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Constitutional Barriers to Smooth Sailing:
14 U.S.C. § 89(a) and the Fourth Amendment

MEGAN JAYE KIGHT

INTRODUCTION

Bill Bolling had the first in a series of unfriendly encounters with the United States Coast Guard on June 4, 1987. The Coast Guard cutter Ute approached the Albert, the Bollings’ home on the sea, and requested the name and description of the vessel, which Bolling provided. Bolling continued his journey and subsequently anchored in Charleston, South Carolina where two customs agents approached and boarded the Bollings’ vessel. The duo rummaged through the family’s clothing and possessions as they searched the vessel. When Bill Bolling’s son appeared, he was asked about a past drug conviction in New York. The officers realized their error only when Bill, Jr., assured them that he had never lived in New York. The Coast Guard apparently had the wrong Billy Bolling.

The Bollings’ second encounter with the Coast Guard on July 17 produced only minor agitation. It was during the third encounter in September that the Coast Guard boarded the Albert three times in one night. A single officer tried to board initially, and when refused, the officer secured more men to help facilitate the “safety inspection.” Upon their return, they searched for about twenty minutes, found nothing and departed. At 3:00 a.m. the Bollings awoke to the sound of yet another boarding party, this one consisting of nine men and one drug-sniffing dog. Three hours later, the Coast Guard left having discovered no safety violations in the Bollings’ drawers or beds.

The above account is interesting for two reasons: it is true, and at the present time, it appears to be legal. Two statutes, 14 U.S.C. § 89(a) and 19 U.S.C. §

* J.D. Candidate, 1997, Indiana University School of Law—Bloomington; B.A. 1994, DePauw University. I wish to express my appreciation to the United States Coast Guard for stopping me and my family in the middle of the night in order to search our vessel and sparking my interest in the subject of this Note. I also wish to thank my parents for introducing me to the sea and my husband for his unwavering support and encouragement.


2. 14 U.S.C. § 89(a) (1994) authorizes the Coast Guard to: make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. 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.
vest the United States Coast Guard and customs officers with virtually unlimited authority to stop, board, and search vessels on the high seas and within the customs waters without any particularized suspicion of wrongdoing, much less a warrant. As such, these provisions comprise what has been accurately characterized as "one of the most sweeping grants of police authority ever to be written into U.S. law." Although the statute places no patent limitations on the Coast Guard’s authority, courts have generally interpreted the broad language to confine the Coast Guard’s authority to authorize searches for the purpose of conducting safety and documentation inspections. The Coast Guard exercises these powers often and aggressively, as part of a devoted effort to reduce the flow of drugs into the United States. It has been estimated that at times as much as twenty-five percent of the Coast Guard’s entire operations is directed to drug interdiction. According to one Coast Guard Boarding Officer, in "[e]very boarding the Coast Guard conducts they are looking for drugs, as a rule, no matter where the vessel is or its activity." Some of the Coast Guard’s interdiction programs have received criticism due to their waste of precious resources and misplaced motives. This criticism is magnified by the reality that during a period of

3. 19 U.S.C. § 1581(a) (1994) provides:
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 . . . within a customs-enforcement area . . . or at any other authorized place . . . and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

4. Commissioned, warrant, and petty officers of the Coast Guard are also deemed to be officers of the customs under 14 U.S.C. § 143 (1994).

5. The nautical delineation "high seas" refers to the area beyond the three mile territorial sea, which extends from the coastline, and the contiguous zone, which extends from three to twelve miles from the coast. James S. Carmichael, Comment, At Sea with the Fourth Amendment, 32 U. MIAMI L. REV. 51, 56 (1977); see also United States v. Warren, 578 F.2d 1058, 1064 n.4 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980).


11. For example, the "Zero Tolerance" program was implemented in 1988 and was designed to decrease demand for illicit drugs by concentrating on drug users. It authorized seizure of a vessel on which any detectable amount of drugs was found. After overwhelming
particularly aggressive enforcement, in only one percent or less of the boardings conducted by the Coast Guard was a drug violation discovered. As the Coast Guard uses more intrusive methods, causing law-abiding boat owners to suffer, public resistance to these antics grows. This discontent has produced ardent constitutional protests to such police authority based primarily on the Fourth Amendment which protects citizens from "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."

The purpose of this Note is to examine and analyze the judicial treatment of the power vested in the Coast Guard, and to consider the constitutional challenges that have been advanced. Part I of this Note will offer a brief overview of the history of the statutory evolution of 14 U.S.C. § 89. Part II will examine and analyze the judicial treatment of the law by focusing on common problems and issues addressed by the courts. Part III will offer alternatives which coincide with the traditional interpretation and treatment of the Fourth Amendment.

I. STATUTORY EVOLUTION

The foundations for this contemporary constitutional battle were laid on July 31, 1789. In an act regulating the collection of duties on the tonnage of vessels and on the importation of merchandise, the First Congress provided:

That every collector, naval officer, and surveyor . . . shall have full power and authority, to enter any ship or vessel, in which they 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 . . . .

resistance to this measure surfaced, Congress evaluated the program. Shortly thereafter, the Coast Guard rescinded the program. See Greg Shelton, The United States Coast Guard Authority's Law Enforcement Under 14 U.S.C. § 89: Smugglers' Blues or Boaters' Nightmare?, 34 WM. & MARY L. REV. 933, 979-80 (1993).

13. U.S. CONST. amend. IV, § 1 provides:

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

15. This Note will focus primarily on the Coast Guard's authority to board and search vessels beyond the territorial sea under 14 U.S.C. § 89(a), as opposed to the authority of customs officers to search vessels in the United States customs waters under 19 U.S.C. § 1581(a). However, the issues which arise under these parallel statutes are often synonymous. Thus, there will be some overlap.
This Act was repealed by the Act of August 4, 179017 which enlarged the prior regulations and created the Revenue Cutter Service.18 Section 31 of the Act provided:

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 . . . 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 . . . .19

This Act remained substantially unchanged20 until the Act of July 18, 1866 which provided:

That it shall be lawful for any officer of the customs . . . or of a revenue cutter . . . to go on board of any vessel . . . and to inspect, search, and examine the same, and any person, trunk, or envelope on board . . . and to use all necessary force to compel compliance . . . .21

This provision should be closely compared with section three of the Act of July 18, 1866, which governs the authority of the same officials to search “vehicle[s], beast[s], or person[s],” presumably referring to the counterparts of vessels located on land.22 The two sections of the Act of July 18, 1866, are largely identical except that section three incorporates an additional provision which confines the officers’ authority to search exclusively where they have “reasonable cause” to believe there is a violation of law.23 Thus, the section dealing with the authority to search vessels at sea expressly permitted searches based on no particularized suspicion. Additionally, in the predecessors to this Act the authority to board and search was limited by the language “in any part of the United States, or within four leagues of the coast thereof, if bound to the United States.”24 However, the words expressing this restriction were omitted in the Act of July 18, 1866.25

18. § 62, 1 Stat. at 175.
19. § 31, 1 Stat. at 164.
20. In fact, the provision in § 31 of the Act of Aug. 4, 1790, ch. 35, 1 Stat. 145, 164, was preserved in the Act of Mar. 2, 1799, ch. 22, § 70, 1 Stat. 627, 678. The latter is now § 3072 of the Revised Statutes and provides:
It shall be the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue, as well without as within their respective districts.
Title 34, ch. 10, § 3072, Revised Statutes of the United States 590 (1878).
22. Id.
23. Id.
25. This provision was also reenacted in the Revised Statutes. Title 34, ch. 10, § 3059, Revised Statutes 588 (1878). The significance of the omission in this provision is ambiguous, as another section of the same title, which also dealt with the boarding and searching of vessels,
Congress created the United States Coast Guard as it exists today in 1915 when it combined the existing Life-Saving Service with the Revenue Cutter Service to form the new agency. This Act had no practical effect on the law enforcement power of the agency, as the Act expressly continued the applicability of preexisting statutes and directed that "[a]ll duties now performed by the Revenue-Cutter Service and Life-Saving Service shall continue to be performed by the Coast Guard . . . ."

