University of Miami Law Review

Volume 32 | Number 1 Article 5

12-1-1977

At Sea with the Fourth Amendment

James S. Carmichael

Follow this and additional works at: https://repository.law.miami.edu/umlr

Recommended Citation
James S. Carmichael, *At Sea with the Fourth Amendment*, 32 U. Miami L. Rev. 51 (1977)
Available at: https://repository.law.miami.edu/umlr/vol32/iss1/5

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENTS

At Sea with the Fourth Amendment

James S. Carmichael*

This article presents the development of the law of searches at sea. The statutes authorizing these searches, the cases construing these statutes and the constitutional limitations are examined in detail. Finally, the present trends toward stricter scrutiny of searches on constitutional grounds are discussed and criticized, and a suggested framework for future analysis is presented.

I. Introduction 51
II. Jurisdiction 55
III. Statutory Analysis 65
IV. A Fourth Amendment Framework 76
V. Analogous Areas of the Law of Searches 81
A. *Automobile Searches* 81
B. *Administrative Searches* 83
C. *Border Searches* 85
VI. In the Wake of Almeida-Sanchez 90
A. *Cases Attacking Searches Pursuant to 14 U.S.C. Section 89(a)* 90
B. *Cases Attacking Searches Pursuant to 19 U.S.C. Section 1581(a)* 93
VII. Conclusion 99

I. Introduction

The case of *Almeida-Sanchez v. United States*[1] involved the constitutionality of a Border Patrol's warrantless search of an automobile twenty-five miles north of the Mexican-United States border. Relying on 8 U.S.C. Section 1357(a)(3),[2] a section of the Immigration and Nationality Act which authorizes warrantless searches of cars within a reasonable distance from any border,[3] the government agents searched defendant's car without probable cause, consent, or reasonable suspicion and found marijuana. Stating that "no Act of Congress can authorize a violation of the Constitution,"[4] the Court held the search to be in violation of the fourth amendment since it could not be classified as a border search or the functional equivalent of a border search—facts which would have dispensed

* J.D., University of Miami; Former Member, University of Miami Law Review; Lt. USCG, Ass't District Legal Officer, 14th Coast Guard District, Honolulu, Hawaii.

1. 413 U.S. 266 (1973).
2. (1970).
3. 8 C.F.R. § 287.1 (1977) defines "reasonable distance" as within 100 miles of the border.
4. 413 U.S. at 272.

with the requirements of probable cause or consent.[5]

Since the *Almeida-Sanchez* decision, the lower federal courts have been faced with arguments by defense counsel that the rationale of that decision should be expanded to closely related areas of the law involving analogous factual situations. Boardings, searches, and seizures at sea have recently come under such attacks. The United States Coast Guard, as the primary enforcer of federal law at sea,[6] relies on two statutes for authority to board and search vessels at sea.[7] 14 U.S.C. section 89 states:

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

5. *Almeida-Sanchez* is further analyzed at notes 169-78 and accompanying text *infra.*

6. 14 U.S.C. § 2 (Supp. VI 1976) establishes the Coast Guard as the primary maritime agency charged with the enforcement of federal law at sea and sets forth the primary duties of the Coast Guard.

> The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on and under the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States . . . shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; . . . and shall maintain a state of readiness to function as a specialized service in the Navy in time of war.

A Coast Guard vessel is a warship of the United States and Coast Guard personnel maintain a state of readiness in addition to peacetime functions of search and rescue, icebreaking, fishery patrols, surface law enforcement patrols to prevent smuggling, and administrative safety inspections to prevent loss of life at sea.

7. "At sea" is a term encompassing internal waters, territorial waters, the contiguous zone and the high seas. These terms are discussed further in the jurisdiction section, notes 16-18 and accompanying text *infra.*

> liable to forfeiture . . . such vessel or such merchandise, or both, shall be seized.[8]

Furthermore, the Coast Guard is authorized to board vessels under customs enforcement provisions. 19 U.S.C. section 1581 states:

> (a) 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 a customs-enforcement area established under sections 1701 and 1703-1711 of this title, 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, truck, 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.
>
> (b) Officers of the Department of the Treasury and other persons authorized by such department may go on board of *any vessel* at *any place in the United States or within the customs waters* and hail, stop, and board such vessel in the enforcement of the *navigation laws*.
>
> . . . .
>
> (e) *If upon the examination of any vessel* or vehicle it shall appear that a breach of the laws of the United States is being or has been committeed so as to render such vessel or vehicle, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel or vehicle, liable to forfeiture or to secure any fine or penalty, the same shall be seized and any person who has engaged in such breach shall be arrested.
>
> . . . .
>
> (9) any vessel, within or without the customs waters, from which any merchandise is being, or has been, unlawfully introduced into the United States by means of any boat belonging to, or owned, controlled, or managed in common with, said vessel, shall be deemed to be employed within the United States and, as such, subject to the provisions of this section.[9]

---

8. 14 U.S.C. § 89(a) (1970) (emphasis added).

9. 19 U.S.C. § 1581 (1970) (emphasis added). 14 U.S.C. § 143 (1970), 19 U.S.C. § 1401(i) (Supp. VI 1976), and 19 U.S.C. § 1709(b) (1970) provide that Coast Guard commissioned officers, warrant officers and petty officers are deemed to be officers of the customs. Customs waters are defined in 19 U.S.C. § 1401(j) (Supp. VI 1976) as waters within distances allowed by treaties and, for every other vessel, water within four leagues (12 miles) of the United States' coast. A customs-enforcement area created under 19 U.S.C. §§ 1701, 1703-11 may extend up to 62 miles outward from the coast and laterally up to 100 miles in each direction, thus creating a rectangular enforcement zone of 200 miles by 62 miles. For an excellent discussion of this zone see FICKEN, *The 1935 Anti-Smuggling Act Applied to Hovering Narcot-*

The Coast Guard boards vessels under the authority of these two statutes for enforcement of the motorboat and navigation laws,[10] customs laws,[11] general federal law enforcement,[12] and security boardings. Motorboat and navigation laws deal with vessel documentation, registry, enrollment, licensing, numbering, navigation rules, equipment standards and operator qualifications, all implemented to insure safety at sea. The customs laws require manifesting of cargo and reporting of goods landed in the United States so that proper duties are paid. Inherent in the customs laws is the suppression of smuggling contraband items. Smuggling by vessels has always been, and continues to be, a primary method of importing contraband. The customs laws are integrally related to the motorboat and navigation laws in that a vessel must be certified seaworthy to carry any cargo and must be documented to that effect. The Coast Guard effects general federal law enforcement when it renders assistance to other governmental agencies in their primary fields of responsibility. This includes, *inter alia*, enforcement of conservation, criminal, immigration, pollution, quarantine and national security laws. The security laws are designed to prevent subversive acts such as sabotage or the introduction of weapons, persons, or cargo inimical to national security. It is arguable that customs laws are closely related to this area, especially with regard to prohibition of the smuggling of narcotics. Further, it is possible that Coast Guard boardings may encompass only one or all of these purposes and a restraint in one area must be examined for its effect in the others.

The analogy of Coast Guard boardings and searches to the *Almeida-Sanchez* fact pattern has been made:

> A government roving border patrol [Coast Guard] assigned to a certain highway [channel] some 25 miles [270 miles] north of

---

ics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law, 29 U. MIAMI L. REV. 700 (1975). A manifest is a summary of all the bills of lading and is required for the protection of the ship and the owners of cargo. It is the vessel master's duty to insure that it is carried on board. The fact that cargo cannot be lawfully imported does not dispense with the necessity of a manifest. United States v. Sischo, 262 U.S. 165 (1922). The purpose behind a manifest is not only for the collection of duties, but also to enable the government to ascertain the ship's cargo without having to search.

10. *E.g.*, 46 U.S.C. § 277 (1970) (examination of the register, enrollment, and license of American vessels); Coordinated National Boating Safety Program, 46 U.S.C. § 1451-89 (1970). For navigation requirements, see generally Title 33, United States Code. For shipping requirements see generally Title 46, United States Code.

11. *E.g.*, 19 U.S.C. § 1581 (a) (1970). *See generally* Title 19, United States Code.

12. *E.g.*, 16 U.S.C. §§ 772(d), 776(d), 916(g), 990, 1027, 1081-86, 1091-94 (1970) (boardings & searches for fisheries violations); 33 U.S.C. §§ 1001-15 (1970) (oil pollution control). For laws relating to public health and welfare, *see generally* Title 42, United States Code.

> the Mexican Border [from the United States territorial waters] was directing eyesight [radar] surveillance toward vehicles traveling the road [sea-lane] by all outward appearances legally. The patrol [cutter] arbitrarily singled out a vehicle [vessel], stopped it, asked questions of the driver [captain], inspected and searched it from front to rear [stem to stern], and eventually uncovered a cache of marijuana. All in the 'asserted interest' of detecting the importation of illegal aliens [detecting safety and fishery violations].[13]

On its face, the analogy appears to be sound.

II. JURISDICTION

The broad authority of 14 U.S.C. section 89(a) and 19 U.S.C. section 1581(a) is limited by jurisdictional phrasing. Section 89(a) authorizes searches "upon the high seas and waters over which the United States has jurisdiction" and allows Coast Guard officers to "board . . . any vessel subject to the jurisdiction, or to the operation of any law, of the United States." Section 1581(a) authorizes searches of any vessel or vehicle "at any place in the United States or within the customs waters or . . . within a customs-enforcement area . . . or at any other authorized place."[14] The power is conferred not only over American vessels but also over foreign vessels. This fact requires that the jurisdictional discussion encompass a brief analysis of the international law of the sea. Since the contraband most frequently uncovered by the Coast Guard is a controlled narcotic, the provisions of Title 21, United States Code, also will be discussed.[15]

---

13. Brief for Appellant at 18-19, United States v. One Forty-Three Foot Sailing Vessel, 538 F.2d 694 (5th Cir. 1976).

14. For statutory definitions of terms contained in 19 U.S.C. § 1581(a) see note 9 *supra*.

15. The Title 21 provisions most frequently applicable are: 21 U.S.C. § 812 (schedule of controlled substances); 21 U.S.C. § 841(a) (unlawful to intentionally manufacture, distribute, dispense, or possess a controlled substance); 21 U.S.C. § 844 (penalty for simple possession); 21 U.S.C. § 846 (attempt or conspiracy to commit defined offenses); 21 U.S.C. § 952 (unlawful to import into the customs territory of the United States); 21 U.S.C. § 955 (unlawful for any person to bring or possess on board any vessel arriving in or departing from the United States or the customs territory of the United States); 21 U.S.C. § 960 (penalty for violation of § 952 or § 955); 21 U.S.C. § 963 (attempt or conspiracy to commit defined offenses); 21 U.S.C. § 951(a)(1) (1970) (defines import as "any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States)"). Otherwise customs territory is defined by headnote 2 to the tariff schedules of the United States (19 U.S.C. § 1202) as including only the States, the District of Columbia and Puerto Rico. Congress failed to include customs waters of the United States in this definition; however, 21 U.S.C. § 802(26) (1970) defines the term "United States" when used in a geographical sense, as "all places and waters, continental or insular, subject to the jurisdiction of the United States," and would thus appear to encompass customs waters.

Prior to a discussion of the amount of power which may be applied, it is necessary to define the areas of water in and around nation states wherein different rights, duties and claims are applicable. There are basically three divisions of the waters: internal waters, territorial sea, and high seas. The latter encompasses an area known as the contiguous zone. The three mile limit[16] of the territorial sea refers to "that body of the seas which is included within a definite maritime belt immediately adjacent to a state's coastline. Territorial seas do not include, but are seaward of, rivers, most bays, some gulfs, straits, lakes, ports and roadsteads, such being considered to be internal, or national, waters."[17] Seaward of this three mile limit is the high seas. However, for implementation of certain United States law, there is a contiguous zone which extends nine miles from the three mile boundary, or in other words, to a boundary between three and twelve miles from the coast.[18]

Underlying the classifications above is a concept of freedom of the seas. With deference to this freedom, states have certain interdependent rights and duties incident to their sovereignty which form the basis of their relations with the community of nations. Within this framework, the claims a state makes to authority over internal waters is almost as comprehensive as that made with regard to sovereignty over its land.[19]

National security in the sixteenth and seventeenth centuries depended on the ability of a nation to control activities off its coast. This resulted in the concept of a territorial sea. It is now settled by the usage of states and the principles of international law that all states possess sovereign rights within this marginal belt.[20] The

16. At sea, distances are measured in nautical miles. There are 60 nautical miles in one degree of latitude making a nautical mile equal to 6,076.12 feet or 1853 meters or approximately 2000 yards. One marine league is equal to three nautical miles. C. COLOMBOS, THE INTERNATIONAL LAWS OF THE SEA 88 (6th ed. 1967).

17. B. BRITTIN & L. WATSON, INTERNATIONAL LAW FOR SEAGOING OFFICERS 78 (3d ed. 1972) [hereinafter cited as BRITTIN].

18. *See* notes 32-43 *infra* and accompanying text.

19. M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 92, 93 (1962) [hereinafter cited as MCDOUGAL]. Specifically the claims are: (1) claims to control access to internal waters; (2) claims to apply authority to vessels; (3) claims to prescribe policy for activities directly relating to the use of internal waters; (4) claims to prescribe and apply policy to events on board ship while in internal waters; and (5) claims relating to resources.

20. H. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 51 (1975-76 ed.). *See also* BRITTIN, *supra* note 17, at 96. For a thorough discussion of the genesis of the territorial sea, see Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597 (1959). In accordance with the underlying concept of self-preservation a state may exercise rights with regard to: (1) jurisdiction over foreign ships of war and foreign merchant vessels; (2) police, customs and revenue functions; (3) fishery regulations; (4) maritime ceremonials; and (5) establishment of defense zones. C. COLOMBOS, *supra* note 16, at 132. Interna-

United States adopted a zone of uniform breadth for purposes of neutrality in 1793.[21] This zone was reiterated by Congress and defined as "a marine league" in 1794.[22] The Supreme Court recognized the plenary nature of the jurisdiction within territorial waters in *The Schooner Exchange v. M'Faddon.*[23] The dictum from Mr. Chief Justice Marshall in that case was applied in *Cunard S.S. Co. v. Mellon*[24] wherein the Court held that territory of the United States, as designated by the eighteenth amendment, included the established three mile limit and that since the United States possessed plenary jurisdiction in its territorial waters, it had the power to apply prohibition measures against foreign vessels therein. Although the concept of plenary jurisdiction is not questioned, *Cunard* has been criticized for its implications regarding the right of innocent passage.

