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Criminal Procedure - Vessels in Inland Waters Are Subject to Suspicionless Boarding - United States v. Villamonte-Marquez

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INTRODUCTION

Many defense attorneys have long felt that the fourth amendment assumes different dimensions in drug cases and the breadth of its protection shrinks in proportion to the quantity of drugs involved. Because of the war on the illegal importation of controlled substances by the United States Coast Guard and the Customs Service, and the proximity of Latin America to the long coastline of the states of the Gulf of Mexico and the South Atlantic, issues have arisen about the propriety of stopping and searching vessels. The recent ruling by the Supreme Court in United States v. Villamonte-Marquez restricting the fourth amendment indicates that protections against unreasonable search and seizure are giving way to battle the fast-spreading drug enforcement problem.

Title 19 U.S.C. § 1581(a) authorizes customs officers to “board any vessel at any time and at any place” in the United States to examine the vessel’s manifest and other documents. A similar provision, 14 U.S.C. § 89(a) which provides the Coast Guard with similar authority, has been referred to as “one of the

4. Id. Section 1581(a) provides:
Any officer of the customs may at any time go on board of any vessel . . . at any place in the United States or within the customs waters or . . . within a customs enforcement area . . . or at any other authorized place, without as well as within his district . . . and examine, inspect, and search the vessel . . . and every part thereof.
most sweeping grants of police authority ever written into U.S. law." United States v. Villamonte-Marquez presented the Supreme Court with the undecided issue of whether the fourth amendment is offended when customs officers, acting pursuant to section 1581(a), and without any suspicion of wrongdoing, board a vessel located in inland waters providing ready access to the sea. The status of the law prior to this decision was muddled and conflicting. The Ninth Circuit has limited the scope of 19 U.S.C. § 1581(a) and its sister statute, 14 U.S.C. § 89(a), by adhering closer to fourth amendment limitations, while the Fifth Circuit has accepted them in a broader interpretation of permissible police conduct.

However, one theme which is consistent in the Courts' rulings in this area is that whenever possible the decision to make such searches and seizures should not be left to the unbridled discretion of officers in the field. The Court has refused to permit warrantless random inspections for safety purposes whether directed at

7. The fourth amendment 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 warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.
8. 103 S. Ct. at 2573.
9. United States v. Piner, 608 F.2d 358 (9th Cir. 1979) (random nighttime safety checks of boats violate the fourth amendment); United States v. Odneal, 565 F.2d 598 (9th Cir. 1977) (Coast Guard is subject to limitations imposed by the fourth amendment); United States v. Stanley, 545 F.2d 661 (9th Cir. 1976) (a stop under 19 U.S.C. § 1581(a) (1976) requires probable cause or a search warrant unless a border stop).
10. United States v. Whitmire, 595 F.2d 1303 (5th Cir. 1979) (despite the absence of known border crossing facts, detaining the defendants ashore and conducting a brief inspection aboard the vessel was reasonable under the fourth amendment), cert. denied, 448 U.S. 906 (1980); United States v. Freeman, 579 F.2d 942 (5th Cir. 1978) (upheld stop under § 1581(a)); United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (upheld a stop and search under § 89(a), reversed on other grounds, 612 F.2d 887 (5th Cir. 1980); United States v. Whitaker, 592 F.2d 826 (5th Cir. 1979) (the fourth amendment does not prohibit document inspections in the absence of any suspicion in customs waters), cert. denied, 444 U.S. 950 (1979).
11. 3 W. LaFave, Search and Seizure § 10.8 (Supp. 1983).
residential premises,\footnote{12} business premises,\footnote{13} or automobiles,\footnote{14} or for documentation purposes, whether to establish citizenship,\footnote{15} or the presence of a driver’s license and vehicle registration.\footnote{16} Because of the conflict between the circuits and the importance of the question as it affects the enforcement of customs laws, the Supreme Court granted certiorari in \textit{Villamonte-Marquez} to resolve this problem.\footnote{17}

The Court held that the U.S. Customs officers’ “suspicionless” boarding of a sailboat in inland waters providing ready access to the sea, while no less random than highway stops condemned in earlier cases,\footnote{18} was reasonable under the fourth amendment in light of the waterborne setting, the complexity of vessel registration, and the limited nature of the intrusion.\footnote{19} The Court took a large step forward in the fight against increasing problems of drug enforcement along the Nation’s borders, but it severely restricted the fourth amendment’s protection of one’s expectation of privacy from governmental intrusion regarding vessels in inland waters.

The purpose of this Note is to examine the fourth amendment implications of the holding in \textit{Villamonte-Marquez}. The Note will examine the Court’s treatment of Section 1581(a) under which the search arose, analyze the judicial treatment of the decisions relied on by the Court and criticize the Court’s treatment of the “reasonableness” of the governmental intrusion. The Note concludes that because private cabin-boaters have great interests against arbitrary intrusion by officials, cases such as \textit{Villamonte-Marquez} should be scrutinized more carefully to preserve the protection of the fourth amendment.