In 1936, Congress enacted the foundations for 14 U.S.C. § 89 to clearly define the jurisdiction of the Coast Guard by "remov[ing] all possible doubt" regarding the scope of the jurisdiction. The Act of June 22, 1936, was enacted in response to the Supreme Court's decision in Maul v. United States and contained the provisions of 14 U.S.C. § 89 as they currently exist.

II. JUDICIAL TREATMENT AND ANALYSIS

Courts which have approached the Coast Guard's authority to board and search granted by 14 U.S.C. § 89(a) have often refrained from employing traditional Fourth Amendment analysis. Courts have hastily declared the statute constitutional, and in doing so, have commonly cited United States v. One 43 Foot Sailing Vessel, a Fifth Circuit per curiam opinion of only one paragraph, in which the court was content to simply state that the statute is constitutional.

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27. Id. at 801.
30. 274 U.S. 501 (1927). Maul involved the forfeiture of the vessel Underwriter for violation of §§ 4377 and 4337 of the Revised Statutes of the United States, in that the vessel was employed in a trade other than that for which she was licensed, and she was on a foreign voyage and was not properly registered. The District Court dismissed the action, holding that the Coast Guard lacked authority to seize the vessel on the high seas. The Underwriter, 6 F.2d 937 (D. Conn. 1925). The Second Circuit reversed and sustained the two causes of action. The Underwriter, 13 F.2d 433 (2d Cir. 1926), aff'd sub nom. Maul v. United States, 274 U.S. 501 (1927). The Supreme Court held that the jurisdiction of the Coast Guard was not restricted to the territorial waters of the United States or the contiguous zone (12 miles). Maul, 274 U.S. at 511. In the House Report on the bill which would eventually become 14 U.S.C. § 89, it was cautioned that "based upon some expressions in the majority opinion, the contention will be made that express authority of law is necessary to secure enforcement by the Coast Guard of some laws and also to give jurisdiction to enforce those laws beyond the 12-mile limit." H.R. REP. No. 2452, 74th Cong., 2d Sess. 2-3 (1936).
31. See supra note 2.
32. 538 F.2d 694 (5th Cir. 1976) (per curiam) (holding that 14 U.S.C. § 89(a) is constitutional).
without confronting any of the possible constitutional problems. This treatment is typical of the courts' approach to the constitutionality of 14 U.S.C. § 89(a). The courts have, at best, superficially applied the Fourth Amendment in upholding "boarding[s] that would be unconstitutional under any reasonableness standard."34

A. The Historical Argument for Constitutionality

In 1789 the First Congress, which promulgated the Bill of Rights, also established the foundation for 14 U.S.C. § 89(a). The courts of several circuits have used this "impressive historical pedigree"35 to demonstrate the statute's validity and its resilience to Fourth Amendment challenges. For example, in United States v. Williams36 the Fifth Circuit noted that section 24 of the Act of July 31, 1789, "granted customs officials 'full power and authority' to enter and search ‘any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed . . . .’"37 The court emphasized that this acknowledgment of plenary customs power was broad in comparison to the more limited authority to enter and search "‘any particular dwelling-house, store, building, or other place . . . ’ where a warrant upon ‘cause to suspect’ was required."38 Thus, the court concluded that the 1789 customs statute reflected the opinion of the First Congress that the Fourth Amendment did not prohibit warrantless searches based upon no suspicion of criminal activity.

The Ninth Circuit followed suit in United States v. Watson,39 emphasizing that the involvement of the First Congress in the enactment of the predecessor to the current statute demonstrates that these searches are not "unreasonable" within the meaning of the Fourth Amendment.40 The Supreme Court of the United States similarly relied on this argument in United States v. Villamonte-Marquez.41 The Court noted that "it is clear that the

36. 617 F.2d 1063 (5th Cir. 1980) (en banc).
37. Id. at 1079 (quoting the Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43).
38. Id.
39. 678 F.2d 765 (9th Cir. 1982).
40. Id.
41. 462 U.S. 579 (1983). It is important to note that Villamonte-Marquez does not provide controlling precedent for cases arising under 14 U.S.C. § 89(a) because its holding was limited to approval of a suspicionless boarding of a vessel in the territorial waters of the United States by customs officers. Villamonte-Marquez was decided under 19 U.S.C. § 1581(a). To understand why this Note does not take issue with 19 U.S.C. § 1581(a), see supra note 15.

The only treatment of 14 U.S.C. § 89(a) by the Supreme Court has been in the context of illustrating the jurisdiction of the United States upon the high seas. See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 258 (1991) (citing 14 U.S.C. § 89(a) as one of the numerous occasions on which Congress has expressly legislated the extraterritorial application of a statute);
members of [the First Congress] did not regard searches and seizures of this kind as ‘unreasonable,’ and they are not embraced within the prohibition of the amendment.”

The court in Williams acknowledged that “[a]lthough the First Congress’s construction of the fourth amendment is entitled to great weight, it does not necessarily settle the question of what is ‘reasonable’ within the meaning of the fourth amendment today.” It is clear that the First Congress thought various practices were “reasonable” that would be abhorrent to contemporary American society, such as slavery and refusing women the right to vote. Fundamental to our democracy is the notion that “no Act of Congress can authorize a violation of the Constitution.” It follows that because the Constitution is not static, but changes with contemporary notions of justice, reliance upon the First Congress’s interpretation of the Fourth Amendment is misplaced and insufficient. A statute must be “reasonable” under a modern interpretation of the Fourth Amendment.

Even courts which have offered this historical analysis have acknowledged that times have changed since the days of the First Congress. For example, in Williams the court stated that “[t]he undoubted constitutionality of customs searches and administrative inspections in the absence of suspicion of criminal activity does not mean that the Coast Guard’s power to search nautical vessels is today as unrestricted as when [Chief Justice] Marshall decided [Church v. Hubbart].”

The high seas themselves have also changed considerably since 1789:

The character of nautical activities has changed substantially since Chief Justice Marshall’s day. At the end of the eighteenth century almost all the vessels on the seas were either warships or cargo vessels that would be tiny by modern standards. Presently, however, the seas are teeming with pleasure vessels, [and] ocean liners that carry passengers and little cargo . . . .