Although transient vessels in the territorial sea must obey reasonable rules and regulations promulgated by the littoral state for the safety of navigation and maritime police, the littoral sovereign's conduct may not amount to an unreasonable interference with the navigation of a foreign vessel merely innocently transiting the territorial sea.[25] In general, all ships enjoy a right of innocent passage, but the exclusive interest of a state in its territorial sea obligates it to insure those waters are not used for acts contrary to the rights of other countries. A coastal state also has the right to take necessary steps to protect itself against acts prejudicial to its security. It may board a foreign merchant ship passing through its territorial waters to arrest a person or investigate a crime allegedly taking place within its territorial seas if the consequences of the crime extend beyond the ship and disturb the peace of the coastal state.[26] Appraisal of coastal state action, such as boarding and searching a foreign vessel, is based upon a balance between the interests of the general community in freedom of navigation and the interests of particular states in their own value processes. Factors in determining what is reasonable in view of all the circumstances include: the

---

tional agreement with regard to rights in the territorial sea is contained in the Convention on the Territorial Sea and Contiguous Zone, arts. 1-13, [1964] 15 U.S.T. 1606, 1608-10.

21. *See* Note from Secretary Jefferson to the British Minister, Nov. 8, 1793 in 1 MOORE, DIGEST OF INTERNATIONAL LAW 702-03 (1906).

22. Act of June 5, 1794, ch. 50, § 6, 1 Stat. 384.

23. 11 U.S. 116, 137 (1812) (dictum). A coastal state possesses "full and absolute territorial jurisdiction" within a band of sea one league in breadth along its coast.

24. 262 U.S. 100, 124 (1923).

25. P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 121 (1927). To take advantage of the doctrine of innocent passage a vessel must be in passage. Generally, if it is entering port or anchoring, its status is like that of a vessel in port.

26. BRITTIN, *supra* note 17, at 96-100.

consequentiality and range of interests sought to be protected by the coastal state, the scope of authority claimed, the importance of the area for navigation, the impact of non-interference on the coastal state, and alternate sanctions available for coastal protection. The interest to be protected should be one regarded as important in the community of nations.[27]

The high seas are generally not subject to the sovereignty of any state,[28] yet reasonable regard must be given to the rights of others to use the high seas. Thus, many regulations exist through conventions and treaties on the safety of life and traffic at sea, salvage, fisheries, prevention of pollution, and suppression of piracy and slave trade.[29] Control of ship movements to avoid collisions is crucial to effective commerce. Control of ship construction, licensing, manning and all other aspects of the seagoing industry is also critical to insure safety at sea. The state whose flag a vessel flies is duty bound by international law to establish and police safety standards effectively.[30] To carry out the international duty to suppress piracy, a state's warships may approach the merchant ship of any nation and determine her identity and nationality.[31]

Due to the plenary jurisdiction exercisable within the territorial sea, its breadth has been limited. This limitation has not always allowed the coastal state to protect its values effectively. Ocean transportation is a source of wealth but it also may be used to deprive a state of this wealth; for example, cargo may be destined to enter the state in violation of its laws. Since the methods of smuggling are so varied, and the difficulty of policing a vast coastline so great, the exercise of preventative measures at a greater distance from the coast is required. The resultant exercise of jurisdiction in the contiguous zone is limited to protection of specific interests such as customs, security and health laws. Although the concept of contiguous zones is fully accepted in international law[32]

27. McDOUGAL, *supra* note 19, at 229. Although article 17 of the Convention on the Territorial Sea and Contiguous Zone, [1964] 15 U.S.T. 1606, 1611 does not explicitly state that the coastal state may enforce its laws in the territorial sea, it nevertheless appears that this was one of its objectives.

28. *See generally*, Convention on the High Seas, [1962] 13 U.S.T. 2312.

29. *See generally*, BRITTIN, *supra* note 17, at 122-47.

30. *See* article 10, Convention on the High Seas, [1962] 13 U.S.T. 2312, 2316.

31. *See* article 22, Convention on the High Seas, [1962] 13 U.S.T. 2312, 2318. Full exercise of the power to stop vessels on the high seas for identification checks is limited to: (1) acts of interference derived from powers specifically conferred by treaty; (2) suspicion of piracy; (3) suspicion of engaging in slave trade; and (4) suspicion that a ship, although flying a foreign flag, is in reality of the same nationality as the warship.

32. *See* article 24 of the Convention on the Territorial Sea and Contiguous Zone, [1964] 15 U.S.T. 1606, 1612-13. Therein the zone is limited to 12 miles.

and a vast number of measures have been adopted with regard to customs enforcement, the language of the present Convention on the Territorial Sea and Contiguous Zone does not appear to extend the sphere of validity of a state's laws into the contiguous zone. It appears that infringement of the state's laws must occur within its territory or territorial sea. In practice, however, and consequently as a matter of present international custom, the contiguous zone extends a state's powers beyond the territorial sea.[33] The crucial international law question to be asked is whether the state's action is reasonably calculated to secure a professed interest substantial enough to outweight the intrusion.[34]

In 1790 the United States, following Britain's lead, enacted legislation designed to prevent smuggling. This legislation was made applicable to vessels within four leagues of the coast.[35] Three Supreme Court cases during the early 1800's reflected, in dicta, the view of the Court with regard to the revenue statutes. *Church v. Hubbart*[36] dealt with an action on an insurance policy written on an American vessel which excepted losses arising from illicit trade with another nation's colony. The vessel had been seized from four to five leagues off the coast of the colony, and the insured claimed that because the seizure was unlawful the policy should cover the loss. The Court stated:

> The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. . . . If [the means] are such as are reasonable and necessary to secure their laws from violation, they will be submitted to. . . .
>
> . . . .
>
> Indeed, the right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that in the opinion of the *American* government, no such principle as that contended for has a real existence.[37]

33. KNIGHT, *supra* note 20, at 85. *See generally*, Comment, *Maritime Contiguous Zones*, 62 MICH. L. REV. 848 (1964), wherein the author argues that a contiguous zone would be of little value if preventative or punitive action could not be taken within the zone.

34. MCDOUGAL, *supra* note 19, at 576-80 discusses the state's competence to prescribe and apply its laws in the contiguous zone.

35. Ch. 35, § 31, 1 Stat. 164 (1790). *See* note 74 *infra* and accompanying text. This 1790 legislation has remained the basis of American law in the contiguous zone for customs enforcement. For a discussion of the development of smuggling legislation and early jurisdictional court decisions see W. MASTERSON, JURISDICTION IN MARGINAL SEAS (1929).

36. 6 U.S. 187 (1804).

37. *Id.* at 234-35.

In *Rose v. Himely,*[38] an American vessel had been seized ten leagues from the coast of Santo Domingo for a breach of French municipal law. The vessel was later condemned by a French Court in Santo Domingo while it was in the waters of South Carolina. Chief Justice Marshall held the French degree void finding that the vessel was not within the French Court's jurisdiction. The Court also noted that the *arrete,* under which the seizure was made, only provided for seizure within two leagues of the coast and had stated that the seizure of a vessel on the high seas not belonging to a subject for the breach of a municipal regulation, was an act which a sovereign could not authorize.

Although the dicta appeared to be contrary to *Church,* the Court in *Hudson v. Guestier*[39] upheld the condemnation by a French court of the cargo of an American vessel seized six leagues from shore for a violation of a municipal law of France prohibiting trading with colonies in revolt. The Court strongly intimated that a sovereign's power might be exercised not only to prevent an impending injury but also to punish for one which had been consummated.[40]

In *The Betsey,*[41] Judge Story, while discussing section 27 of the 1799 customs act forbidding unloading within four leagues of the coast without the payment of duties, stated: "[T]he policy of the act applies equally to all vessels; and indeed more strongly to foreign vessels; since frauds committed by them in evasion of the revenue laws are less easily detected, than like frauds are under the regulations applicable to American vessels."[42] The same section was discussed in *The Coquitlam*[43] by the Ninth Circuit, which reversed the lower court by stating that the cargo unloaded within four leagues must be bound for the United States and there must be an intent to avoid payment of duties. The district court had held that once a vessel entered within four leagues it had "arrived" and should be treated as bound for the United States. The circuit court refused to

38. 8 U.S. 241 (1808).

39. 10 U.S. 281 (1810).

40. During this early period the tenor of the Supreme Court cases with regard to probable cause for boarding, searching and seizing was one of questioning probable cause for seizure and questioning whether the vessel was bound for the United States in fact. The validity of the boarding was apparently presumed. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 121-23 (1804) (grounds creating substantial reason for believing vessel and cargo liable to seizure discovered after boarding); The Apollon, 22 U.S. 362, 371-72 (1824) (stated the right of visitation was limited to American vessels within 12 miles and foreign vessels within the same distance if bound for the United States and then discussed probable cause for seizure). *See also* The Marianna Flora, 24 U.S. 1, 50 (1826).

41. 3 F.Cas. 303 (C.C.D. Mass. 1818) (No. 1365).

42. *Id.* at 304.

43. 77 F. 744 (9th Cir. 1896).

hold that the statute prohibited unloading from every vessel that arrived within the customs zone.

Before 1920, illicit trade was carried on mainly from foreign and domestic vessels in port or from small American vessels that cruised near the coast.[44] Subsequently, however, the government's authority to apply its customs laws to vessels within twelve miles of the coast and bound for the United States became inadequate to handle the smuggling of liquor. Demand for the product and the use of high speed craft for transshipment from hovering vessels to the United States caused Congress to expand enforcement of prohibition laws to certain ships irrespective of destination.[45] *The Henry L. Marshall,*[46] although dealing with a statutory violation arising when the "bound for" language was still required, held that a British vessel which was found with two clearances, no manifest and 1250 cases of liquor on board, and was sailing along the United States coast would not be heard to deny it was bound for the United States since its real objective was to transship the liquor to smaller American vessels. The court felt that the decision was in accord with the design of the customs and revenues laws especially since, in the interim between arrest and appeal, the "bound for" language had been removed from the statute.

At least as to foreign vessels, the statutory predecessors could not, and present section 1581(a) cannot, take general jurisdiction over all vessels within twelve miles, as this would violate international law's concept of freedom of the seas. It appears that some standard must be met before a foreign vessel is subject to search or seizure. If it is not known whether the vessel is bound for the United States, then there must be a reasonable suspicion, arising from conduct or previous information, that the vessel is engaged in smuggling operations.[47]

In 1927 the Supreme Court decided two cases clarifying jurisdictional principles pertaining to American flag vessels. In *Maul v. United States,*[48] an American vessel enrolled and licensed for the coastwise trade was seized by Coast Guard officers thirty-four miles

44. W. MASTERSON, *supra* note 35, at 205.

45. 42 Stat. 989 (1922). Congress no doubt wished to bring within the terms of the law the "rumfleet" hovering off the coast with no intention of entering port. W. MASTERSON, *supra* note 35, at 229. *See also,* McDOUGAL, *supra* note 19, at 588.

46. 292 F. 486 (2d Cir. 1923).

47. A different standard under 19 U.S.C. § 1581(a) (1970) for foreign vessels and American vessels with regard to boardings and searches would likely not be a violation of equal protection guaranteed by the Constitution since international ramifications create a rational basis for the distinction.

48. 274 U.S. 501 (1927).

from shore for being on a foreign voyage without being duly registered. The issue was whether the vessel could be seized outside the twelve mile limit. After tracing the statutory history of section 3072 of the Revised Statutes, the Court responded to defendant's contention that section 581 of the Tariff Act of 1922 was the sole authority for Coast Guard officers to seize by stating that section 581 did not repeal section 3072 of the Revised Statutes.

> [The former] provides primarily for boarding and searching vessels, within prescribed limits, to discover and prevent intended smuggling, and secondarily for the prompt seizure of the vessel by the searching officer if the search discloses a violation of law which subjects her to forfeiture. The other provides broadly, and without restriction as to place, for the seizure of vessels which, through violation of the laws respecting revenue, have become liable to seizure.[49]

The Court continued:

> If Congress were without power to provide for the seizure of such vessels on the high sea, a restrictive construction might be justified. But there is no want of power in this regard. The high sea is common to all nations and foreign to none; and every nation having vessels there has power to regulate them and also to seize them for a violation of its laws.[50]

Justices Brandeis and Holmes concurred, not on a construction of section 3072 because they felt that seizure for a violation of navigation laws was not seizure for a violation of laws "respecting the revenue," but rather on a ground that the authority was to be implied as an incident of the police duties of the ocean patrol. They found that the authority of the Revenue Cutter Service had been extended into numerous fields of operation including enforcement of navigation laws.[51] The concurring Justices stated: "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 the common law and the Constitution upon the arrest of persons and upon the seizure of 'papers and effects.' "[52] Referring to a comparison of section 581 and section 3072 they stated:

> There is no foundation for the assumption of the claimant that the first paragraph of § 581 was intended as the exclusive grant

49. *Id.* at 507.
50. *Id.* at 511.
51. *Id.* at 515-17. These duties are presently compiled in 14 U.S.C. § 2 (1970).
52. 274 U.S. at 524 (footnote omitted).

> of the power to seize. The primary purpose of that paragraph was not to provide for the seizure of American vessels of known or suspected guilt. It was to facilitate, by means of boarding and examination of manifest before arrival in port, both the entry of admittedly innocent vessels and the collection of revenues. *This end was furthered by enabling customs officers to board and search any vessel, foreign or domestic, within the stated limits, without the necessity of establishing probable cause.* The authority to board and search foreign vessels beyond the territorial limits would doubtless not have been implied as a mere incident of the customs officers' duties, and it is probable that the authority to board and search American vessels in the absence of probable cause was not regarded as clear.[53]

The response of Congress to Justices Brandeis' and Holmes' concurring opinion was the legislative predecessor to 14 U.S.C. § 89(a).[54]

In *United States v. Lee,*[55] the defendant had been taken from an American vessel which had just taken on liquors from a foreign vessel twenty-four miles at sea. The defendant had intended to carry the liquor ashore; however, all of the evidence against defendant was obtained by the seizure. The lower court had held the evidence inadmissable because the search was thought to be unlawful and the seizure unauthorized since made beyond twelve miles.[56] The Supreme Court, citing *Maul,* reversed, stating:

> From [the power to seize beyond twelve miles] it is fairly to be inferred that [Coast Guard officers] are likewise authorized to board and search such 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.[57]

Section 8 of article I of the United States Constitution grants Congress the power to punish felonies committed on the high seas, and section 2 of article III extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. In *United States v. Flores,*[58] the Court stated that the criminal jurisdiction of

---

53. *Id.* at 529-30 (emphasis added).

54. Act of June 22, 1936, ch. 705, 49 Stat. 1820. *See* H.R. 12305, 74th Cong., 2d Sess. (1936).

55. 274 U.S. 559 (1927).

56. The circuit court opinion is found at 14 F.2d 400 (1st Cir. 1926). The court had added that the seizure would have been lawful if the government had "adopted" the act by instituting forfeiture proceedings against the vessel and its liquor cargo. This is supported by The Richmond, 13 U.S. 102, 104 (1815) ("the law does not connect [the] trespass, if it be one, with the subsequent seizure by the civil authority under the process of the District Court. . . ."). *But see* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). *See also* United States v. Janis, 428 U.S. 433 (1976).

57. 274 U.S. at 562.

