of the administrative and technical staff of a diplomatic mission under the 1961 Vienna Convention on diplomatic relations.

22. Assets seized in consequence of any operation undertaken in _____ waters pursuant to this agreement shall be disposed of in accordance with the laws of _____. Assets seized in consequence of any operation undertaken seaward of the territorial sea of _____ pursuant to this agreement shall be disposed of in accordance with the laws of the seizing Party. To the extent permitted by its laws and upon such terms as it deems appropriate, a Party may, in any case, transfer forfeited assets or proceeds of their sale to the other Party.

23. In case a question arises in connection with implementation of this agreement, either Party may request consultations to resolve the matter. If any loss or injury is suffered as a result of any action taken by

the law enforcement or other officials of one Party in contravention of this agreement or any improper or unreasonable action is taken by a Party pursuant thereto, the parties shall, without prejudice to any other legal rights which may be available, consult at the request of either Party to resolve the matter and decide any questions relating to compensation.

24. Except as provided in paragraph 21, nothing in this agreement is intended to alter the rights and privileges due any individual in any legal proceeding.

25. Situations not provided for by this agreement will be determined in accordance with international law.

26. Nothing in this agreement shall prejudice the position of either Party with regard to the international law of the sea.

ENTRY INTO FORCE AND DURATION

27. This agreement shall enter into force upon signature by both parties.

28. This agreement may be terminated at any time by either Party upon written notification to the other Party through the diplomatic channel, such termination to take effect one year from the date of notification.

29. This agreement shall continue to apply after termination with respect to any administrative or judicial proceedings arising out of actions taken pursuant to this agreement.

In witness whereof, the undersigned, being duly authorized by their respective governments, have signed this agreement.

Done at _____, this ___; day of __ of 199_, in the English and _____ languages, each text being duly authentic.