Thus, the idea that a vessel might be a “dwelling-house” was foreign to the members of the First Congress, which may explain part of its willingness to authorize warrantless searches of vessels based upon no suspicion of wrongdoing. Perhaps if pleasure vessels had been more prevalent, the distinction between the two sections of the Act of 1789 previously mentioned, one requiring no suspicion and the other requiring a warrant based on probable cause, would not be as clear. Additionally, modern technology has simplified the duties of the Coast Guard and customs officers. For example, the Coast Guard is able to contact vessels and acquire information about the home port of the vessel, its intended destination, its purpose, and the number and identification of those

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42. Villamonte-Marquez, 462 U.S. at 587 (quoting Boyd v. United States, 116 U.S. 616, 623 (1886)).
43. United States v. Williams, 617 F.2d 1063, 1081 (5th Cir. 1980) (en banc); see also United States v. Streifel, 665 F.2d 414, 419 n.8 (2d Cir. 1981).
45. Williams, 617 F.2d at 1086.
46. Id. at 1085.
aboard through the use of a radio. It may then check this information against that
which it has conveniently stored in a computer on shore by using a ship-to-shore
radio. As the Second Circuit acknowledged, these factors necessitate that the
courts "interpret the Fourth Amendment in the light of contemporary notions of
privacy as well as contemporary technology." 47

There is evidence that the enactments of the First Congress do not reflect an
intention to authorize warrantless searches of vessels on the high seas based
upon no particularized suspicion. The Act of July 31, 1789, authorized searches
of vessels by customs officers only when they had "reason to suspect" that goods
subject to duty were concealed aboard the vessel. 48 Furthermore, the statute was
facially confined to searches within the 12-mile limit, and thus, withheld
authorization for such searches upon the high seas. The Act of August 4, 1790,
permitted searches "in any part of the United States, or within four leagues of the
coast thereof," 49 excluding any waters beyond the 12-mile limit. Therefore, the
intention of the First Congress was to give customs agents the power to search
vessels in or near American ports only. 50

Similar reasoning has been used in other instances, yet failed to carry the day.
For example, the dissents in Almeida-Sanchez, led by Justice White and joined
by three others, vehemently argued that in the enforcement of immigration laws
Congress had long considered vehicle searches at a reasonable distance from
international frontiers constitutionally permissible under the Fourth
Amendment. 51 Although in Almeida-Sanchez the earlier authorizations were not
promulgated by the creators of the Fourth Amendment, it illustrates that a long
history of congressional approval does not necessarily establish per se
constitutionality.

B. The Reasonableness Calculus

The essential purpose of the Fourth Amendment is to impose a standard of
"reasonableness" upon the exercise of discretion by government officials. 52 It is
fundamental that searches conducted without a warrant based upon probable
cause are per se unreasonable under the Fourth Amendment, subject to a few
"specifically established and well-delineated" exceptions. 53 The Supreme Court
has stated that "the permissibility of a particular law enforcement practice is
judged by balancing its intrusion on the individual's Fourth Amendment interests

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47. Streifel, 665 F.2d at 419 n.8.
48. Ch. 5, § 24, 1 Stat. at 43.
49. Ch. 35, § 31, 1 Stat. at 164.
50. See Streifel, 665 F.2d at 419 n.8.
    U.S. 307, 315-16 (1978); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry
    v. Ohio, 392 U.S. 1, 20-22 (1968); Camara v. Municipal Court, 387 U.S. 523, 539 (1967);
The courts have borrowed heavily from the cases involving searches of automobiles, and by comparison have concluded that the government has a greater interest at sea than on the roads, and that the sailor has a lower expectation of privacy than the driver. Some courts have completely rejected the applicability of the land-based precedent due to the unique circumstances at sea. Most courts have, however, usually engaged in at least a cursory examination of the balancing test mandated by the Fourth Amendment, and resolved the conflict in favor of the government.

Although some "quantum of individualized suspicion" is usually a prerequisite to a constitutional search, the Fourth Amendment imposes no "irreducible requirement of such suspicion." Where less than individualized suspicion is required, other safeguards are generally established. Thus, the courts have stated that the reasonableness standard requires that the facts upon which an intrusion is based be capable of measurement against an "objective standard," which entails an examination of the nature and extent of the governmental interest involved. In the seminal case justifying searches based upon less than probable cause, the Supreme Court stated:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard . . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Thus, in order for police conduct to be reasonable, it "must pass muster under objective standards applied to specific facts."

Courts have traditionally described the legitimate governmental interest involved as securing compliance with safety and documentation regulations upon the high seas. The "important factual differences" existing at sea in comparison to analogous areas have led the courts to conclude that the governmental interest is greater at sea than in similar situations on land. In Williams, which involved the seizure of a Panamanian vessel in international waters about one hundred

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54. Prouse, 440 U.S. at 654; see also United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976); Brignoni-Ponce, 422 U.S. at 878; Terry, 392 U.S. at 20-22; Camara, 387 U.S. at 533.  
56. Martinez-Fuerte, 428 U.S. at 561; see also Terry, 392 U.S. at 21 & n.18.  
57. Martinez-Fuerte, 428 U.S. at 561.  
59. Id. at 654; see also Terry, 392 U.S. at 21-22.  
60. Terry, 392 U.S. at 21-22.  
61. Martinez-Fuerte, 428 U.S. at 569.  
miles east of the tip of the Yucatan Peninsula, the court examined these factual differences and noted that "[t]here is a substantial distinction between a land-locked vehicle and a nautical vessel for Fourth Amendment purposes." The court emphasized the relative difficulty of policing the nautical frontiers when compared to policing the territorial boundaries of land and stated that "the extensive federal and international regulation of shipping and boating significantly limits the privacy that anyone might expect to have on the seas." The court cited the observations of one commentator that "[u]nlike 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 court held that the search satisfied the Fourth Amendment, however, it did so on the basis that the Coast Guard had reasonable suspicion. The Williams court did not, however, determine whether reasonable suspicion was the minimum standard for searches of vessels on the high seas.

The Fifth Circuit reiterated this logic in United States v. Shelnut, which featured the boarding of a United States vessel in international waters one hundred and eighty miles south of the mouth of the Mississippi River. After stating that two recent Supreme Court cases, Marshall v. Barlow's, Inc. and United States v. Verdugo-Urquidez, the Supreme Court held that the Fourth Amendment did not apply to a search in Mexico by American authorities of the residence of a Mexican citizen. 494 U.S. 259 (1990). The soundness of this opinion is tenuous, as evidenced by the four separate opinions filed, due to the irony of requiring "foreign nationals to abide by [United States law] even when in their own countries, [yet] our Government need not abide by the Fourth Amendment when it investigates them for violations of our laws." Id. at 279 (Brennan, J., dissenting). As the Brennan dissent points out, this ignores the notion of mutuality which ensures the "fundamental fairness that underlies our Bill of Rights." Id. at 284 (Brennan, J., dissenting). However, the constitutional inadequacies of denying nonresidents the protections of the Fourth Amendment in foreign lands is a subject which could comprise an entirely separate note, and will not be treated fully herein. The holding of Verdugo-Urquidez appeared to apply only to searches of nonresident aliens in foreign countries. However, the reasoning was explicitly adopted in the context of searches at sea in United States v. Davis, which held that the Fourth Amendment guarantees did not extend to a search of a foreign registry vessel on the high seas. 905 F.2d 245, 251 (9th Cir. 1990). Therefore, the Fourth Amendment would no longer apply to the search of the foreign registry vessel in Williams; however, the Fifth Circuit's application of the reasonableness calculus remains pertinent.