58. 289 U.S. 137 (1933).

the United States is statutory and is generally based on a territorial principle. Although not given extraterritorial effect by implication, this limitation is not deemed applicable to merchant vessels flying the sovereign's flag as they are deemed to be part of the territory of that sovereignty even within the territorial limits of another state.[59] It appears that the key is whether a specific statute punishes offenses on a United States vessel out of the jurisdiction of a state when committed within the special maritime and territorial jurisdiction of the United States.[60] The United States also ascribes to the objective view of the territorial principle wherein jurisdiction is extended over all acts having an effect within the state even though the acts occur elsewhere.[61] There is also authority, both in international law and in United States law, for the protective principle of jurisdiction by which a state may prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security and operation. Under this theory, all the elements of the crime may occur outside the territory of the state but jurisdiction exists because of the potential for adverse effects on security.[62] Furthermore, a defendant in a criminal trial, whether citizen or alien, whether arrested within United States territory or without, cannot challenge a court's jurisdiction because his presence was secured unlawfully.[63]

Three other aspects of jurisdiction deserve brief mention: treaties, the doctrine of hot pursuit, and extended customs zones. Although treaties are not considered as evidence of a signatory's belief in international custom, they do constitute recognition that authority exercised over vessels of the signatory beyond the territorial sea is entirely reasonable. During the prohibition era, Great Britain's refusal to acknowledge our customs enforcement zone extending to twelve miles led to the Treaty of May 22, 1924.[64] The treaty allowed the United States, within a zone from the coast to a distance which could be traversed by the foreign vessel within an hour: (1) to board and examine the papers; (2) to search if suspicions were aroused; and (3) to seize if reasonable cause existed for believing the vessel was committing offenses against the United States.[65]

59. *Id.* at 155-57. *Flores* held United States law applicable to the murder of an American by an American on a United States vessel while in foreign territorial waters.

60. *See* 18 U.S.C. § 7 (1970).

61. Ford v. United States, 273 U.S. 593 (1927); Rivard v. United States, 375 F.2d 882 (5th Cir. 1967).

62. United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); Rocha v. United States, 288 F.2d 545 (9th Cir. 1961).

63. Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886).

64. 43 Stat. 1761.

65. The treaty was interpreted and found to supersede § 581 of the Tariff Act in Cook v. United States, 288 U.S. 102 (1933).

The right of hot pursuit is recognized in article 23 of the Convention on the High Seas.[66] Pursuit may be commenced when the coastal state has good reason to believe the vessel has violated the state's laws and when the vessel or its boat is in internal waters, the territorial sea or the contiguous zone.[67] A visual or auditory signal must be given to stop and the pursuit must not be interrupted.

An extended customs enforcement zone may be created pursuant to authority granted by the 1935 Anti-Smuggling Act.[68] The President (or his congressionally appointed representative) is able to designate temporary zones encompassing an area sixty-two miles from the coast and 100 miles in both directions laterally upon a determination that vessels are hovering off the coast and smuggling is likely to occur. The rights relating to customs enforcement, exercisable in the normal contiguous zone, would be applicable in the extended zone.[69]

III. STATUTORY ANALYSIS

"One of the oldest functions of the United States Coast Guard[70] is the boarding of vessels in the enforcement of Federal law."[71] The Coast Guard was created in 1915 by a consolidation of the Revenue Cutter Service and the Life Saving Service.[72] Authority to board vessels was given to the Revenue Cutter Service upon its inception in 1790 in "[a]n act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or

66. Convention on the High Seas, [1962] 13 U.S.T. 2312, 2318-19.

67. It appears clear that article 23 authorizes hot pursuit for acts committed in the contiguous zone which the state has good reason to believe are in violation of the laws applicable within the contiguous zone. McDOUGAL, *supra* note 19, at 920.

68. 19 U.S.C. § 1701 (1970).

69. *See, The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law,* 29 U. MIAMI L. REV. 700 (1975). *See also* U.S. Coast Guard Cmdt. Inst. 5920.6 (15 April 1976) for implementation guidelines for law enforcement actions against hovering vessels.

70. The Coast Guard is the primary agency for enforcement of federal laws at sea. At times the Coast Guard enforces customs laws and immigration laws and in such posture is restricted by the regulations of the departments primarily responsible for enforcement of those laws. Although this paper will continually refer to the law of search and seizure as it affects Coast Guard procedures, there are aspects of this analysis which are applicable to these other agencies in so far as their duties may be carried out at sea. This comment relates specifically to the Coast Guard since its authority to board vessels for customs enforcement is interlocked with other provisions of the United States Code which necessarily qualify any discussion of the applicability of the fourth amendment to Coast Guard operations.

71. UNITED STATES COAST GUARD BOARDING MANUAL 1-1 (CG-253, 1972).

72. An Act to Create the Coast Guard, ch. 20, 38 Stat. 800 (1915). The Lifesaving Service was created by ch. 344, 18 Stat. 125 (1874).

vessels."[73] Specifically, section 31 of that act stated:

> That it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters . . . to go on board of ships or vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels; and the said officers respectively shall have free access to the cabin, and every other part of a ship or vessel. . . . [74]

The primary purpose of this statute was to account for all cargo and to insure that proper duties were paid. There is no qualifying language limiting the power of the Revenue Cutter officers to board any vessel except that within the twelve mile (four league) zone the vessel had to be bound for the United States. Evidence that the first Congress was mindful of limitations on the power to search can be found in section 48 of the same act:

> That every collector, naval officer and surveyor, or other person specifically appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel in which they *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. And if they shall have *cause to suspect* a concealment thereof in any particular dwelling-house, store, building or other place, they or either of them shall, upon application on oath to any justice of the peace, be entitled to a *warrant* to enter such house, store or other place (in the daytime only) and there to search for such goods . . . . [75]

---

73. Ch. 35, 1 Stat. 145 (1790). Ch. 35, § 62, 1 Stat. 175 (1790) created the Revenue Cutter Service. Section 64 stated:

> That the officers of the [boats or cutters to be employed for the protection of the revenue], shall be appointed by the President of the United States, and shall respectively be deemed officers of the customs, and shall have power and authority to go on board of *every* ship or vessel which shall arrive within the United States, or within four leagues of the coast thereof, *if bound for the United States*, and to search and examine the same and *every part* thereof, and to demand, receive and certify the manifests herein before required to be on board of certain ships or vessels. . . .

Ch. 35, § 64, 1 Stat. 175 (1790) (emphasis added).

74. Ch. 35, § 31, 1 Stat. 164 (1790).

75. Ch. 35, § 48, 1 Stat. 170 (1790). Except for the deletion of "or affirmation" after "oath," this is a verbatim transcription of the inspection provision enacted by the First Congress in its first session. Customs Act, ch. 5, § 24, 1 Stat. 43 (1789). This earlier statute is frequently cited as the seminal statute for searches at sea. Such citation appears to be incorrect in view of the 1790 legislation passed by the same Congress. Another statute fre-

The chronological order of these statutes enacted by the First Congress and the subjects with which they deal suggest that Congress was following the normal flow of goods from the transit stage, sections 22 and 23, to the landed and storage stage, section 31.[76] The relevant portions of the act of 1790 were re-enacted without substantial changes in 1799[77] and remained unchanged until 1866. Then in "[a]n Act further to prevent Smuggling and for other Purposes" Congress stated it would be

> lawful for any officer of the customs . . . or of a revenue cutter . . . to go on board of *any vessel,* as well without as within his district, and to inspect, search, and examine the same, and any person, trunk, or envelope on board, and to this end, to hail and stop such vessel if under way, and to use all necessary force to compel compliance; and *if it shall appear* that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which, such vessel, or the goods, wares, and merchandise, or any part thereof, on board of or imported by such vessel, is or are liable to forfeiture, to make seizure of the same, or either or any part thereof, and to arrest, or in case of escape, or any attempt to escape, to pursue and arrest any person engaged in such breach or violation . . . .[78]

---

quently cited for the proposition that probable cause is required for searches at sea is ch. 5, § 36, 1 Stat. 47 (1789):

> And when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares or merchandise, and judgment shall be given for 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 or 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 (emphasis added).

However, it is apparent that liability is grounded on a *seizure* without probable cause and that the section does not relate to boardings and searches.

76. The context of ch. 5, §§ 22-24, 1 Stat. 42-43 (1789) supports this contention. Section 22 begins: "That when it shall appear that any goods, wares or merchandise of which entry shall have been made . . . ." Section 23 commences with: "That it shall be lawful for the collector, or other officer of, the customs, after entry made of any goods . . . ." Ch. 35, § 31, 1 Stat. 164 (1790) flows from ch. 5, § 11, 1 Stat. 38-39 (1789). The earlier statute required vessels to have manifests of cargo and to deliver them to the customs officer on demand. The latter authorized customs officers to come on board for the purpose of demanding these manifests when the ship was within four leagues or within bays, harbors, ports, rivers, creeks or inlets if laden with goods and bound to the United States.

77. Ch. 35, § 31, 1 Stat. 164 (1790) was re-enacted as ch. 22, § 54, 1 Stat. 668 (1799); ch. 35, § 48, 1 Stat. 170 (1790) became ch. 22, § 67, 1 Stat. 677 (1799); and ch. 35, § 64, 1 Stat. 175 (1790) became ch. 22, § 99, 1 Stat. 700 (1799).

78. Ch. 201, § 2, 14 Stat. 178 (1866) (emphasis added). This act made a crucial distinction between searches of vessels and searches of the landlocked counterparts of vessels. A suspicion standard was established for the latter. Ch. 201, § 3, 14 Stat. 178 (1866) stated:

> [t]hat any of the officers or persons authorized by the second section of this act

Explicit in this statute is the authority to board and search without knowledge or suspicion of a violation of United States law. There is a much broader law enforcement function inherent in this statute than was contained in prior customs laws. The prior language of the customs statutes qualifying boarding "within four leagues of the coast thereof if bound to the United States," is conspicuously absent. Conceivably this was a recognition that smugglers would always claim they were not bound for the United States if boarded outside United States territorial waters but within four leagues of the coast. Therefore, implicit in this statute was the necessity of an examination of United States competence to prescribe and apply its laws at sea.[79]

The expanded powers enunciated in 1866 were carried forward to the Revised Statutes of 1878. Section 2760[80] reiterated the provisions of the 1790 and 1799 legislation authorizing boarding within four leagues if the vessel was bound for the United States. Section 3059 restated the broad law enforcement provisions of 1866 under the title "Enforcement of Duty-Laws and Punishment for Violations."[81] This same title also contained section 3067 which stipulated that

> [i]t shall be lawful for all collectors . . . and the officers of the revenue-cutters, to go on board of vessels in any port of the United States, or within four leagues of the coast thereof, if bound to the United States . . . for the purposes of demanding the manifests, and of examining and searching the vessels; and those officers respectively shall have free access to the cabin and every other part of a vessel.[82]

It is not immediately apparent from these sections when actual knowledge of destination was critical to boarding. It seems that in

---

to board or search vessels may stop, search, and examine, as well without as within their respective districts any vehicle, beast, or person on which or whom he or they *shall suspect* there are goods, wares, or merchandise which are subject to duty or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a *reasonable cause to suspect* there are goods which were imported contrary to law.

79. *See generally* section II, JURISDICTION *supra*.

80. Title 34, ch. 3, § 2760, Revised Statutes 535 (1878) was a re-enactment of ch. 22, § 99, 1 Stat. 700 (1799).

81. Title 34, ch. 10, § 3059, Revised Statutes 588 (1878) was a restatement of ch. 201, § 2, 14 Stat. 178 (1866). Title 34, ch. 10, § 3061, Revised Statutes 588 brought forward the suspicion requirement for landlocked carriers from ch. 201, § 3, 14 Stat. 178 (1866). Title 34, ch. 10, § 3066, Revised Statutes 589 (1878) stipulated the warrant requirement for a dwelling house, store or building as previously provided in ch. 22, § 68, 1 Stat. 678 (1799).

82. Title 34, ch. 10, § 3067, Revised Statutes 589 (1878) (a re-enactment of ch. 22, § 54,

order to demand a manifest, which was only required of ships carrying cargo and either proceeding to an American port or transshipping to another vessel destined for an American port, there must have been suspicion that the vessel or its cargo was bound for the United States. This requirement has become apparent from the discussion of international consequences upon boarding foreign vessels.[83] It is obvious that Congress did realize the tremendous difficulty in preventing smuggling by sea and attempted to expand the power of the Revenue Cutter Service to stem the tide against the influx of contraband articles. In any event, there was no requirement that, prior to boarding, there be probable cause to believe that a violation of United States laws had occurred or was occurring.

The immediate predecessor to 19 U.S.C. section 1581 was section 581 of the Tariff Act of 1930.[84] This section combined the broadest provisions from all the prior boarding statutes:

> Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may *at any time* go on board of *any vessel or vehicle* at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search and examine the vessel or vehicle, and every part thereof, and any person, trunk or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and *if it shall appear* that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, *on board of or imported by* such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, *and to arrest* . . . any person engaged in such breach or violation.[85]

This statute broadened still further the power of customs officers in that it deleted the reasonable suspicion standard[85.1] for vehicles. Once again the boarding and searching could be conducted without any requirement of an appearance of wrongdoing. The statute was also broad enough to cover mere possession, as opposed to

1 Stat. 668 (1799)).

83. *See* notes 28-34 and accompanying text *supra*.

84. The Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930). This act repealed the Tariff Act of 1922, ch. 356, 42 Stat. 858 (1922). The language of section 581 in both acts was identical.

85. *Id.*

85.1 *See* notes 78 & 81 *supra*.

importation, of contraband articles if such was in violation of the law.

Alexander Hamilton, the first Secretary of the Treasury, realized the extent of the discretionary power conferred upon the Revenue Cutter Service. In his first letter of regulations in 1790 he stated in part:

> While I recommend in the strongest terms to the respective officers, activity, vigilance and firmness, I feel no less solicitude that their deportment may be marked with prudence, moderation and good temper. Upon these last qualities, not less than the former, must depend the success, usefulness and consequently continuance of the establishment in which they are included. They cannot be insensible that there are some prepossessions against it, that the charge with which they are entrusted is a delicate one, and that it is easy by mismanagement to produce serious and extensive clamour, disgust and alarm.
>
> They will keep in mind that their countrymen are free men, and, as such, are impatient of everything that bears the least mark of domineering spirit. They will, therefore, refrain, with the most guarded circumspection, from whatever has the appearance of haughtiness, rudeness, or insult.[86]

There was very little said about any of the statutes forming the basis for 19 U.S.C. section 1581(a) and 14 U.S.C. section 89(a)[87] until after the Supreme Court decided *Carroll v. United States*[88] in 1925. Then, a series of cases in the lower federal courts challenged the authority of statutory predecessors to section 1581(a).[89] Almost all of the cases dealt with the smuggling of liquor during the prohibition era.