63. United States v. Williams, 617 F.2d 1063, 1070 (5th Cir. 1980) (en banc). In United States v. Verdugo-Urquidez, the Supreme Court held that the Fourth Amendment did not apply to a search in Mexico by American authorities of the residence of a Mexican citizen. 494 U.S. 259 (1990). The soundness of this opinion is tenuous, as evidenced by the four separate opinions filed, due to the irony of requiring "foreign nationals to abide by [United States law] even when in their own countries, [yet] our Government need not abide by the Fourth Amendment when it investigates them for violations of our laws." Id. at 279 (Brennan, J., dissenting). As the Brennan dissent points out, this ignores the notion of mutuality which ensures the "fundamental fairness that underlies our Bill of Rights." Id. at 284 (Brennan, J., dissenting). However, the constitutional inadequacies of denying nonresidents the protections of the Fourth Amendment in foreign lands is a subject which could comprise an entirely separate note, and will not be treated fully herein. The holding of Verdugo-Urquidez appeared to apply only to searches of nonresident aliens in foreign countries. However, the reasoning was explicitly adopted in the context of searches at sea in United States v. Davis, which held that the Fourth Amendment guarantees did not extend to a search of a foreign registry vessel on the high seas. 905 F.2d 245, 251 (9th Cir. 1990). Therefore, the Fourth Amendment would no longer apply to the search of the foreign registry vessel in Williams; however, the Fifth Circuit's application of the reasonableness calculus remains pertinent.

64. Williams, 617 F.2d at 1081 (quoting United States v. Freeman, 579 F.2d 942, 946 (5th Cir. 1978)).

65. Id.

66. Id. at 1087.

67. Id. (quoting Carmichael, supra note 5, at 100).

68. Id. at 1084 (stating that the court was not considering what minimal degree of suspicion is required).

69. Id.

70. 625 F.2d 59, 60 (5th Cir. 1980).

71. 436 U.S. 307 (1978) (holding that a warrantless administrative search is prohibited by the Fourth Amendment).
Delaware v. Prouse,\textsuperscript{72} which restricted the permissibility of warrantless searches based upon no suspicion, were not applicable to the circumstances before them, the Shelnut court reaffirmed its position that searches of the high seas are "fundamentally different" from those on land.\textsuperscript{73} However, the court did not explore the reasonableness calculus any further. It held that the searches were based upon probable cause and were thus constitutional, as 14 U.S.C. § 89(a) requires no suspicion of wrongdoing.\textsuperscript{74}

The First Circuit employed similar reasoning in United States v. Burke, in which the Coast Guard boarded an American ship in the Anegada Passage which separates the Virgin Islands from the Leeward Islands.\textsuperscript{75} The court held that the Coast Guard boarded the vessel upon reasonable suspicion, which ripened into probable cause justifying a full search, thus precluding discussion of the fact that 14 U.S.C. § 89(a) requires no suspicion of criminal activity to board.\textsuperscript{76} In reaching this conclusion, the First Circuit did apply the reasonableness calculus, which as in Williams, weighed in the government's favor. The Burke court used United States v. Brignoni-Ponce, in which the Supreme Court declared that random roving patrol stops by the Border Patrol to monitor illegal immigrants are constitutionally prohibited,\textsuperscript{77} as its principal source of comparison. In doing so, the court concluded that the "factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area" justified a different conclusion from that which the Supreme Court reached in Brignoni-Ponce.\textsuperscript{78} The court emphasized the impracticality of conducting permanent checkpoint stops on the high seas where vessels are able to maneuver "in any direction at any time and need not follow established 'avenues' as automobiles must do."\textsuperscript{79} Thus, for the Burke court, as for the Williams court, the unique problems of policing the seas justified a less restrictive standard, and the absence of less intrusive alternatives supported search tactics requiring no "quantum of individualized suspicion."\textsuperscript{80}

In the three cases discussed above the courts avoided considering that 14 U.S.C. § 89 requires no suspicion of criminal activity by determining that the Coast Guard had either probable cause or reasonable suspicion to search. The courts' ability to find that the Coast Guard had reasonable suspicion heightened the government's interest in securing compliance with safety laws, which certainly affected the application of the reasonableness test. This observation is not meant to suggest that the courts fabricated reasonable suspicion for the Coast Guard where the conclusion was not warranted. It is only meant to illustrate that

\begin{itemize}
\item \textsuperscript{72} 440 U.S. 648 (1979) (prohibiting random stops of automobiles where not based upon suspicion of criminal activity or conducted within administrative guidelines).
\item \textsuperscript{73} Shelnut, 625 F.2d at 61.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} 716 F.2d 935, 936 (1st Cir. 1983).
\item \textsuperscript{76} Id. at 938-39.
\item \textsuperscript{77} 422 U.S. 873, 883 (1975).
\item \textsuperscript{78} Burke, 716 F.2d at 938 (quoting United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983)).
\item \textsuperscript{79} Id.
\item \textsuperscript{80} United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976).
\end{itemize}
many courts are able to avoid discussing that the statute requires no suspicion of wrongdoing because the Coast Guard had reasonable suspicion or probable cause in the particular cases before them.

The uniformity with which the previous decisions determined that the reasonableness calculus weighed in favor of the government is not representative of all cases in which the balancing test has been applied. The Supreme Court offered a novel approach in *Delaware v. Prouse*,\(^1\) which did not concern searches at sea, but examined the constitutionality of random stops of automobiles to monitor compliance with licensing and registration regulations. The Court furthered the notion that the reasonableness of police conduct should be evaluated under both objective and subjective standards, which it had adopted in *United States v. Martinez-Fuerte*.\(^2\) This entails an examination of the intrusion upon the individual's Fourth Amendment interests in terms of the "objective intrusion—the stop itself, the questioning, and the visual inspection . . . [and] the subjective intrusion—the generating of concern or even fright on the part of lawful travels."\(^3\) Additionally, the governmental interest is to be evaluated in light of the "alternative mechanisms available, both those in use and those that might be adopted," to achieve the government's objectives.\(^4\) The Court, after concluding that these stops are not less intrusive than the roving stops held impermissible in *United States v. Brignoni-Ponce*,\(^5\) evaluated the weight of the governmental interest in promoting public safety on the roads in comparison to the individual's privacy interest. The Court conceded that the government has "a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed."\(^6\) However, the Court concluded that the governmental interest was not sufficient to justify the intrusion upon Fourth Amendment interests. The Court's conclusion focused on the costs associated with conducting random searches in order to find improperly licensed drivers. The Court reasoned that many violations of safety laws are observable due to requirements that vehicles carry valid license plates, submit to annual safety inspections, and comply with minimum insurance requirements.\(^7\) Ultimately, the Court determined that:

> The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials. To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would

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\(^1\) 440 U.S. 648 (1979).
\(^2\) Id. at 656 (citing *Martinez-Fuerte*, 428 U.S. at 558).
\(^3\) Id. (quoting *Martinez-Fuerte*, 428 U.S. at 558).
\(^4\) Id. at 659.
\(^6\) *Prouse*, 440 U.S. at 658.
\(^7\) Id. at 660.
Thus, the Court's resolution of the reasonableness test in favor of the individual was largely due to the "grave danger of abuse of discretion" by the police in conducting the random searches. Although the Court did not consider the analogous searches at sea authorized under 14 U.S.C. § 89(a), the comparison is manifest and demands consideration.