In 1926, the Fifth Circuit succinctly stated:

> It is evident that the [vessel] was loaded with a cargo intended to be introduced into the United States by those on board. This could be done by the use of small boats after arriving within a convenient distance from the coast as well as by sailing into a harbor and there unloading on lighters or at a wharf. When she reached a point within four leagues of the shore she was as much

86. UNITED STATES COAST GUARD BOARDING MANUAL 1-1 (CG-253, 1972).

87. Since the two major Supreme Court cases regarding the fourth amendment were not decided until the late nineteenth and early twentieth centuries it is probable that the authority to board vessels without probable cause was never questioned or if it was that the contentions were summarily dismissed.

88. 267 U.S. 132 (1925). *See also* notes 138-41 and accompanying text *infra*.

89. Specifically, these were section 581 of the Tariff Act of 1922, ch. 356, 42 Stat. 858 and later, section 581 of the Tariff Act of 1930, ch. 497, 46 Stat. 590. The latter superseded the former and was subsequently codified as 19 U.S.C. § 481.

> within the jurisdiction of the United States as if actually in port, and was required to observe all the customs laws and regulations. When the Coast Guard observed her at anchor they had the authority to board her for the purpose of making inquiry as to her cargo and destination, and finding no manifest, had the right to search without the necessity of procuring a search warrant. Finding probable cause therefore, the seizure was justified.[90]

This decision left unanswered the question of authority to search if a manifest had been present, but the initial boarding and inquiries were apparently presumed valid without the necessity that the vessel was suspected of smuggling. The only requirement was that the *seizure* be justified by probable cause. In essence, this allowed the Coast Guard to board and develop probable cause for seizure.

A year later the Supreme Court decided *Maul v. United States*[91] and *United States v. Lee.*[92] *Maul* held that the Coast Guard could seize an American vessel on the high seas beyond twelve miles if the vessel was subject to forfeiture for a violation of the United States revenue laws. In *Lee* this was expanded so that the Coast Guard had the authority to board, search, and seize an American vessel on the high seas beyond twelve miles when probable cause existed to believe United States law was being violated. The latter situation was analogized to the search and seizure of automobiles as allowed by *Carroll.* The Court reasoned that since the seizure was proper, the search was authorized by section 581 of the Tariff Act of 1922.

In *United States v. 63 Kegs of Malt*[93] and *The Mistinguette*[94] forfeiture proceedings were based upon discovery of unmanifested cargo aboard British schooners. The Second Circuit assumed the validity of the boarding and search. The issue in each case was whether a manifest was required because the vessel was bound for the United States. The court held that probable cause to believe the vessel was bound for the United States was required in order to *seize.*[95]

90. The Island Home, 13 F.2d 382, 384 (5th Cir. 1926) (citations omitted).

91. 274 U.S. 501 (1927). *See* notes 48-54 and accompanying text *supra.*

92. 274 U.S. 559 (1927).

93. 27 F.2d 741 (2d Cir. 1928).

94. 27 F.2d 738 (2d Cir. 1928).

95. *See also* Gillam v. United States, 27 F.2d 296 (4th Cir. 1928). In a district court opinion in the same year, *The Pescawha,* no mention was made of probable cause to board. A Coast Guard vessel, while searching for survivors of a sinking vessel, observed the Pescawha headed away from the coast under full sail approximately 6.6 miles from the coast. For reasons not explained, the Coast Guard officer considered the vessel suspicious and intercepted it to determine identity, purpose, and destination. Upon boarding he determined that the vessel was carrying a large quantity of liquor with no manifest and accordingly seized the cargo. The court stated there was a fair inference that the vessel was attempting to escape and that this justified pursuit. 45 F.2d 221 (D. Ore. 1928).

In 1929 the Second Circuit decided the case of *The Newton Bay*[96] wherein an anchored British vessel had been sighted eight and one half miles from the coast. Upon approach by the Coast Guard the vessel had turned off its lights and maneuvered erratically. The Coast Guard pursued the vessel and fired two blanks. The vessel stopped and was boarded. All of these events transpired more than twelve miles from the coast. The subsequent search uncovered unmanifested liquor. The vessel's papers had indicated it was supposedly on a voyage which would have kept it 250 miles away from the coast. The court found that the actions of the vessel confirmed the intent to introduce its cargo unlawfully into the United States:

> [t]herefore authority for the Coast Guard officers to board this vessel, found within four leagues of the coast, and to search and examine it, or any part thereof, and to use all necessary force to compel compliance, is found in section 581 of the Tariff Act of 1922. . . .[97]

The statutory authority was cited to sustain the pursuit of the vessel outside the twelve mile customs waters, but the court implied that once a reasonable suspicion arose that the foreign vessel was "bound for the United States" the statute was applicable without suspicion that unmanifested contraband was aboard. The court apparently recognized the necessity of boarding in order to inspect the manifest.

From 1930 to 1931 several circuits were presented with cases involving the validity of boardings and searches under section 1581(a)'s predecessors. They either assumed probable cause was not required or stated it was not necessary.[98] However, a different result was reached by the District Court for the Southern District of New York in *Fish v. Brophy*.[99] When presented with a case involving the boarding and search of a private pleasure craft in New York Bay, the court stated:

---

96. 36 F.2d 729 (2d Cir. 1929).

97. 36 F.2d at 731.

98. Alksne v. United States, 39 F.2d 62 (1st Cir. 1930). Citing Boyd v. United States, 116 U.S. 616, 623 (1885), and Carroll v. United States, 267 U.S. 132, 149 (1925), the court refused to suppress evidence obtained during a customs inspection without mention of probable cause. *See also* Awalt v. United States, 47 F.2d 477, 477-78 (3d Cir. 1931) ("19 U.S.C.A. § 481 . . . authorizes officers of the Coast Guard to go on board of any vessel at any place within the United States or within four leagues of the coast . . . without the necessity of establishing probable cause or procuring a search warrant."); The Metmuzel, 49 F.2d 368 (4th Cir. 1931) (discussing the validity of a seizure without discussing probable cause for boarding).

99. 52 F.2d 198 (S.D.N.Y. 1931).

> Section 581 of the act of 1922, title 19, U.S.C.A., § 481, undoubtedly gave defendant the right to stop boats in New York Harbor to examine their manifests. But manifests are required only in the case of vessels "arriving in the United States" with cargo from foreign ports. . . . In the instant case, defendant states no facts which would justify a belief that plaintiff's boat, a pleasure craft, was carrying a cargo from a foreign port into the United States.[100]

The judge in this case appears to have been applying a border search rationale similar to the one being employed in the recent cases construing section 1581(a). However, the issue was phrased solely in terms of whether probable cause to believe the pleasure boat was being used in violation of the law was required; and, therefore, the case would seem to require probable cause for a yacht even in a border crossing situation.[101]

Fish was cited as authority for a probable cause requirement in *United States v. Coppolo.*[102] While patrolling the entrance to Ambrose Channel a Coast Guard officer sighted a fishing vessel entering the harbor. After boarding, the skipper of the fishing boat stated that the vessel was loaded with scallops. The Coast Guard officer, claiming a right to investigate, opened the hatches to the hold and discovered a cargo of liquor. There was no probable cause to believe the vessel was engaged in smuggling. Responding to the government's claim of section 581 authority, the court stated that the protection of the fourth and fifth amendments extended to boats. In refusing to give weight to the dicta in *Maul v. United States* and by distinguishing *United States v. Lee, Gillam v. United States, United States v. Hayes* and *The Island Home,* the court was able to agree that probable cause was required to search the vessel. The court first stated:

> A government officer has the right to board a vessel to inspect the manifest *and observe the cargo,* and if, from this investigation, it is apparent that a crime is being committed in his presence, by reason of what he can see, or by reason of the failure of the master to produce a manifest, or an incomplete or improper

100. *Id.* at 200.

101. United States v. Hayes, 52 F.2d 977 (E.D.N.Y. 1931) assumed probable cause to be required for boarding, searching and seizing a yacht in territorial waters under the provisions of the National Prohibition Act and found that probable cause had existed. However, the judge stated in dicta that probable cause was not a prerequisite, under section 581 of the Tariff Act of 1930, for the Coast Guard boarding to inspect for any violation of navigation, tariff, or other laws of the United States. The judge also recognized a distinction between the border crossing limitation for searches without probable cause with regard to vehicles and the boarding authority with regard to vessels. 52 F.2d at 978.

102. 2 F. Supp. 115 (D.N.J. 1932).

> manifest, or other apparent violation of the navigation or revenue laws, he would have the right to arrest the offender and seize and search the vessel.[103]

In other jurisdictions where probable cause is not required for the initial intrustion, this series of steps would justify a much more intrusive search, as the relevant facts supporting probable cause to believe a violation was being committed became apparent. But the language above also would justify the instant search. Incongruously the court continued:

> In the instant case no such violation was proven, for, as the proof goes, there was nothing in the appearance of the vessel, or the surrounding circumstances, to indicate that it was violating any United States law. The violation was discovered only upon the opening of the hatches and the making of an exploratory search.[104]

The Second Circuit has recognized the practical difficulty of distinguishing between boarding to find a violation of prohibition laws and boarding to find a violation of customs laws. In *The Atlantic,*[105] a Coast Guard officer observed the vessel riding low in the water and eventually boarded while the vessel was underway due to its failure to stop when signalled to do so. Upon boarding he smelled alcohol, entered the pilot house to demand the ship's papers and saw the liquor in the engine room. The court indicated that

> [t]he authorization of § 581 is to ascertain whether there are any

---

103. *Id.* at 116 (emphasis added).

104. *Id. Accord,* United States v. Powers, 1 F. Supp. 458 (E.D.N.Y. 1932). A Coast Guard officer approached a fishing vessel of a class known to smuggle liquor by using a double bottom. Noting that the vessel appeared to be loaded, the officer boarded, inspected the ship's papers and asked permission to check the hold. The officer took measurements which indicated a high probability that the vessel had a double bottom but he could not find any concealed hatch. The officer left and then reboarded and without consent searched the hold and located the entrance to the double bottom, thereby discovering a cargo of liquor. Citing *Hayes* and *Fish,* the court first found that the boarding was conducted for the purpose of detecting a prohibition violation and not for detecting a customs or shipping law violation and since the officer "suspected that the [vessel] had a cargo of intoxicating liquors, and that was the only excuse for [his] actions, [he] could not board the [vessel] in the absence of probable cause. . . ." 1 F. Supp. at 460.

But see United States v. 146,157 Gallons of Alcohol, 3 F. Supp. 450 (D.N.J. 1933). Although the court made a distinction between an in rem and a criminal proceeding, the court stated that customs officers may exercise the right of boarding for the purpose of enforcing navigation laws as well as customs laws. *See also* The America, 4 F. Supp. 775 (E.D.N.Y. 1933) where a moored, unattended fishing vessel, listing to starboard was boarded by a Coast Guard officer. In the engine room he found a small quantity of fish and ice stored equally on each side of the boat. Upon cutting a hole in the deck of the engine room he discovered contraband liquor. The judge indicated that 19 U.S.C. § 1581 gave full authority to board and that the actual search was not unreasonably conducted since nothing visible at the time of boarding and search of the engine room accounted for the listing.

105. 68 F.2d 8 (2d Cir. 1933).

> dutiable articles concealed in the vessel; it is not to discover acts of criminality. If by chance contraband merchandise or dutiable articles are discovered, then the Coast Guard officer must arrest any person connected with the smuggling of such merchandise. . . . Nor is this right of stoppage and search confined to commercial vessels. It also applies to vessels that might be classified as "private" or "pleasure."[106]

The court stated that it need only decide whether the officers had legal power to board the vessel and inspect her license,[107] since the exercise of that authority precipitated the incidental discovery of the contraband. However, apparently attempting to settle the issue with regard to section 581 once and for all, the court went on to explain the rationale behind the statute:

> [T]o effectuate the provisions of the navigation and tariff laws and to protect the revenue of the United States, Congress, by § 581 of the Tariff Act of 1930, enables officers of the Coast Guard to board and search any vessel within the territorial waters of the United States in order to examine the vessels for identification and to discover whether they have arrived from a foreign port and to see that they observe the quarantine and health laws and, comprehensively, all the laws of the United States. . . . A search of a vessel by officers of the Coast Guard or of the customs for the purpose of discovering a cargo which might be subject to duty should not be regarded as unreasonable even though the search, as distinguished from the seizure, is made without probable cause.[108]

In spite of the qualification that this authority be applied within the territorial waters, this was the broadest construction given to the statute by any circuit. It also clearly distinguished search from seizure for purposes of requiring probable cause. *United States v. Wischerth*[109] further implemented this theory. Chasing a vessel into New York harbor, a Coast Guard officer finally boarded and examined the papers which licensed it as a fishing yacht. Upon checking below the officer discovered contraband liquors. The court stated that probable cause to board, search and seize was not required. The vessel had violated the navigation laws by violating the conditions of her license by engaging in a trade other than that for which she was licensed.[110]

106. *Id.* at 9.

107. The Second Circuit indicated that the power to board and inspect a license applied to inbound, outbound, foreign vessels, domestic vessels, and vessels which have never left United States waters. 68 F.2d at 10.

108. 68 F.2d at 10.

109. 68 F.2d 161 (2d Cir. 1933).

110. *See also* The Thorndyke, 67 F.2d 198 (3d Cir. 1933), which assumes the validity of

IV. A Fourth Amendment Framework

The Constitution never has been a rigid series of regulations. Rather, it was created as a set of flexible guidelines to be molded to the mores of a changing society. This is true even though the fourth amendment was created to be a protection against a specific abuse of power—the use of general warrants in a commercial setting.[111]

In 1662, the British Parliament had passed a statute similar to the present day United States statutes 14 U.S.C. section 89(a) and, especially, 19 U.S.C. section 1581(a). The British enactment had authorized the examination of ships, vessels and persons on board to find articles sought to be imported or exported without appropriate duties having been paid. Officers were also empowered to visit and search places of concealment such as warehouses and a "writ of assistance"[112] could be used in the enforcement procedure.[113] As late as 1761, the colonists were being subjected to these general warrant searches and by that time their use was well known and was being vigorously denounced. Subsequently, cases in England outlawed the use of general warrants. The separate American colonies seized the opportunity to provide against unreasonable searches and seizures in their declaration of rights.[114]

Before Congress acted on the Proposed Bill of Rights, it passed the Act of July 31, 1789[115] authorizing searches of ships without warrants and searches of houses with warrants. After the Bill of Rights was submitted to the states, Congress enacted the New Collection Act providing for warrantless, "mere suspicion" searches

---

the statutory authority to board and search. Between the mid-1930s and the decision of *Almeida-Sanchez* in 1973, very few cases appear to have argued the validity of searches conducted under the authority of 19 U.S.C. § 1581(a). Those cases involving application of the statute seem to assume the validity of boarding and searching without probable cause or reasonable suspicion. *E.g.* The Peublos, The Monalola, The Choctows, 77 F.2d 618, 620 (2d Cir. 1935); United States v. Massiah, 307 F.2d 62, 67 (2d Cir. 1962); Compania Naviera Vascongada v. United States, 354 F.2d 935, 939 (5th Cir. 1966).

111. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part One,* 3 U. RICH. L. REV. 278, 293-94 (1969).

112. The "writ of assistance" issued from the Court of Exchequer to the sheriff commanding his assistance to government collectors.

113. Stengel, *supra* note 111, at 294.

114. *Id.* at 295.

115. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 authorized designated officers to enter any ship or vessel, in which they 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 . . . and if they shall have *cause to suspect* a concealment thereof, in any particular dwelling-house, store, building, or other place, they . . . shall . . . be entitled to a *warrant* . . . to search for such goods. . . . (emphasis supplied).

of vessels.[116] This suggests that the fourth amendment made few changes in the search and seizure procedures being practiced at the time with regard to vessels.[117] The founders of our Constitution appeared to be concerned with overreaching warrants and not with warrantless searches justified by situations where the requirement of obtaining a warrant would create a delay that would frustrate the purpose of the search. These warrantless searches, however, had to be kept within reasonable bounds and the Court's struggle with this concept has led at least one commentator to suggest that the Court's emphasis on a warrant requirement has "stood the amendment on its head."[118] The merit of this contention, and the theoretical base for present day application of the fourth amendment to searches at sea, will be examined through a brief historical review of the major Supreme Court decisions relating to searches and seizures.

The Fourth Amendment states:

> 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.[119]

The Amendment's basic purpose is to restrict searches by the government that invade individual privacy but, by its language, it does allow some searches.[120] An early Supreme Court case which gave

116. Ch. 35, § 31, 1 Stat. 164 (1790). *See generally* Section III, STATUTORY ANALYSIS *supra*. The fourth amendment was subsequently proclaimed on December 15, 1791.

117. Congress later enacted the Act of 25 April 1808, ch. 66, § 7, 2 Stat. 501, authorizing specified officers to detain any vessel when they had reason to suspect the vessel would violate embargo provisions. The Supreme Court, in Crowell v. McFaddon, 12 U.S. 94 (1814), accepted Congress' dictates, answering a probable cause argument by stating the "law places a confidence in the opinion of the officer. . . ." *id.* at 98. A year earlier the Court had defined probable cause for a *seizure* as cause that "imports a seizure made under circumstances which warrant suspicion." Locke v. United States, 11 U.S. 339, 347 (1813).

118. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 47 (1969). The author argues that this has led to several harmful consequences: (1) it has fostered a "belief that most searches are and should be covered by warrants, when in fact most [cannot be]"; (2) it has induced an "oversimplified, if not erroneous notion that warranted searches are better"; and (3) it has pushed legislators toward a misconception "that the cure for the evils of search and seizure is more warrants." *Id.*

119. U.S. CONST. amend. IV.

120. Whether the wording indicates that warrantless searches are unreasonable per se or whether the warrant requirement only applies to searches that would be unreasonable without a warrant is cause for speculation. Weinreb, *Generalities of the Fourth Amendment* 42 U. CHI. L. REV. 47, 47-48 (1974). Since there is no doubt that 14 U.S.C. § 89(a) and 19 U.S.C. § 1581(a) deal with searches and seizures as contemplated under the Constitution and that they have the requisite relationship to "persons, houses, papers and effects," these areas will not be discussed.

effect to the fourth amendment was *Boyd v. United States.*[121] In holding unconstitutional an act of Congress requiring a defendant in a revenue case to produce his private books, invoices and papers in court or to suffer the consequences that the allegations against him would be considered as true, the Court pointed out that even the writs of assistance did not allow for such searches and seizures. In distinguishing a search through a person's private papers from a search for and seizure of stolen or forfeited goods, or goods liable to payment of duties, the Court stated that:

> The two things differ *toto coelo.* In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the Act of July 31, 1789, (1 St. 43), contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments . . . it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the amendment.[122]

The enactments of 1790 would fall within this same construction of the amendment. Not being unreasonable by reason of history or Congressional dictate, they are outside fourth amendment proscriptions.

In applying fourth amendment proscriptions to invalidate the stop, search and seizure of an automobile in *Carroll v. United States,*[123] the Court reiterated the *Boyd* rationale referring to the 1789 statutory language, but emphasized that there the statutory language had required "reason to suspect" a violation. This necessity, the Court felt, disposed of any warrant requirement. Apparently recognizing that later statutes had eliminated that language, the Court shifted to a different analysis to reach a requirement of probable cause. In quoting section 970 of the Revised Statutes[124] which states that the seizing officer is immune from liability when the

121. 116 U.S. 616 (1885).

122. *Id.* at 623 (footnote omitted).

123. 267 U.S. 132 (1925).

124. Comp. Stat. § 1611, 2 Fed. Stat. Anno. 2d ed. 638. The provisions of section 970 are identical to those of ch. 5 § 36, 1 Stat. 47 (1789). *See* note 75 *supra.*

claimant wins the forfeiture proceeding if there was reasonable cause for the seizure, the Court stated:

> It follows from this that, if an officer seizes an automobile or the liquor in it without a warrant, and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure. The *measure of legality of such a seizure is, therefore, that the seizing officer shall have reason or probable cause for believing that the automobile which he stops* and seizes has contraband liquor therein which is being illegally transported.[125]

Thus, the Court moved the dispositive instant from post actual seizure, when sufficient facts might well have developed to have retroactively justified the initial intrusion, to a point prior to the stop. From a historical viewpoint it is not clear that this was ever the intent of Congress, especially in situations involving stops at sea where such facts are almost impossible to discern prior to boarding. Although the Court has returned to reasonableness as the ultimate standard,[126] warrantless searches are still considered to be narrow exceptions to the fourth amendment. Except in a narrowly restricted set of search situations, probable cause is the benchmark for reasonableness of warrantless searches.[127]

Prior to *Katz v. United States,*[128] the Supreme Court commonly used the concept of a "constitutionally protected area" to limit the scope of the fourth amendment's protection. Since that decision, however, a "privacy" concept has been used, which still remains largely undefined.[129] All government control of human behavior is an invasion of privacy and the government may intrude on that privacy only if there is a special need. Privacy is not a good held at the

125. 267 U.S. at 155-56 (emphasis supplied) (citation omitted).

126. *See, e.g.,* United States v. Edwards, 415 U.S. 800, 807 (1974); Cady v. Dombrowski, 413 U.S. 433, 439 (1973); United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950).

127. This appears to be a consistently applied governing principle. Hard and fast lines have been drawn around each of the major exceptions to the warrant requirement. *See, e.g.,* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border searches); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (consent searches); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (auto searches); Vale v. Louisiana, 399 U.S. 30 (1970) (exigent circumstances); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest).

128. 389 U.S. 347 (1967).

129. At least three facets have been revealed: (1) the right of the individual to be free in his private affairs from governmental surveillance and intrusion; (2) the right of an individual not to have his private affairs made public by the government; and (3) the right of an individual to be free in action, thought, experience, and belief from governmental compulsion. None of these is absolute. Kurland, *The Private I,* THE UNIV. OF CHICAGO MAG. 7, 8, Autumn 1976.

pleasure of the government. It is a concept at the very foundation of freedom, and yet this must be balanced against the reality of societal interchange and societal preservation—interests which warrant intrusions into this privacy.[130] For this reason, searches and seizures affecting protected interests are limited by the fourth amendment only if they are unreasonable. In *United States v. Rabinowitz*,[131] the Court emphasized that the definition of reasonableness was extremely elastic, but the Court has since hardened the line of demarcation.[132] Furthermore, should the Court decide that a search in particular circumstances is reasonable without a warrant or probable cause, it is necessary to insure that the actual search is not made in an abusive, unduly intrusive manner.[133] Generally, the rules governing the scope and manner of searches are based on objective criteria since subjective considerations are thought to allow too much discretion and eventually lead to abusive searching techniques.

Although there have been hints that the Supreme Court may be shifting from the present "all or nothing" model of the fourth amendment,[134] the simplicity of that analysis sustains it as the current standard.[135] The fourth amendment protects against invasions of privacy, and this decision with regard to interests to be protected rests upon value judgments which are difficult to achieve through the balancing process, since there are always competing interests. "The ultimate question . . . is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."[136] The primary concern

130. *Id.* at 8-13, 36; Comment, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J. OF L. REF. 154, 176-78 (1972).

131. 339 U.S. 56 (1950).

132. *See, e.g.*, United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972). The broader, elastic view retains vitality as evinced by Justice White's dissent in Almeida-Sanchez v. United States, 413 U.S. 266, 289 (1973). *See also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358-60 (1974).

133. *Cf.* Cady v. Dombrowski, 413 U.S. 433, 448 (1973); Von Cleef v. New Jersey, 395 U.S. 814 (1969); Schmerber v. California, 384 U.S. 757, 771-72 (1966).

134. *E.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967).

135. Amsterdam, *supra* note 132, at 389-91. The question of what constitutes a covered search therefore must be viewed from the perspective that removal from fourth amendment restrictions removes it from judicial control. The author suggests that a "sliding scale" approach placing all searches within the fourth amendment's protection to varying degrees would be too complex to control since the validity of each search would be dependent on its particular set of circumstances.

136. *Id.* at 403. The author suggests that police discretion to conduct searches be con-

is against unjustified and arbitrary searches and seizures. For this reason, the characteristics of those searches completely justifiable without warrants must be compared to the characteristics of those searches conducted under the auspices of general warrants and must be deemed unreasonable if there is no principled basis for distinguishing them from general warrants.[137]

V. Analogous Areas of the Law of Searches

Since the Supreme Court is extremely reluctant to expand the categories of warrantless searches, it is necessary to summarize these exceptions to the fourth amendment and enumerate their characteristics for comparison to searches and seizures at sea. The doctrines analogous to searches and seizures made under the authority of 14 U.S.C. section 89(a) or 19 U.S.C. section 1581(a) can be broadly classified as: (1) automobile searches encompassing the mobility and exigent circumstances exceptions; (2) administrative searches; and (3) border searches involving enforcement of customs, immigration and national security laws. The secondary doctrines of plain view, inevitable discovery, founded suspicion and collateral searches will be discussed in the context of these three classifications.

A. Automobile Searches

The automobile exception stems primarily from *Carroll v. United States,*[138] *Chambers v. Maroney,*[139] and *Coolidge v. New Hampshire.*[140] *Carroll* held that if there was probable cause to believe that the car contained contraband or weapons endangering the police, and if exigent circumstances made it impractical to procure a warrant in the course of reasonable investigation, then a warrant was unnecessary.[141] *Chambers* appeared to ignore the exigent circumstances requirement of *Carroll* in allowing a warrantless search of a car based on probable cause, despite the circumstances surrounding the search. However, the *Coolidge* Court in discussing the necessary elements of the plain view exception,[142] defined a justifi-

fined by legislation or police-made rules and regulations, subject to judicial review for reasonableness and that the exclusionary rule be flexibly administered to insure compliance.

137. *Id.* at 411.

138. 267 U.S. 132 (1925).

139. 339 U.S. 42 (1970).

140. 403 U.S. 443 (1971).

141. 267 U.S. at 153-54.

142. In order to fall within the "plain view" exception the evidence must have been seized pursuant to circumstances which show that: (1) the initial intrusion affording the "plain view" must have been lawful; (2) the discovery of the incriminating evidence must

able initial intrusion as one founded on the dual *Carroll* requirements. The trend is to expand the "exigent circumstances" definition. A variety of circumstances qualify, such as location of the vehicle and its condition, proximity of persons in control of the vehicle to the car at the time of the search, and practicability of obtaining a warrant. Exigent circumstances are evaluated at the time of the initial intrusion. Cases involving the plain view exception to strict standards of probable cause permit searches based upon reasonable suspicion or exigent circumstances. Ordinary probable cause requirements are softened when an overriding public necessity makes an intrusion permissible based on a lesser quantum of fact.[143] *Cady v. Dombrowski*[144] exemplifies this approach. Two and one half hours after the driver of a car had been arrested for drunken driving and his car left seven miles from the police station, another officer made a thorough search and found bloodied items which led to the driver's conviction for murder. The search was sustained by extrapolation from a number of theories, but plain view doctrine was the primary basis. The initial intrusion was justified by reference to the ambulatory character of the car, the unique role that the local police play with regard to automobile regulation and public safety, the standardization of the procedures used, and the fact that the searching policeman had no knowledge of any murder investigation being conducted. Parallel to this relaxation of intrusion standards is the doctrine of "founded suspicion" enunciated by the Ninth Circuit in the case of *Wilson v. Porter.*[145] The court justified a less than probable cause stop and subsequent search of a vehicle, on the ground that the officer had a "founded suspicion" that the driver might be engaged in criminal activity. Under this doctrine, the subsequent investigation may lead to probable cause to believe the driver has engaged in criminal activity, thus justifying the eventual arrest, search and seizure. The doctrine

---

have been inadvertent; and (3) the incriminating nature of the evidence must have been immediately apparent. For a discussion of the evolution of the plain view doctrine see Comment, *Constitutional Standards for Applying the Plain View Doctrine,* 6 ST. MARY'S L. J. 725 (1974).

143. For excellent discussions of the mobility exception to fourth amendment requirements and its interplay with the plain view doctrine see Farquhar, Lieb and Vogel, *Criminal Procedure* 1973-1974 ANN. SURVEY OF AM. L. 379, 379-401; Simka, *Collateral Search: A Survey of Exceptions to the Warrant Requirement,* 21 S. DAK. L. REV. 254, 258-61, 269-71 (1976); Comment, *Back on the Road Again—The Mobility Exception in the 70's,* 7 LOY. L.A. L. REV. 550 (1974).

144. 413 U.S. 433 (1973).

145. 361 F.2d 412 (9th Cir. 1966). The doctrine is analyzed in Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion,* 9 U.S.F.L. REV. 219 (1974).

is analogous to that of "stop and frisk"[146] and forms the basis from which a court can determine that the initial detention was neither arbitrary nor harrassing. As with stop and frisk, the test of reasonableness should be partly objective in that the circumstances at the moment of search or seizure should lead a reasonable man to conclude that the action taken was appropriate; and partly subjective since the officer's conclusions in light of his experience that criminal activity may have been taking place should also help justify the stop.[147]

The two remaining categories deal not only with warrantless searches but also with searches that do not require probable cause or require only a diluted probable cause standard. The rationales in these areas are closely related to searches at sea. The Coast Guard conducts safety inspections of vessels under the auspices of 14 U.S.C. section 89(a) which are closely akin to administrative searches upheld by the Court, and customs inspection within twelve miles of the United States coast under the auspices of 19 U.S.C. section 1581(a) which are closely akin to the border searches sustained by the Court.