The government has a legitimate interest in wishing to ensure that vessels on the high seas are in compliance with the many safety and documentation regulations, as did the law enforcement officers in Prouse. However, the intrusion visited upon drivers of motor vehicles pales in comparison to the intrusion to which those aboard vessels on the high seas are subjected. Instead of being stopped along a public highway, on which there are bound to be other travelers, a seafarer may be visited by the Coast Guard in the open waters where he may not even see another traveler for days at a time. Additionally, the customary practice for police officers in pulling over a vehicle is to activate their lights to identify themselves as law enforcement officials. However, it is not unusual for the Coast Guard to approach vessels in the middle of the night without identifying themselves until they are within a few hundred yards of the vessel, leaving those aboard wondering whether they are about to be overtaken by drug pirates or the like. Furthermore, under normal circumstances, the police officer does not climb into a vehicle with the passenger, even at checkpoint stops which have been held constitutional. This, of course, is not the case in searches at sea, where the Coast Guard may board the vessel, and search until they locate all safety equipment, which may involve searching the hold for the main beam number, the engine, the closed compartments, and the bilges. Thus, the intrusion resulting from vessel searches, both the objective stop itself and the subjective amount of fright generated, is far greater than that involved in any automobile search. This fact clearly weighs against the government in the reasonableness calculus.

In Prouse, the Court found that random searches were unreasonable because the officers had unfettered discretion in deciding which vehicles to search. Under 14 U.S.C. § 89(a) the officers of the Coast Guard may board any vessel at any time and in any place, as long as that vessel is subject to the laws of the United States, without any limitation upon their discretion to choose which vessels to board, or how frequently they might board one particular vessel. Thus, the officers' discretion at sea could not possibly be any more unlimited. Under the reasoning used by the Supreme Court in Prouse, this too would seem to weigh against the government in the reasonableness calculus.

88. Id. at 661 (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)) (omission in original).
89. Id. at 662 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976)).
90. Martinez-Fuerte, 428 U.S. at 566.
91. United States v. Piner, 608 F.2d 358, 359 (9th Cir. 1979).
93. United States v. Willis, 639 F.2d 1335, 1337 (5th Cir. 1981) (stating that "the statutes authorizing such inspections place no limits on their frequency").
In *United States v. Piner*, the Ninth Circuit narrowly held "that the random stop and boarding of a vessel after dark for safety and registration inspection without cause to suspect noncompliance," is not justified by the governmental need to enforce compliance, and thus, violates the Fourth Amendment. Because the ruling was narrowly tailored to fit the facts of the case, specifically that the boarding was conducted at night, it is difficult to determine what application it may have for other cases involving searches under 14 U.S.C. § 89(a). Nevertheless, the court does provide some insight into the reasonableness calculus. The *Piner* court adopts the subjective test, as expounded in *Delaware v. Prouse*, to determine the weight of the individual interest involved in the context of vessel searches upon the high seas. The court determines that the stop of an isolated boat at night, followed by a physical intrusion, has an unsettling effect immeasurably greater than the stop of an automobile upon a public highway by an identifiable police car. For this reason, the court demanded that the government produce more significant factors to sway the reasonableness scale in its favor.

The court again emphasized the difference between vessels at sea and automobiles in *United States v. Aikens* in determining the appropriate standard against which to judge a search intended to discover contraband as opposed to safety violations. An ongoing undercover investigation of marijuana trafficking culminated in the boarding of a Panamanian freighter approximately 700 miles southeast of the Hawaiian Islands. The court considered that vehicles are typically operated along established roads, whereas vessels are operated upon the open sea; the relative anonymity enjoyed by a sailor compared to that of a driver; the practical difficulty in requiring the Coast Guard to return to shore in order to obtain a warrant before searching a ship; and the decreased expectation of privacy that occupants of both vessels and vehicles enjoy due to the prevalence of police regulation. The court concluded that the distinctions between a land vehicle and a sea vessel are so nominal that a separate standard for justifying a search at sea is inappropriate. Thus, as probable cause is required to justify the search of a vehicle, it should also be required to justify the search of a vessel.

This case illustrates that comparisons to other areas of Fourth Amendment law have been used to contradict, as well as support, the validity of suspicionless searches at sea authorized by 14 U.S.C. § 89(a).

The *Aikens* court considered the greater expectation of privacy held by those aboard vessels upon the high seas. In so doing, it relied on *United States v. Cadena*, in which the Fifth Circuit examined the privacy expectation and noted that there is a greater expectation of privacy held by those aboard vessels than by

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94. *Piner*, 608 F.2d at 361.
95. *Id.*
96. *Id.*
98. *Id.* at 734-35.
99. *Id.* at 740.
100. *Id.* at 741.
101. *Id.* at 740.
those driving automobiles. The court focused on the different purposes for which vehicles and vessels are commonly used, stating that under normal circumstances, motor vehicles are not designed to be residences, whereas "[t]he ship is the sailor's home." The court did acknowledge that the unique characteristics of a ship at sea make it difficult to impose the traditional warrant requirement, however, it concluded that the increased measure of privacy expected by those aboard vessels mandates that such searches be permitted only upon probable cause.

The Supreme Court has held that a warrantless search of a mobile home, which might be comparable to a vessel, is constitutional despite its capability of use as a residence. However, the Supreme Court was not willing to eliminate the probable cause requirement for such a search even though the ready mobility of the vehicle reduced the expectation of privacy. Thus, the Supreme Court, in maintaining the probable cause requirement in a situation with patent similarities to searches of vessels at sea, provided yet another argument for demanding that the Coast Guard establish probable cause before searching vessels at sea.

The foregoing analysis demonstrates that the reasonableness calculus is vulnerable to manipulation. As most tests articulated by the Supreme Court, it is fact-sensitive and does not provide a bright-line rule which can be applied with any appreciable degree of uniformity. The courts have found that the government’s interest on the high seas is heightened by the difficulty in enforcing safety regulations created by the important factual differences existing at sea. In contrast, the courts have generally considered the intrusion visited upon the individual’s Fourth Amendment interests to be minimal. However, the motivations of the Coast Guard in conducting such searches, and the extent of the search allowed once the boarding has occurred are additional factors contributing to the unreasonableness of these searches.