B. *Administrative Searches*

Frank v. Maryland[148] held that administrative housing inspections were not searches and therefore were without the protection of the fourth amendment. This "all or nothing" rationale was abandoned in *Camara v. Municipal Court*[149] and *See v. Seattle.*[150] These administrative searches fall within the fourth amendment and require the use of the warrant procedure,[151] but the probability requirement is modified. The administrative inspection warrant could issue despite the absence of probable cause to believe that a viola-

146. The law of stop and frisk is developed in Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968); and Terry v. Ohio, 392 U.S. 1 (1968). The intrusion is sustained if the officer is "able to point to *specific* and *articulable* facts which, taken together with *rational inferences* from those facts, reasonably warrant that intrusion." 392 U.S. at 21.

147. *See* Terry v. Ohio, 392 U.S. 1, 21-22, 30 (1968).

148. 359 U.S. 360 (1959).

149. 387 U.S. 533 (1967).

150. 387 U.S. 541 (1967). *See* extended the rationale of *Camara*, relating to private houses, to commercial establishments.

151. At this point the Court felt that the warrant requirement could only be dispensed with in searches pursuant to consent or exigent circumstances, or a crossing of the border. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Warden v. Hayden, 387 U.S. 294 (1967) (search of premises following hot pursuit); Schmerber v. California, 384 U.S. 757 (1966) (searches of the person to prevent loss of evidence); Carroll v. United States, 267 U.S. 132, 154 (1925) (border searches).

tion had occurred provided there was valid statutory authority for the inspection. Once the need for regulation was determined to be a valid government interest, reasonable legislative standards met the probable cause requirement for issuance of the warrants. The necessity of warrantless non-probable cause administrative searches was briefly addressed by the Court in *Colonnade Catering Corp. v. United States*[152] and extensively treated in *United States v. Biswell.*[153] In the former, the Court sustained a warrantless non-probable cause inspection of a liquor store because that industry had historically been highly regulated by Congress, and Congress had had broad authority to fashion standards of reasonableness for searches with regard to the industry. *Biswell* extended the *Colonnade* rationale to include the firearms industry. Apparently relying on a theory of implied consent, the Court decided that a dealer in the pervasively regulated firearms business operated with knowledge that his records, firearms and ammunition would be subject to effective inspections. The Court said: "We have little difficulty in concluding that where, as here, 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."[154] The concealability and portability of the items to be inspected and the concomitant potential for frustrating the inspection were cited as practical justifications for this exception to *Camara* and *See.* Although there were criminal penalties involved in *Biswell,* it appears that the Court is making a distinction between administrative and criminal searches.[155] An administrative search implies a routine inspection of a morally neutral class of persons in order to secure compliance with various regulations. A criminal search has focused on an individual suspected of involvement in criminal actions. When an administrative search encompasses noncompliance with regulations punishable by criminal sanctions, more

152. 397 U.S. 72 (1970).

153. 406 U.S. 311 (1972).

154. 406 U.S. at 317. The crucial *Biswell* factors appear to be: (1) the inspection was specifically authorized by statute; (2) the inspection was carefully limited in time, place and scope; (3) the inspection was conducted in furtherance of an urgent federal interest; (4) the inspection concerned an area where there was a limited expectation of privacy; (5) such inspections were required for enforcement of a pervasive regulatory system; (6) there was only a slight possibility of abuse of the power authorized; and (7) the licensing scheme authorizing such searches was sufficiently pervasive to give the manager notice as to the purpose and limitations of the inspection.

155. *See also* Wyman v. James, 400 U.S. 309 (1971) (upholding the right to require home visits, without procuring warrants, by case workers for individuals seeking government monetary aid). The Court noted that no criminal penalty was invoked by refusal to permit the visit.

stringent fourth amendment standards may be required.[156] To date the Court appears willing to balance the reasonableness of the intrusion against the overriding governmental interest and is disposed to uphold the admissibility of discovered evidence if the good faith efforts of the administrative officers in carrying out the purposes of the regulatory scheme are apparent.[157]

C. *Border Searches*

The lower federal courts appear to be confining the authority of 19 U.S.C. section 1581(a) to the border search rationale. However, the Supreme Court has only spoken directly to the issue of border searches in the context of vehicles, not vessels, and in the context of immigration laws, not customs enforcement statutes. The factors limiting the border search doctrine may or may not be applicable to all searches at sea.

The term "border search" applies to searches for contraband and aliens unlawfully entering the country. The customs inspections considered by the courts to date have been held to be subject to the fourth amendment's constraint against unreasonable searches, but the scope of reasonableness has been found to be broader in the border search context because of a nation's right to self preservation.[158] Furthermore, with regard to searches of international travelers at the border, the Court has not deemed it appropriate to define reasonableness in the confining terms of either a warrant or probable cause requirement. The power to institute customs enforcement searches at national borders is well grounded in history and it appears that the Court is willing to accept that the mere fact of crossing the border is sufficient grounds for a search.[159] Through enact-

156. Rothstein and Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?* 50 WASH. L. REV. 341 (1975). For further analysis of administrative searches see Greenberg, *The Balance of Interests Theory and The Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CAL. L. REV. 1011 (1973). For analysis of the *Biswell* exception to other administrative searches see Comment, *The Validity of Warrantless Searches Under the Occupational Safety and Health Act of 1970*, 44 U. CHI. L. REV. 105 (1974); Note, *Warrantless Inspection Under the Federal Food, Drug, and Cosmetic Act*, 42 GEO WASH. L. REV. 1089 (1974).

157. Simka, *Collateral Search: A Survey of Exceptions to the Warrant Requirement*, 21 S. DAK. L. REV. 254, 269 (1976).

158. *See* Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 53 (1974); Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U.J. OF INT'L L. AND POL. 93, 94 (1972).

159. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); Carroll v. United States, 267 U.S. 132, 154 (1925) (dictum). Border searches are distinguishable from searches pursuant to criminal investigations on three grounds: (1) since an individual crossing a border belongs to a class whose members frequently violate certain laws in the process of entering, the fact of his crossing is by itself some evidence that he may be violating some law; (2) since

ment of the customs statutes, Congress has determined that the individual right to privacy must yield extensively to an overriding public interest. Although the authority of section 1581(a) is broad enough to encompass searches of vehicles and persons carrying contraband at any place, it is the purpose of this comment to analyze the statutory authority only in its grant of power to search vessels.

In the border search context, as with other searches, there are two elements: initiation and conduct. The latter relates to the degree of intrusion which is reasonable and, to the extent applicable to this paper, will be discussed in the concluding section. More important to present considerations are the two facets of initiation, port of entry and extended border searches. The definitions of these two terms may limit the opportunities for searches of vessels irrespective of statutory language.

The reasonableness of a border search is dependent on its proximity to an international boundary. Within the area of the border itself and a narrow customs barrier,[160] a general suspicion is all that is required to institute a search. In this context, the border search rationale has been extended to persons who have never actually crossed an international boundary but who work within the customs zone.[161] The courts, under pressure to give customs officials greater authority to halt the flow of narcotics, have recognized the necessity that some customs searches must take place away from the immediate border area,[162] and they have created criteria which must be satisfied to insure the reasonableness to such "extended" searches.[163] Recognizing that the power of a customs agent to search

---

the individual crossing a border is on notice that certain types of searches are likely to be made, his expectation of privacy is lessened; and (3) since non-intrusive personal searches at the border are administered to a class not deemed unworthy, such searches lack the quality of insult felt by an individual singled out for a search. Note, *Border Searches and the Fourth Amendment*, 77 YALE L. J. 1007, 1012 (1968). The author argues that automatic exemption of all border searches from the requirements of probable cause is not justified historically nor on a policy basis. See also Comment, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968), arguing that more than mere suspicion is required for more than merely cursory searches since there is a greater danger of harassment with intrusive searches.

160. *See, e.g.*, United States v. Yee Ngee How, 105 F. Supp. 517 (N.D. Cal. 1952).

161. United States v. McGlone, 394 F.2d 75 (4th Cir. 1968).

162. The border is considered as an elastic concept rather than a static barrier, with its elasticity dependent upon the circumstances of each case. *See, e.g.*, United States v. Glaziou, 402 F.2d 8, 12 (2nd Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 366 U.S. 977 (1961). *See also*, *Recent Developments—Constitutional Law—Search and Seizure*, 27 VAND. L. REV. 523, 525 (1974).

163. The validity of extended border searches has been sustained in United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972); United States v. Warner, 441 F.2d 821 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971); Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

derives from the presumption that any contraband uncovered during the search has been smuggled into the United States, *Alexander v. United States*[164] set forth the criteria necessary for a search away from the border:

> [T]he legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle *at the time of entry* into the jurisdiction of the United States.[165]

The key question to be asked is whether it was reasonably certain that the contraband crossed the border or whether there was an opportunity for the illegal goods to have been procured domestically.[166] Within this concept the Fifth Circuit phrases the issue as whether the circumstances known to the officer amount to a "reasonable suspicion to believe that the customs laws [are] being violated."[167] Thus, prior to *Almeida-Sanchez v. United States,* it was clear that neither distance from the border nor time elapsed since entry were in and of themselves the crucial factors.[168] Since the searches were generally non-intrusive the courts focused on the quantum of suspicion necessary to sustain the search.

In 1973 the Supreme Court decided *Almeida-Sanchez v. United States,*[169] holding that probable cause was required for non-border searches of cars conducted by the Immigration and Naturalization Service's "roving patrols" looking for illegal aliens.[170] Noting that the officers had not even satisfied the reasonable suspicion standard of *Terry v. Ohio*[171] the Court stated:

> It is not enough to argue . . . that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual

---

164. 362 F.2d 379 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966).

165. 362 F.2d at 382 (emphasis added).

166. See Note, *Criminal Procedure—Search & Seizure—Aliens and "Extended" Border Inspections,* 20 WAYNE L. REV. 1141, 1143 (1974).

167. United States v. Martinez, 481 F.2d 214, 219 (5th Cir. 1973). *See also* United States v. Hill, 430 F.2d 129 (5th Cir. 1970).

168. *See,* United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972); Alexander v. United States, 362 F.2d 379 (9th Cir. 1966); United States v. Vigil, 448 F.2d 1250 (9th Cir. 1971); United States v. Weil, 432 F.2d 1320 (9th Cir. 1970).

169. 413 U.S. 266 (1973).

170. *See* notes 1-5 *supra* and accompanying text.

171. 392 U.S. 1 (1968).

against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.[172]

The Court, in responding to the government's border search argument, directly recognized the validity of a true border search conducted without probable cause or a warrant but stated that it must take place at the actual border or a functional equivalent. Because of this limitation the majority opinion followed the traditional warrantless search rationale and held the automobile search exception inapplicable, since probable cause was required to stop the vehicle and the court did not see fit to apply the administrative inspection exception exemplified by *Colonnade* and *Biswell.*[173] Justice Powell, concurring,[174] argued that the use of area warrants authorized by *Camara* and *See*[175] in this situation would effectively balance the intrusiveness of the proposed search with the Government's interest in conducting the search. These warrants, Justice Powell stated, could be issued on a functional equivalent of probable cause to preserve the flexibility of the immigration searches. The dissenters would have given deference to congressional judgment. Relying on the reasonableness standard of *Cady v. Dombrowski,*[176] the dissent[177] argued that all searches by the immigration officials were reasonable in border regions with high concentrations of aliens. The authorizing statute was thought to represent Congress's considered judgment, in accordance with its duty to propose constitutionally valid legislation, that proper enforcement of immigration laws in border areas required random searches of vehicles without probable cause or a warrant.[178] Thus the dissent would limit only the extent of the search, circumscribing it with the bounds of reasonableness under the first clause of the fourth amendment.

Almeida-Sanchez has been extended in *United States v. Brignoni-Ponce.*[179] In the same areas where service officials are restricted in searching, they are also limited in interrogating any alien or person believed to be an alien as to his right to be in or to remain in the United States. Referring specifically to *Terry v. Ohio,*[180] the Court stated that the fourth amendment applies to all seizures of

172. 413 U.S. at 273.
173. *Id.* at 270-71.
174. 413 U.S. at 275-85.
175. *See* notes 149-51 *supra* and accompanying text.
176. 413 U.S. 433, 439 (1973).
177. *Id.* at 289.
178. *Id.* at 291.
179. 422 U.S. 873 (1975).
180. 392 U.S. 1 (1968).

persons including seizures short of arrest. Therefore, although probable cause is not required, the officers must be able to point to specific and articulable facts which, when taken together with rational inferences from those facts, must reasonably warrant a belief that the vehicle contains illegal aliens.[181]

Although the key problem in *Almeida-Sanchez* appeared to be the unfettered discretion of a roving patrol, the rationale of that decision was expanded to encompass fixed check point searches in *United States v. Ortiz.*[182] The government argued that non-border fixed check point searches were less intrusive and less frightening to motorists because of greater regularity and visibility. The Court acknowledged this argument, but still found those protections insufficient, because the actual number of cars searched imported a degree of discretion inconsistent with fourth amendment standards.[183]

The language of these decisions establishes the principle that only searches at the border or its functional equivalent can be conducted without normal probable cause limitations upon police power. Traditional probable cause standards now apply to all immigration related searches outside of the privileged zone. The functional equivalent question merely requires a court to ascertain whether a substantial percentage of persons who reach a certain point have crossed the border or have originated in the United States.[184]

It appears that only four types of searches are exempt from a probable cause requirement: consent searches, certain administrative searches of highly regulated industries, the *Terry* protective frisk for weapons, and border searches. The courts have struggled

---

181. 422 U.S. at 882. Further, the court stated:

> [T]o approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.

Id.

182. 422 U.S. 891 (1975).

183. *Id.* at 896.

184. Fragomen, *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment,* 13 SAN DIEGO L. REV. 82, 107 (1975). For an excellent discussion of the border search exception and *Almeida-Sanchez* and its progeny, see Friedman, Hashmall, Hirsch, *Criminal Procedure—The Border Patrol and the Fourth Amendment,* 1976 ANN. SURVEY OF AM. L. 148; Keller, *Border Searches Revisited: The Constitutional Propriety of Fixed and Temporary Checkpoint Searches,* 2 HAST. CONST. L. Q. 251 (1975); Sutis, *The Extent of the Border,* 1 HAST. CONST. L. Q. 235 (1974); *Recent Developments-Constitutional Law—Search and Seizure,* 27 VAND. L. REV. 523 (1974); Note, *The Aftermath of Almeida-Sanchez v. United States: Automobile Searches for Aliens Take on a New Look,* 10 CAL. WES. REV. 657 (1974).

with these concepts in validating airport searches,[185] and appear likely to continue to attempt to force searches at sea into one of these categories. Just as the courts have evinced a reluctance to invalidate airport searches because of the important societal interest in preventing air piracy, so have they evinced reluctance with regard to searches at sea due to the strong interest in preventing the smuggling of narcotics. Frequently, the doctrine of collateral search becomes involved to sustain the actual discovery regardless of the justification for the initial intrusion. When officers making a legitimate search directed at a given offense discover circumstances which cause them to be suspicious about the commission of an unrelated or remotely related crime, the validity of their actions ultimately rests on a balancing of the extent of the intrusion of the collateral search against the benefit to effective law enforcement and the public welfare.[186] This collateral search doctrine is clearly applicable to Coast Guard boardings under 14 U.S.C. section 89(a). During the course of an administrative inspection it may become apparent that there are violations of the customs laws. This problem was also apparent in the *Almeida-Sanchez* case since the authority of immigration officers to stop vehicles was far broader than the correlative power of customs inspectors. However, the searches of immigration officers frequently uncover contraband items. This may have been one of the implicit reasons for the holding in *Almeida-Sanchez* and is likely to cause problems for the courts regarding boardings by the Coast Guard.