C. Pretextual Boardings

Courts have generally interpreted 14 U.S.C. § 89(a) as conferring authority upon the Coast Guard to search for safety and documentation violations. Because the vast majority of boardings conducted by the Coast Guard are for the stated purpose of performing administrative safety inspections, the government has occasionally referred to administrative searches in other contexts to justify the Coast Guard’s searches at sea. This is not a novel approach. The

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102. 588 F.2d 100 (5th Cir. 1979).
103. Id. at 101.
104. Id. at 102.
106. Id. at 392, 394.
107. See cases cited supra note 8.
The government also borrowed heavily from the administrative search cases to establish the validity of warrantless searches of automobiles. ¹¹⁰

In Frank v. Maryland, the Supreme Court upheld a warrantless inspection of private premises for the purposes of locating and eliminating a public nuisance. ¹¹¹ The opinion was generally interpreted as creating another "specifically established and well-delineated" exception to the rule that warrantless searches are unreasonable under the Fourth Amendment. ¹¹² However, the Court abandoned this interpretation in Camara v. Municipal Court, in which it stated that "such [administrative] searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees." ¹¹³ The Court did, however, modify the warrant requirement for certain administrative searches, and held that probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also upon a showing that "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [location]." ¹¹⁴ This modification was expanded in Colonnade Catering Corp. v. United States ¹¹⁵ and United States v. Biswell, ¹¹⁶ which upheld warrantless administrative searches based on no suspicion of criminal activity due to pervasive congressional regulation of the liquor and firearms industries. Thus, warrantless administrative searches absent probable cause have been approved in some circumstances. The government has cited the administrative search cases as additional support for the validity of the Coast Guard's searches under 14 U.S.C. § 89(a). However, there are significant problems with this comparison.

The general rule is that the Coast Guard may stop and board any American flag vessel on the high seas †¹⁷ without any particularized suspicion of criminal activity. ¹¹⁸ Despite the fact that 14 U.S.C. § 89(a), as written, would empower the Coast Guard to board any American vessel and fully search it for any reason, the language has been construed restrictively, allowing such stops for the limited purpose of conducting safety inspections. ¹¹⁹ Once the Coast Guard has boarded a vessel, the Coast Guard may conduct a full stem-to-stern search only if circumstances arise during the safety inspection that generate probable cause that

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¹¹⁰ Id. (stating that the cases involving administrative searches upon which the government relied were not sufficient to support constitutionality of warrantless search of automobile by roving patrol absent probable cause).


¹¹³ Id. at 534.

¹¹⁴ Id. at 538.

¹¹⁵ 397 U.S. 72 (1970) (sustaining a warrantless inspection without probable cause of a liquor store because of pervasive regulation by Congress of the industry).

¹¹⁶ 406 U.S. 311 (1972) (expanding the reasoning of Colonnade to encompass firearms industry).


¹¹⁸ See cases cited supra note 117.

¹¹⁹ See cases cited supra note 8.
there is a violation of United States law.\textsuperscript{120} Two related problems arise in the context of these administrative searches. The first is that some courts have ruled that the Coast Guard may board under the guise of a safety inspection, while intending to search for drugs. The second is that once on board, the scope of the search is not confined to that which is necessary for a safety inspection.\textsuperscript{121}

The case law does not definitively determine whether such pretextual searches are valid under 14 U.S.C. § 89(a). Some courts, primarily those in the Fifth Circuit, have held that the Coast Guard’s power to stop and board American vessels on the high seas encompasses not only safety and documentation inspections, but also searches for “obvious customs and narcotics violations.”\textsuperscript{122} Moreover, it appears that a stop initiated for the sole purpose of looking for obvious narcotics violations would be constitutionally permissible according to the Fifth Circuit. However, this interpretation of the Fourth Amendment is the subject of much controversy even within the Fifth Circuit.

In \textit{United States v. Warren}, the Coast Guard boarded a shrimping vessel approximately 700 miles from the United States for the purpose of conducting a safety and documentation inspection.\textsuperscript{123} Upon boarding the vessel, one of the officers examined the ship’s papers which indicated that the vessel was not bound for a foreign port. A special agent of the Drug Enforcement Agency, who was one of three comprising the boarding party, then asked if there were any firearms aboard. A crew member stated that there were, and led the officers to the crew’s quarters to examine the firearms.\textsuperscript{124} Subsequently, the officers performed a “cursory search” of the vessel, which was presumably initiated pursuant to their authority to conduct such administrative searches and involved the opening of closets, cabinets, drawers, and personal items of the crew such as one of the defendant’s shaving kits.\textsuperscript{125} This case illustrates the anomaly created when the Coast Guard conducts these safety inspections. Although such searches might be justified under the relevant administrative search law, the defense

\textsuperscript{120} United States v. Stuart-Caballero, 686 F.2d 890, 892 (11th Cir. 1982); United States v. Erwin, 602 F.2d 1183, 1184 (5th Cir. 1979); \textit{Warren}, 578 F.2d at 1065; United States v. Odom, 526 F.2d 339, 342 (5th Cir. 1976); United States v. Crews, 605 F. Supp. 730, 737 (S.D. Fla. 1985).

\textsuperscript{121} \textit{See} \textit{Operation Stopgap}, \textit{BOSTON GLOBE}, Sept. 17, 1978 (Parade Magazine), at 7:

If we suspect a ship of carrying narcotics, and it doesn’t stop... [w]arning shots usually stop them. Then we board, usually with five men in a smaller boat, well armed. We say we are operating under the law... It’s a subterfuge. We say we are running a check for “compliance with U.S. law.” Or we say: “We are authorized under umpty-umpty-ump of the government something,” and we board. If it’s empty we do a routine safety inspection... Id. (quoting Commander John Streeper, U.S. Coast Guard, Head of General Law Enforcement Section).

\textsuperscript{122} United States v. Jonas, 639 F.2d 200, 203 (5th Cir. 1981) (quoting \textit{Warren}, 578 F.2d at 1064-65); \textit{see, e.g.}, United States v. Williams, 617 F.2d 1063, 1075-78 (5th Cir. 1980) (en banc); United States v. Erwin, 602 F.2d 1183, 1183-84 (5th Cir. 1979) (per curiam), \textit{cert. denied}, 444 U.S. 1071 (1980).

\textsuperscript{123} 578 F.2d at 1061.

\textsuperscript{124} Id.

\textsuperscript{125} Id. at 1062, 1085.
becomes tenuous when the inspection entails a search for evidence of criminal violations as well as safety violations. Although the majority held that the search was constitutionally permissible, the dissent recognized the serious problem presented by the court's holding.

The dissenters in Warren would have held that the search and seizure were unconstitutional. The dissent noted that in the previous cases before the Fifth Circuit in which illegal contraband was discovered during a Coast Guard search, it was found either in plain view or in the course of a genuine safety inspection which was limited in scope. It then distinguished these cases from Warren by emphasizing that the Coast Guard in this case was engaged from the outset in an "affirmative investigation beyond the scope of a safety inspection." Thus, the search was unconstitutional, not because of its fundamental nature, but due to the shape the search assumed once the Coast Guard was aboard the vessel.

In a separate dissenting opinion, Judge Fay emphasized that "[t]he moment the Coast Guard absent probable cause enlarges the scope of its inquiry beyond that of a safety and documentary inspection, the seizure is no longer constitutional." Thus, Judge Fay and her fellow dissenters in the en banc decision of the Fifth Circuit would adhere to the rule generally adopted in the other circuits which would confine the Coast Guard's authority under 14 U.S.C. § 89(a) to true administrative searches for safety and documentation purposes.