VI. IN THE WAKE OF ALMEIDA-SANCHEZ

A. *Cases Attacking Searches Pursuant to 14 U.S.C. Section 89(a)*

Some of the most recent attacks upon the boarding and searching authority of the Coast Guard under Title 14, United States Code, section 89(a) have been considered by the Fifth Circuit Court of Appeals. In *United States v. Winter*,[187] the Coast Guard had boarded an American vessel 35 miles from Florida's coast and 11.9

185. *See*, Brodsky, *Terry and the Pirates: Constitutionality of Airport Searches and Seizures*, 62 KY. L.J. 623 (1974). The key to admissibility of evidence found during airport searches is: (1) whether the passengers boarding the aircraft were warned of the search and had the opportunity to withdraw or consent to the search (*see, e.g.*, United States v. Williams, 516 F.2d 11, 12 (2d Cir. 1975); United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973)); and (2) whether the search was confined in scope and purpose to accomplish the intended ends of the regulatory scheme of safeguarding passengers and aircraft, rather than to search for evidence of a crime. Simka, *Collateral Search: A Survey of Exceptions to the Warrant Requirement*, 21 S. DAK. L. REV. 254 (1976).

186. Simka, *supra* note 157, at 255.

187. 509 F.2d 975 (5th Cir. 1975).

miles from the nearest island of the Bahamas. The boarding officers promptly located 1130 pounds of marijuana they knew to be on board. The crew of the vessel, consisting of two Jamaicans, one Bahamian, and two Americans was charged with conspiracy to import a controlled substance into the United States. The defendants challenged jurisdiction over the person and the crime and sought to suppress the contraband, arguing the search was made in violation of the fourth amendment. Prior surveillance and an informer's tips had provided the knowledge that contraband was aboard. The court assumed that the boarding and arrests were beyond the territorial limits of the United States, but stated that this did not imply that the circumstances were beyond the Coast Guard's jurisdiction to arrest. Recognizing that the United States subscribes to the objective view of the territorial principle of jurisdiction,[188] the Fifth Circuit sustained jurisdiction over the offense, stating there was no doubt that a conspiracy to violate the narcotics laws of the United States existed. The court found it unnecessary to respond to appellants' contentions as to jurisdiction over the person because "a defendant in a federal criminal trial whether citizen or alien, whether arrested within or beyond the territory 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."[189] The court ignored the fourth amendment claim either presuming the validity of the statute or the existence of probable cause.

The constitutionality of section 89(a) was again challenged in *United States v. Odom.*[190] Defendants had appealed from a conviction of conspiracy to import and conspiracy to possess with intent to distribute 6000 pounds of marijuana. A Coast Guard cutter, while on a routine law enforcement patrol between Cuba and Mexico, located a small craft heading north toward the United States. Upon determining that the vessel was based in the United States, a boarding party visited the vessel to conduct a routine safety and documentation inspection. After checking the documentation papers and safety equipment, the boarding officer noticed that the fishing gear looked rusty and unused. When asked to open the hold for a check of the main beam identification number, the crew was reluc-

188. 509 F.2d at 981. The objective view stipulates that jurisdiction extends over all acts which take effect within the state even though the actors are not within that state's territorial jurisdiction. *See* Richard v. United States, 375 F.2d 882, 886 (5th Cir. 1967), and the cases cited therein.

189. 509 F.2d at 985-86 (*citing* Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952)).

190. 526 F.2d 339 (5th Cir. 1976).

tant, stating that the hold was full of ice. Upon opening the hold the boarding officer saw very little ice but did see several burlap bags containing the subsequently seized marijuana. The government argued that the search should be governed by border search standards and that a reasonable suspicion existed to believe the vessel was carrying contraband; that is, a vessel at sea, bound for the United States, must cross the border to reach its destination and that this connection with the border, even though 200 miles away, was a much closer relationship than a car travelling one mile inside the border. The court, realizing the significant limitations of this argument, cited section 89(a) for the proposition that it allowed boardings for administrative inspections. Once on board, circumstances became evident to support probable cause to search the hold. This was as far as the court had to reason to sustain the validity of the search and seizure of the marijuana.

In *United States v. Hillstrom*[191] defendants were convicted of conspiracy to import marijuana. Coast Guard officers and customs agents had arrested defendants aboard a sailing vessel of United States ownership and registry while sailing in the Windward Passage between Cuba and Haiti. In sustaining the validity of the search, the court stated that the Coast Guard officers had been on board to conduct a safety and documentation inspection and that while carrying out this inspection it had been necessary to dislodge several bales of marijuana to ascertain the documentation number on the frame of the vessel. Citing *Odom,* the court stated that the Coast Guard was legitimately aboard under the statutory authority of 14 U.S.C. Section 89(a). Since the initial intrusion was justified, the subsequent discovery of the contraband in plain view was valid.[192] The court intimated that even if the inspection had not encompassed the necessary shifting of marijuana bales the plain view doctrine may have been applicable because the vessel was not licensed to carry any cargo. Even a prior suspicion that contraband was aboard would not taint the validity of the safety inspection under section 89(a).

The Fifth Circuit, relying on the aforementioned precedents, specifically held 14 U.S.C. section 89(a) constitutional in *United States v. One Forty-Three Foot Sailing Vessel.*[193] In so doing the court adopted the district court's opinion.[194] The vessel, "Winds

191. 533 F.2d 209 (5th Cir. 1976).

192. The court cited Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971), for authority for the plain view doctrine.

193. 538 F.2d 694 (5th Cir. 1976).

194. United States v. One Forty-Three Foot Sailing Vessel, 405 F. Supp. 879 (S.D. Fla. 1975).

Will," was observed by a Coast Guard cutter near the Yucatan Channel, proceeding without lights. Under the authority of sections 2 and 89(a) of Title 14, United States Code, the vessel was boarded and checked for safety and fishery violations. Once on board, the smell of marijuana was very strong and the boarding officer noticed a large bag of grassy material in plain view in the galley. Subsequently, 2030 pounds of marijuana were found on board and the United States brought a forfeiture proceeding against the vessel. The district court's opinion first addressed the jurisdictional issue posed by section 89(a)[195] and concluded there was a right to board and inspect the vessel and, if contraband was discovered, to seize the vessel and cargo. The boarding and inspection were justified by an international duty of the United States to exercise effective administrative control over vessels flying its flag. The district court stated that the inspection was limited to safety equipment and administrative details and that a broad search into private papers or personal belongings was not sought. The inspection was analogized to those administrative inspections characterized by a high governmental interest, such as the control of liquor or firearms.[196] The action by the Coast Guard was stated to be part of a systematic enforcement of navigation and shipping laws and, once on board, plain view and the strong smell of marijuana supplied the necessary additional justification for a full search.[197]

B. *Cases Attacking Searches Pursuant to 19 U.S.C. Section 1581(a)*

Generally, the courts have struggled to find alternate rationales rather than to sustain searches solely under the blanket authority conferred by section 1581(a). This may be because 19 U.S.C. section 1581, unlike 14 U.S.C. section 89(a), affords the same broad authority to search vehicles ashore as is conferred to search vessels at sea. In any event, the trend seems to be toward limitation of this authority. Serious challenges to the constitutionality of searches conducted under section 1581(a) have been made in the two circuits encompassing the majority of the United States coastline—the Fifth and the Ninth Circuits.

---

195. *See* notes 48-57 and accompanying text *supra* for a further discussion of jurisdictional issues.

196. *See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972).

197. Citing United States v. Byrd, 483 F.2d 1196 (5th Cir. 1973), the district court stated that the smell of marijuana alone would have justified the search.

Arguing before the Ninth Circuit, the government urged the applicability of section 1581(a), or, in the alternative, the rationale of extended border search, to the facts in *United States v. Solmes.*[198] A customs agent had observed defendants take on board their speedboat a large amount of fuel. Upon inquiry, the agent had learned from the gas supplier that the supposed purpose of the trip was to carry female guests to a Mexican island but the agent knew from observation that no females were on board when the boat put out to sea. A customs plane had observed a boat of similar description anchored off the Mexican coast. The following day the agent had seen defendant back in San Diego and an hour later he had found the speedboat docked in a marina with the bow riding low in the water. Surveillance had been maintained until the boat was pulled out of the water on a trailer the next day. The agent approached, requested a customs declaration, and when none was produced, he requested permission to search and found 819 pounds of marijuana aboard. The Ninth Circuit upheld the search as a border search at a functional equivalent of the border, analogizing the situation to the example of the nonstop plane flight arriving in St. Louis from Mexico alluded to in *Almeida-Sanchez.*[199] The court stated:

> Customs agents do not have carte blanche authority to search aircraft arriving from points within the United States merely because nonstop flights from foreign countries also land there. An airport is a functional equivalent of the border only with respect to those airplanes arriving from outside the United States.
>
> Similarly, pursuant to the functional equivalency test applied here, the customs agents are not at liberty to search every boat which enters Mission Bay. There are undoubtedly many pleasure craft entering the bay daily which have not come from foreign waters. A bay adjacent to an ocean is a functional equivalent of a border only with respect to vessels which have traveled in foreign waters before entry.[200]

The court went on to qualify this rationale by stating that a finding that the vessel had actually crossed a border was not always necessary, that continuous surveillance is not required at a functional equivalent of the border, and that provided the vessel remained docked until searched the border search need not be instantaneous upon arrival.[201] The qualification as to actual border cross-

198. 527 F.2d 1370 (9th Cir. 1975).

199. 413 U.S. 266, 273. It is noteworthy that a search under 19 U.S.C. § 1581(a) (1970) does not apply to airplanes since the statute only refers to vehicles and vessels which, as defined in 19 U.S.C. §§ 1401(a), (b) (1970), do not include aircraft.

200. 527 F.2d at 1372.

201. *Id.* at 1373 n.2.

ing appears to be inconsistent with the decision's rationale although the court may be allowing for situations wherein the search was conducted outside of territorial waters when there would be reasonable suspicion to believe the vessel or its cargo was destined to cross the border.

In *United States v. Jones*[202] the Ninth Circuit considered a search by customs agents of a speedboat after it had put out to sea, returned, and been loaded on a trailer and towed twenty miles. Although the court found that there was consent for the search, the government had argued for validity under section 1581(a) as an extended border search. In response the court said: "Strict application of the literal language of [19 U.S.C. section 1581(a) and 19 U.S.C. section 1401(m)] would, as to certain individuals, including present appellants, subvert the Fourth Amendment."[203] It appears that the court was unwilling to define exceptions to fourth amendment strictures outside of a border search rationale.

This approach to construction of section 1581(a) was made clearer in *United States v. Tilton.*[204] A customs patrol officer observed the launching of a fast ocean going motorboat of a type known by customs agents to be used for smuggling. The next day a customs patrol officer saw what he believed to be the same boat being loaded onto the same trailer with the same truck towing the trailer. As soon as the boat had been pulled off the ramp and into the parking area the officer searched and found 880 pounds of marijuana. The only authority for the search was section 1581(a) and the Ninth Circuit began with the proposition from *Almeida-Sanchez* that "no Act of Congress can authorize a violation of the Constitution."[205] In examining whether or not the exercise of authority was reasonable under the fourth amendment, the court began by applying the extended border search rationale to searches of vessels and concluded that it was impractical to have check points at the three mile territorial sea limit and that it was unlikely that passengers or cargo would be transferred between entry into territorial waters and final anchorage or docking. Therefore, a vessel arriving from outside territorial waters at an anchorage in a domestic port would be considered to be at a functional equivalent of the border. Since there was no finding that the boat had ever left territorial waters, however, this theory could not be utilized. The court either distinguished older cases in other circuits or said that they now had to be

202. 528 F.2d 303 (9th Cir. 1975).

203. *Id.* at 304.

204. 534 F.2d 1363 (9th Cir. 1976).

205. *Id.* at 1364 (citing Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973)).

read consistently with *Almeida-Sanchez*. The court stated:

> [A] search without probable cause pursuant to 19 U.S.C. § 1581(a) of a vessel in a harbor may be valid under the Fourth Amendment as a border search at the functional equivalent of the border, not only where, as in *Solmes*, there is evidence to support a finding that the boat actually came from international or foreign waters, but also where there are articulable facts to support a reasonably certain conclusion by the customs officers that a vessel had crossed the border and entered our territorial waters.[206]

This holding constrains authority to search under section 1581(a) by requiring a crossing into territorial waters or a reasonable conclusion to that effect. Apparently a vessel may not be stopped outside of territorial waters even if there is a reasonable belief that the vessel or its cargo is bound for the United States. In effect this extinguishes the contiguous zone for customs enforcement purposes in the absence of probable cause to believe a violation of United State customs laws is being, or will be, committed. If an actual crossing is not shown, the customs officer is bound by a higher standard than probable cause as to his belief that a border was crossed: "The totality of the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information [must] be sufficient in the light of their experience to warrant a *firm* belief that a border crossing has occurred."[207] The case was remanded for further proceedings.

In *United States v. Ingham*[208] the Fifth Circuit was able to fit the fact pattern into the border search exception to probable cause requirements. The vessel involved had a history of visitation to foreign ports and this was known by the customs agents. After a return from international water,[209] the vessel was docked and the customs agents apprehended the defendant ashore. The agents boarded the vessel, smelled marijuana, and subsequently seized 4000 pounds of the contraband. Defendant was convicted of conspir-

206. 534 F.2d at 1366.

207. *Id.* at 1366-67 (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

208. 502 F.2d 1287 (5th Cir. 1974).

209. The use of the term "international waters" is confusing. Customs waters are high seas which are international waters. The United States territorial sea extends only 3 miles from the coast. International waters for international navigational rules also has a different meaning. It is probable that the court was alluding to the imaginary line 12 miles from the coast. Landward from that line is a customs enforcement zone known in international law as a contiguous zone. However, the territorial waters (landward from a boundary 3 miles from the coast) may have been intended since, from a territorial aspect, this is the seaward "border" of the United States. It was not necessary to expound on these terms in the instant case since the vessel had visited a foreign port and was boarded while docked in a United States port and it therefore crossed all of the boundaries.

acy to import, importation, and possession with intent to distribute.[210] The court would not accept a mechanical and unrealistic requirement that the vessel be seen crossing the boundary between international and customs waters. The court also rejected a contention that the search was unreasonable because the agents had elected not to search the vessel at the point of crossing, had elected not to follow the vessel after the crossing, and had failed to obtain a warrant when there had been sufficient time both before and after the crossing. In distinguishing Ninth Circuit cases, the court implied that it was requiring some indication of a border crossing or pursuit or surveillance after the crossing to validate the search. *Almeida-Sanchez* was not applicable to these facts because there was reason to believe that this vessel had crossed the border and, further, that the protection of revenues and national security entitled the agents to search a "newly arrived" vessel. The court indicated that it was only stating principles sufficient to validate the instant search and that it recognized the problems of policing the seaward frontiers by stating:

> Moreover, loath as we are to suggest further distinctions in this dynamic ever-expanding area [referring to the *Almeida-Sanchez* border search criteria], this may well be a Reverian "one if by land, two if by sea." For there is by act of God, nature, the Congress, and the activities of man a great difference between the landlocked vehicle and the nautical vessel in relation to our International borders. Congress has long recognized this and the law has to—and does—reckon with these differences often very specifically.[211]

Although the panel opinion was subsequently vacated,[212] the Fifth Circuit disclosed certain reservations about section 1581(a) in *United States v. Caraway.*[213] Defendants were convicted of conspiracy to import and importation of six pounds of marijuana. The marijuana arrived at Miami International Airport in a trunk addressed to defendant. Upon being claimed by a friend of defendant, the customs agents searched the trunk, found the marijuana and set up a controlled delivery to defendant. During the subsequent delivery at a marina, defendant was arrested and the customs officers made a warrantless exploratory search of defendant's unoccupied houseboat which was moored at a dock and had an engine dismantled and lying on the dock. At the trial, the District Court judge

210. 21 U.S.C. §§ 841(a)(1), 952(a), 963 (1970).
211. 502 F.2d at 1290.
212. 483 F.2d 215 (5th Cir. 1973).
213. 474 F.2d 25 (5th Cir. 1973).

found no probable cause and no border search because there was no knowledge that the boat had been outside territorial waters, but relying on 19 U.S.C. section 1581(a) he refused to suppress the evidence. On appeal the Fifth Circuit panel opinion stated that the district court's construction of 19 U.S.C. section 1581(a) would render the statute unconstitutional.[214] The court noted that customs officials conducting border searches may search without probable cause but that the "mere suspicion" standard involved did not obviate the necessity of complying with a constitutional reasonableness standard. The court also analyzed the extended border search rationale[215] but found it inapplicable because the contraband was never placed on board the houseboat and the boat did not cross any border. There was no probable cause, and exigent circumstances were lacking due to the immobility of the boat. The court concluded by citing two district court cases[216] for the propositions that section 1581(a) did not apply to private pleasure craft and that even if section 1581(a) did apply it would not give government officials the right to conduct an exploratory search unless the initial boarding revealed an apparent violation of navigation or revenue laws. Although this case has no precedential value it indicates the reasoning of several judges of the Fifth Circuit.

The most recent Ninth Circuit case, *United States v. Stanley*,[217] dealt with a vessel leaving the United States with 11,000 pounds of marijuana on board. The vessel was seen departing from a United States harbor and was sighted nine miles out at sea and boarded shortly thereafter. Thus, there was no question that the vessel had crossed the three mile territorial sea border. Marijuana debris around a truck stuck on a dock had led a deputy sheriff to believe that contraband had been loaded aboard a vessel leaving the harbor. There was no link between this marijuana debris and the vessel boarded by the Coast Guard and therefore the search could not be justified by probable cause and exigent circumstances. The court analogized the factual situation to *Almeida-Sanchez*. Stating that a search based solely on 19 U.S.C. section 1581(a) could not sweep more broadly than the fourth amendment would allow and that, unless the search fell within an exception to the warrantless search requirements, probable cause or consent would be necessary, the

214. *Id.* at 30.

215. *See* notes 163-68 and accompanying text *supra* for a discussion of the attributes of an extended border search.

216. Fish v. Brophy, 52 F.2d 198 (S.D.N.Y. 1931); United States v. Coppolo, 2 F. Supp. 115 (D.N.J. 1932).

217. 545 F.2d 661 (9th Cir. 1976).

court referred to *Tilton, Solmes* and *Ingham* as cases dealing with the border search exception. It then analyzed the justifications for border searches of incoming vessels to ascertain whether the same policies applied to departing vessels. The court stated that several aspects of the customs border search were common to vessels entering or leaving: (1) protection of a vital interest, namely the prevention of drug trafficking; (2) the likelihood of smuggling attempts at the border; (3) difficulty in detection; (4) persons crossing the border are on notice that their privacy may be invaded; and (5) persons are searched only because of their membership in a morally neutral class. Thus, the similarity of purpose, rationale and effect qualified the instant search as a border search and the court held that:

> [A] search in customs waters is a functional border search when the vessel has crossed from territorial waters of the United States and there is sufficient evidence to convince a fact finder, to a reasonable certainty, that any contraband which might be found at the time of the search was also aboard at the border crossing.[218]

Although *Ingham* was the last case involving vessel searches in the Fifth Circuit, *United States v. Brennan,*[219] involving an airplane search, contains language indicating that the Fifth Circuit may well apply the limitations of *Almeida-Sanchez* regarding border patrol searches to all customs searches. The reasons given are that: (1) the interests to be protected are the same, namely the protection of the physical and fiscal interests of the United States; (2) the balance between "the governmental interests to be protected and the consequences to innocent members of the public if the probable cause barrier is lowered" is similar; and (3) other circuits have drawn the analogy.[220] Thus, it appears that the Fifth Circuit is bound in the same direction as the Ninth Circuit.

VII. Conclusion

The analogy of Coast Guard boardings and searches at sea to the *Almeida-Sanchez* decision is inappropriate due to factual, theoretical and policy distinctions. Faced with an enormous length of coastline and a vast expanse of ocean to police, the Coast Guard encounters a much more difficult task than the Immigration and Naturalization Service. A citizen in a vehicle on land is subject to the jurisdiction of numerouus police departments and the overlap-

---

218. *Id.* at 667.

219. 538 F.2d 711 (5th Cir. 1976).

220. *Id.* at 719. The court cited *Solmes* for authority that other circuits have drawn the analogy. *Id.* at 719 n.10.

ping controls of several layers of government. Persons aboard vessels, however, are easily lost from surveillance while at sea and subject to infrequent government control. Unlike a land bound citizen in constant contact with the government and police, the mobility and anonymity of persons aboard vessels at sea require that the government be able to exercise effective control when an opportunity is presented. The recent cases addressing this issue recognize this strong governmental interest but have been unwilling to circumvent the probable cause requirement for customs boardings outside of the border search exception. What then will the courts do when a vessel is boarded under authority of 19 U.S.C. section 1581(a) when it is within the twelve mile customs enforcement zone or within territorial or internal waters and there are no articulable facts from which a reasonable inference of a recent international voyage can be drawn? The decisions to date severely restrict authority to board as they appear to require probable cause in such instances. This requirement is impractical for prevention of smuggling. Historically no such requirement has been imposed either by Congress or by the Supreme Court. It is arguable that since the first Congress enacted the initial legislation in this area, after drafting the fourth amendment and submitting it to the states, that these searches may be deemed totally outside fourth amendment constraints. This implication is even stronger when it is realized that Congress created this power in the face of the despised general warrants which had led to the fourth amendment. The boardings and searches were conducted in 1790 much the same as they are today. Technological changes have benefited smugglers to a greater extent than the Coast Guard. Their vessels are capable of faster speeds and greater ranges and are equipped with detection systems as sophisticated as those the Coast Guard utilizes for law enforement functions. Furthermore, smugglers' vessels now operate within a vast, indistinguishable sea of recreational boaters.

Traditionally an appropriate concern for individual rights has not required probable cause for boardings and searches at sea. Earlier in this century the courts accepted this view. It would be difficult to argue that there is no reasonable expectation of privacy aboard a ship at sea. The individual's right of privacy is violated upon boarding and the consequent search must be evaluated for its adherence to reasonable standards of conduct. This requires a full evaluation of all the circumstances and a balancing of interests and rights to reach an acceptable accommodation between law enforcement and privacy. The fourth amendment protects against *unreasonable* searches and seizures. As Mr. Chief Justice Burger stated in his concurrence in *United States v. Ortiz:*

> [H]istory may view us as prisoners of our own traditional and appropriate concern for individual rights, unable—or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country.
>
> . . . .
>
> I would hope that when we next deal with this problem we give greater weight to the reality that the Fourth Amendment prohibits only "*unreasonable* searches and seizures" and to the frequent admonition that reasonableness must take into account all the circumstances and balance the rights of the individual with the needs of society.[221]

In the balancing equation it is arguable that an expectation of privacy with regard to boardings to inspect a manifest and inspect for contraband is not reasonable. There is no historical pattern of destruction of liberty in this regard. Safeguards in this area have remained the same since 1790. The privacy expectation is further lessened by the power to board and search under 14 U.S.C. section 89(a) which is inextricably intertwined with 19 U.S.C. section 1581(a). Pursuant to the duties enumerated in 14 U.S.C. section 2, the Coast Guard patrols the coast and adjacent waters to aid the enforcement of navigation and fishing regulations and other federal laws. Furthermore, the Coast Guard has the duty of enforcing safety regulations through a systematic program of vessel inspections. These administrative inspections are required under international law.[222] There can be no reasonable expectation of privacy as to these safety inspection details.

Requiring probable cause to exercise administrative and customs control is too great a burden and will result in the flaunting of navigation, safety and customs laws. It would amount to granting a license for lawlessness. Perhaps the most succinct argument against the probable cause requirement is found in *United States v. 146,157 Gallons of Alcohol*[223] where the court stated:

> If the contention prevails that customs and Coast Guard officers may not exercise the authority conferred upon them by [19

---

221. 422 U.S. 891, 899-900 (1975) (Burger, C.J., concurring). This concurring opinion also applies to United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

222. The United States has a duty under international law to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." Art. 5, Convention on the High Seas, [1962] 13 U.S.T. 2312, 2315. The maintenance of public order on the world's oceans depends upon effective control. To insure non-interference with United States vessels by foreign states it is necessary to exercise control over them.

223. 3 F. Supp. 450 (D.N.J. 1933).

> U.S.C. § 1581(a)], without having probable cause therefor or a search warrant, it will follow that the Coast Guard and customs officers are precluded from making any inspection of American vessels for violation of any law.
>
> . . . .
>
> If the Coast Guard and customs officers are prevented from making thorough inspection of American vessels, it will mean that the smugglers of contraband, narcotics, liquor, stowaways, foreign merchandise, dutiable and free, prohibited importations, such as infected plants, fruits, etc., or owners of privateers, the masters of filibusters, need only maintain an outward air of respectability and legality to escape discovery, and it will surround them with and assure them of an immunity that was never intended.[224]

The policy reasons for allowing warrantless non-probable cause searches of vessels within twelve miles of the coast are: (1) the difficulty in effectively policing the seaward national boundaries; (2) the likelihood of smuggling contraband or illegal aliens by sea; (3) the governmental interest in protection of the revenue, health and safety laws and national security; (4) the universal understanding that customs laws may be enforced in the contiguous zone, territorial sea and internal waters; and (5) the vessels searched are of a morally neutral class. These are basically the same rationales used to justify an actual border search.

For customs purposes these rationales have been and must continue to be extended into the contiguous zone for both American and foreign vessels. However, as was discussed in the jurisdiction section, this need must be balanced against the concept of freedom of the high seas with regard to foreign vessels. The interest to be protected must be regarded as important in the international community and it appears that enforcement of customs laws, especially as they relate to suppression of narcotics smuggling, is considered sufficient to justify the intrusion.[225] To search foreign vessels, however, a higher standard of suspicion is required and probably approaches, if it does not equal, probable cause to believe the vessel is engaged in smuggling, or knowledge that the vessel is bound for the United States. Theoretically this high standard of suspicion may not be required since reasonableness is determined by balanc-

224. *Id.* at 455-56.

225. Present international agreement allows for enforcement of customs laws in the contiguous zone. It is noteworthy that the Revised Single Negotiating Text of the Third United Nations Conference on the Law of the Sea (May 10, 1976), although merely a procedural text to provide a basis for further discussion, contains several explicit references to suppression of drug smuggling. *See, e.g.*, article 96.

ing the significant interest of the coastal state against the following facts: the detention is short, the search is not unduly burdensome, and there are no practical alternatives for effective enforcement.

The standard for customs searches of American vessels in the contiguous zone need not be as high as that for foreign vessels. The standard should be that of mere suspicion since the search may theoretically be likened to searches at the functional equivalent of the border. The same reasons for implementing a contiguous zone justify this theoretical base. When American vessels are within territorial or internal waters boarding officers should not be required to have either observed the vessel crossing an imaginary line three miles at sea or be reasonably suspicious to that effect. The theory that a nation's perimeters are expandable for purposes of border searches may be utilized as a starting point. It is unreasonable to presume that all illegally entering contraband can be apprehended at the three mile territorial sea limit. The fourth amendment has made reasonable accommodation to the necessity for border searches ashore within the nation's boundaries and the same policy is even stronger for vessel searches. Proof of a border crossing is not the *sine qua non* of a border search. Courts have found that persons and vehicles in and around a border zone may be proper subjects of a search by customs officers if there is direct contact with, or some reasonable relationship between, the person or vehicle and the border area.[226] The ease of crossing the three mile limit practically anywhere along the coast and the inability of customs agents to observe or know of these numerous and frequent crossings creates this reasonable relationship between any vessel and the border.

Administrative inspections for compliance with safety and navigation regulations often lead to probable cause for further search and eventual seizure for violations of other federal laws. There is no carte blanche to search private books and papers under this power, however. The direct interest of the United States in the safety and administration of its flag vessels can be analogized to the traditionally high government interest in control of the liquor and firearms industies. Spontaneous inspections are critical to the effective policing of its flag vessels. As long as the Coast Guard can indicate that the initial boarding for administrative inspection and the actual inspection were conducted in an unintrusive manner, the courts are likely to sustain the initial search and any collateral searches it may have fostered.

226. *See, e.g.*, United States v. McGlone, 394 F.2d 75 (4th Cir. 1968); United States v. Murray, 354 F. Supp. 604 (E.D. Pa. 1973).

Although from a historical viewpoint it appears that searches at sea were considered to be outside the fourth amendment, it does not appear that courts today will sustain these searches on that basis alone. Recognition by the courts that the theories espoused to sustain searches in other analogous areas are appropriate in the seaward situation should lead to sustaining the broad authority of the Coast Guard. All of the theories, from the exigent circumstances of the automobile cases, to the urgent federal interest in the administrative cases, to the recognized policies inherent in the extended border search rationale, converge in the unique role the Coast Guard plays with respect to vessels. As long as the actual boarding procedures are constrained by implemented regulations, the searches should remain free from unreasonable intrusiveness. The courts to date have been diligent in their efforts to uphold vessel searches without probable cause, but the trend toward expansion of the application of *Almeida-Sanchez* bodes ill for effective searches at sea.