Despite the vehement arguments of the dissenters in Warren, the Fifth Circuit reaffirmed its ruling in United States v. Mazyak, in which the Coast Guard boarded a forty-two foot trawler about seventy miles south of Cuba. The appellant alleged that the boarding was pretextual, and thus, an abuse of the authority to conduct safety inspections granted by 14 U.S.C. § 89(a). The court discarded the appellant's argument, and ruled that the case law explicitly authorizes inspections for "obvious narcotics violations." The defendants argued that the scope of the search exceeded that which is authorized by the statute, and specifically objected to the search of a sailbag in the engine room in which the Coast Guard discovered the contraband. However, this complaint fell on deaf ears. The court ruled that the search was proper, saying that the contraband found inside the bag was discovered in the course of a normal search for safety, documentation, and "obvious narcotics violations." Query how contraband hidden inside a sailbag in the engine room could have been "obvious" even under the Fifth Circuit's broad interpretation of 14 U.S.C. § 89(a).

The Eleventh Circuit, in United States v. Thompson, departed from the broad rule propounded by the Fifth Circuit in Warren and Mazyak, but curiously cited an en banc opinion of the Fifth Circuit in doing so. The Thompson court noted that a two-part test was established in Williams, which demanded no suspicion

126. Id. at 1078 (Roney, J., dissenting).
127. Id.
128. Id. at 1080 (Fay, J., dissenting).
130. Id.
131. Id.
132. Id. (emphasis added).
of wrongdoing for a safety and documentation inspection, but required reasonable suspicion for an investigatory search of contraband. Thus, apparently the Fifth Circuit’s inconsistencies lead other courts to give its broad rule a more narrow interpretation.

The Ninth Circuit also considered the effect of a pretextual administrative boarding in *United States v. Watson*. The defendants in *Watson* claimed that the search was invalid because it was motivated by criminal enforcement interests. This claim was based on the parties’ stipulation that if called, the commander of the Coast Guard cutter would testify that he was to “board and inspect all United States vessels less than 200 feet in length.” Moreover, the government conceded that one of the purposes of the administrative plan was to attempt to interdict the flow of illegal drugs into the United States. The court rejected the defendants’ claim, reasoning that the stop and search had an independent administrative justification and did not exceed the permissible scope of the administrative justification. *Watson* is distinguishable from the previous cases because the scope of the search was apparently confined to that which was necessary for a safety inspection. It is not clear how the court would have decided the issue had the search been more intrusive.

Other circuits that have addressed the validity of these pretextual boardings have generally refrained from outwardly stating that the Coast Guard is authorized under 14 U.S.C. § 89(a) to initiate searches for “obvious narcotics violations” as did the Fifth Circuit. They have, however, stated that an otherwise valid search conducted under the auspices of a safety search will not fail under the Fourth Amendment if motivated by criminal enforcement objectives as well. The First Circuit declined to invalidate a safety inspection motivated by such objectives in *United States v. Arra* stating that:

> Ascertaining the real motivation or suspicions of the officer who orders . . . these . . . inspections would prove intractable. Thus, rather than looking into the minds of the officers, we will concentrate on their actions. If the search is limited in scope to checking documentation and checking safety equipment and conditions, it is valid.

Similarly, the Third Circuit refused to strike down an otherwise proper safety inspection merely because it was partly motivated by suspicion of criminal activity. The court reasoned that as long as contraband is discovered during the course of an inspection no more intrusive than a proper safety inspection it is valid. Thus, the courts of different circuits accept to varying degrees administrative searches upon the high seas even though partly motivated by suspicion of criminal behavior. While the Fifth Circuit has made it fairly clear that it will authorize these searches for “obvious narcotics violations” as well as

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134. *Id.* at 1505 (citing United States v. Williams, 617 F.2d 1063, 1086-87 (5th Cir. 1980) (en banc)).
135. 678 F.2d 765 (9th Cir. 1982).
136. *Id.* at 769.
137. *Id.* at 771.
138. 630 F.2d 836, 846 (1st Cir. 1980).
safety and documentation checks, other more conservative circuits have simply said that suspicion of criminal activity will not invalidate an otherwise permissible safety search. However, the problems with these multipurpose administrative searches remain.

The Supreme Court has carefully limited the freedom of officials conducting administrative searches in other contexts. Although the Court has relaxed the probable cause requirement, an administrative warrant was still deemed necessary to "provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." Of significance to the Court is the discretion held by the officials conducting the searches, and the likelihood that such discretion will be abused, a concern of particular relevance to searches conducted by the Coast Guard upon the high seas. Coast Guard officers in the field have complete discretion to determine which vessels to stop, and how frequently to board a particular vessel. Occasionally, officers will claim to be acting under an "administrative plan" which confines their discretion.

However, these administrative plans usually consist of a directive to board all vessels under anywhere from 200 to 600 feet in length. Considering the limited resources available to the Coast Guard, it is difficult to fathom that a Coast Guard cutter is able to stop and board virtually every pleasure and commercial vessel it meets, excluding only large freighters and barges. Assuming this is true, logic suggests that the Coast Guard is left with discretion to determine which of the vessels fitting the length description to board. Furthermore, it seems unlikely that a court would find a random roving automobile search more palatable simply because law enforcement officers are acting under an "administrative plan" to stop all Cadillacs. Presumably, an acceptable administrative plan containing "specific neutral criteria" requires more than a length designation.

That the administrative searches conducted by the Coast Guard are often pretextual presents another impediment to the constitutionality of 14 U.S.C. § 89(a). The law requires definition in this area, and questions need answering. Does the statute authorize the Coast Guard to initiate searches for safety and documentation inspections only, or does it, as the Fifth Circuit would claim, permit searches for "obvious narcotics violations" as well? Once on board, to what extent may the Coast Guard search to discover such violations? This area of the law is in dire need of resolution by the Supreme Court.

III. ALTERNATIVES TO 14 U.S.C. § 89(a)

The government certainly has a vital interest in ensuring that vessels on the high seas are safe, seaworthy, and properly documented. However, this interest

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141. See, e.g., id.
142. See, e.g., United States v. Thompson, 710 F.2d 1500, 1502 (11th Cir. 1983) (involving Coast Guard cutter acting under administrative plan to board every American vessel under 400 feet in length); United States v. Watson, 678 F.2d 765, 769 (9th Cir.) (involving Coast Guard acting pursuant to administrative plan to board all vessels less than 200 feet in length), cert. denied, 459 U.S. 1038 (1982).
should not be advanced at the cost of sacrificing the constitutional freedoms of law-abiding seafarers. There are several avenues which, if pursued, would bring the statute within the confines of the Fourth Amendment. One of the justifications for allowing suspicionless searches on the high seas is that many violations of the safety and documentation regulations are not readily observable from the exterior of a vessel. However, this could be remedied by developing a better system for safety and documentation. Currently, there are no licensing requirements for much of the traffic on the seas. One need not obtain a “driver’s license” prior to setting sail; nor does one have to go through training before heading out to sea. Unlike driver’s education, which is a prerequisite to driving an automobile in many states, there is no course one must take to operate a vessel. Perhaps if a uniform system of licensing were implemented, those on the high seas would not only be more qualified to safely operate their vessels, but they would be better educated about the laws by which they must abide.

This licensing program would also include a feature comparable to “license plates” found on automobiles. Only by qualifying for a license would one be eligible to register a vessel. If an individual is properly licensed, he may register his vessel through the normal means. By following this process, the owner/operator of the vessel would receive the equivalent of a “license plate” which is to remain affixed to the exterior of his vessel in a uniform location at all times.

Individuals would also be required to renew their registration annually. In order to receive this annual registration renewal, the vessel would undergo an extensive safety inspection. During this annual safety inspection, which would be conducted dockside, the Coast Guard would board the vessel to locate and examine all safety equipment, the main beam number, the engine, all storage compartments typically used to maintain safety equipment, and bilges. This annual inspection would also give the Coast Guard an opportunity to ensure that the name and hailing port are properly marked on the vessel. An additional provision would require a minimum amount of insurance on every vessel. The availability of such insurance would be affected by an extremely poor safety record, convictions relating to drug trafficking, and noncompliance with registration regulations. Finally, compliance with safety regulations would be required when not in operation, as well as when underway. These additions to the current regulations would increase safety while maintaining the individual’s Fourth Amendment privacy interests. By establishing a uniform system of registration and annual safety inspections, individuals will have some notice of the Coast Guard’s boarding. This would eliminate the subjective intrusion, or degree of fright, generated by the boarding process, yet maintain the Coast Guard’s right to conduct a fairly extensive search.

The licensing, registration, and insurance requirements could be implemented at a nominal cost. The annual dockside safety inspection would involve considerable expense and man-hours. However, the Coast Guard is currently authorized to conduct random dockside inspections under 14 U.S.C. § 89. By implementing the annual inspection program, the necessity of the random searches at sea would be significantly reduced. Thus, a considerable portion of the resources allotted to such random searches could be reallocated to support the annual inspection program.
In addition to the above modifications, individuals would still be required to submit to warrantless dockside inspections, based upon no probable cause. As an administrative search, the officers’ discretion would be limited by “specific neutral criteria” enumerated in detailed guidelines governing such searches. The administrative plan would specify the reasonable times during which the searches may be conducted, excluding evening hours. The plan would also include a checklist of safety equipment to be located and examined. The scope of the administrative search, which would not be directed to criminal enforcement, would be limited to that which is truly necessary to accomplish the items set forth in the checklist. Clear guidelines would indicate which areas may not be searched. Any evidence obtained in violation of these guidelines would be deemed inadmissible under the exclusionary rule.

The discretion of the officers conducting these dockside inspections would be further confined by limiting the frequency of these searches. Upon completion of a random dockside search, the officers would leave the vessel owners with a form demonstrating that a search has been performed and documenting compliance. If Coast Guard officers are presented with such forms upon initiating a dockside inspection, and the forms indicate that an inspection has been conducted within the past three months, the Coast Guard would refrain from engaging in further examination of the vessel. This would allow the Coast Guard to inspect any one vessel up to four times annually in addition to the mandatory annual safety inspection in concert with registration. Furthermore, because compliance with safety laws would be required regardless of whether the vessel is in operation, and a vessel may be subject to a random dockside inspection, individuals will be discouraged from removing safety equipment from the vessel.

As a corollary to the dockside inspections, the Coast Guard would be permitted to stop and board vessels at certain permanent, or at least well-established, checkpoints. Due to the vast open seas, this alternative would only be useful in certain high traffic areas, such as common paths of commerce, or waterways leading into the open seas. The unique circumstances existing at sea make this alternative less attractive than those previously mentioned. However, if used in concert with the other enumerated modifications, checkpoint stops would provide some benefit to the Coast Guard.

A final modification on the interpretation of 14 U.S.C. § 89(a) would focus on the imposition of some “quantum of individualized suspicion.” Reasonable suspicion of criminal activity would be a prerequisite to all boardings. Only if this suspicion developed into probable cause once aboard would a full search be permitted. The necessity of these searches at sea would be mitigated if the licensing and registration program were enacted, the dockside and checkpoint inspections initiated, and compliance with safety regulations required at all times. Moreover, the licensing program would diminish the strength of the government’s claim that violations of safety laws are often unobservable. The Coast Guard would retain its authority to search for “obvious narcotics violations,” as well as safety violations, as long as they had developed probable cause after boarding the vessel upon reasonable suspicion to suspect such activity. The same factors which have previously established reasonable
Although boaters and the Coast Guard will undoubtedly maintain some of their respective complaints should the above modifications be implemented, both must accept the obligations that accompany rights and freedoms. Boaters would be subject to the same requirements that currently exist, with the additional licensing and registration demands, which are hardly a costly sacrifice for additional freedoms. The Coast Guard, on the other hand, would be permitted to continue all of its current practices subject to restrictions on the scope of their searches and the requirement that searches at sea be preceded by probable cause.

CONCLUSION

The courts which have addressed this issue have reluctantly applied the Fourth Amendment, or some aberration thereof, to determine that the Coast Guard's suspicionless searches of vessels on the high seas are permissible. The result is that the Coast Guard apparently has the authority to stop and board a vessel on the open sea, interrogate the crew, and search every compartment of the ship including its crew's cabins. If probable cause is found during this initial "cursory" safety search, the Coast Guard may pull up carpet, drill holes in the ship, and remove floorboards in search of contraband.

Courts which have applied the Fourth Amendment reasonableness calculus have usually found that the governmental interest outweighs the privacy interests of the individual. In doing so, some courts have considered the difficulty of drug interdiction at sea. This is an inappropriate focus. The courts should confine their analysis to the government's purported purpose of enforcing safety laws. Pretextual boardings should be disallowed, and searches for contraband should be preceded by a showing of at least reasonable suspicion of such criminal activity. Securing compliance with safety laws is certainly an important objective, and the unique character of travel upon the seas creates novel impediments in the fulfillment of this goal. However, the Supreme Court pointed out that "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."144 Even the impossibility of enforcement could not justify unconstitutional practices, for "to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice."145 Furthermore, the Court has rejected a similar system of spot checks for automobiles. In doing so, it reasoned that the "marginal contribution" of such checks was outweighed by the "grave danger" of abuse of discretion and the

The Court in Prouse determined that the government's interest was not sufficient in light of the alternative mechanisms available to justify the intrusion upon constitutional guarantees. The relevance of this decision to the Coast Guard's searches is patent.

There are available less intrusive alternatives which would bring the Coast Guard's searches within the confines of the Fourth Amendment. By implementing some or all of the modifications previously discussed herein, the Coast Guard would retain broad authority to search vessels. Vessels would be searched with more uniformity, and perhaps with more frequency. As with other permissible searches, some "quantum of individualized suspicion" must be required before the Coast Guard can stop and board a vessel upon the high seas. This reasonable suspicion requirement would be the only additional impediment to the Coast Guard's boarding authority as it currently exists. The administrative plans under which the Coast Guard is acting must set forth specific neutral criteria which clearly delineate the appropriate areas to be searched. These guidelines should be published and circulated to those registering vessels, so that individuals traveling upon the high seas recognize and comprehend the boundaries of the Coast Guard's authority.

The inconsistencies and ambiguities in this area of the law require resolution. Until less intrusive alternatives are implemented through legislative action, the courts must ensure that the guarantees of the Fourth Amendment are not assaulted, for the "shield against unreasonable searches does not rust on exposure to salt air."

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147. Id. at 659.
148. United States v. Williams, 617 F.2d 1063, 1095 (5th Cir. 1980) (en banc) (Rubin, J., concurring).