\footnotesize{12. Camara v. Municipal Court, 387 U.S. 523 (1967).}  
\footnotesize{14. Delaware v. Prouse, 440 U.S. 648 (1979), see infra text accompanying note 71.}  
\footnotesize{15. United States v. Brignoni-Ponce, 422 U.S. 873 (1975), see infra text accompanying note 62.}  
\footnotesize{17. 103 S. Ct. at 2573 (1983).}  
\footnotesize{18. Delaware v. Prouse, 440 U.S. 648 (1979), see infra text accompanying note 71; United States v. Almeida-Sanchez, 413 U.S. 266 (1973), see infra text accompanying note 59; United States v. Martinez-Fuerte, 420 U.S. 543 (1976), see infra text accompanying note 67; United States v. Brignoni-Ponce, 422 U.S. 873 (1975), see infra text accompanying note 62; and United States v. Ortiz, 422 U.S. 891 (1975), see infra note 60.}  
\footnotesize{19. 103 S. Ct. at 2582.}
While patrolling the Calcasien Ship Channel some 18 miles inland from the Gulf of Mexico, customs officers sighted an anchored, 40-foot sailboat. The Calcasien channel connects the Gulf of Mexico with Lake Charles, Louisiana, a Customs Port of Entry. While there is access to the channel from Louisiana's Calcasien Lake, the canal is a separate thoroughfare to the west of the lake through which all vessels moving between Lake Charles and the open sea of the Gulf Coast must travel. The wake of a passing vessel caused the sailboat to rock violently. The patrol approached the Henry Morgan II, sighting one man on deck. The officers asked twice if the sailboat and crew were all right. The man, Hamparian, shrugged his shoulders in an unresponsive manner. A customs officer and an accompanying Louisiana state policeman then boarded the vessel and asked to see the vessel's documentation. While examining the registry, the customs officer smelled what he thought to be burning marijuana. Looking through the open hatch, he observed burlap-wrapped bales that proved to be marijuana. Respondent Villamonte-Marquez was on a sleeping bag atop the bales. Hamparian and Villamonte-Marquez were arrested. A subsequent search revealed some 5,800 pounds of marijuana stored in almost every conceivable place.

Before trial, respondents unsuccessfully attempted to suppress
the marijuana evidence on the ground that the search was unreasonable under the fourth amendment. Respondents were found guilty of various federal drug offenses upon trial in Federal District Court for the Fifth District. However, the Court of Appeals for the Fifth Circuit reversed the conviction on grounds that the officers' boarding "was not reasonable under the fourth amendment," because the boarding occurred in the absence of a "reasonable suspicion of a law violation." That court examined the judicial construction of Section 1581(a) and concluded that the broad language of the statute was circumscribed by the reasonableness requirement of the fourth amendment. The court also held that whether a reasonable suspicion exists in a particular case depends on the totality of circumstances and that an officer's hunch of generalized suspicion of criminal activity is not sufficient to authorize the boarding of a vessel.

35. Respondents sought to have the marijuana excluded as evidence pursuant to the exclusionary rule which prohibits the admissibility of evidence unlawfully obtained. Boyd v. United States, 116 U.S. 616 (1886).

See White, Forgotten Points In The Exclusionary Rule Debate, 81 Mich. L. Rev. 1273 (1983), stating that the exclusionary rule is a judicial remedy fashioned to protect those rights that are granted by the fourth amendment against unreasonable searches and seizures. It accomplishes this by deterring unlawful police conduct, but is sensible to apply only to those situations in which its deterrent purpose is advanced. Id. at 1273.

36. Objects falling into plain view of an officer who has a right to be in the position to have that view are subject to seizure without a warrant and may be introduced into evidence. Harris v. United States, 390 U.S. 234, 236 (1968).


38. United States v. Villamonte-Marquez, 652 F.2d 481, 488 (5th Cir. 1981). It is noteworthy that the Fifth Circuit recently upheld the boarding of a similar boat and subsequent seizure of marijuana because the totality of the circumstances warranted a reasonable suspicion. United States v. Whitmire, 595 F.2d 1303, 1316 (5th Cir. 1979), cert. denied, 448 U.S. 906 (1980) (officers did have reasonable suspicion of a customs violation after observing that the boat had been riding heavy in the bow and had sped through a "no wake" area in violation of navigation laws).


40. 652 F.2d at 488.
On appeal by the government, the Supreme Court reversed. The Court relied on section 1581(a)'s historical authorization of suspicionless boarding, but more importantly, found that the boarding was reasonable under the fourth amendment in light of the important governmental interests in fighting drug smuggling operations and ensuring compliance with vessel regulations, the major differences of waterborne traffic as compared to vehicular traffic, and the limited nature of the intrusion.

BACKGROUND

The state of the law with respect to the validity of suspicionless boarding of vessels before Villamonte-Marquez was one of contradiction and uncertainty. Professor W. LaFave states in his treatise on Search and Seizure that there was no effort to develop a systematic fashion of analysis in any of the appellate decisions. The Court in Villamonte-Marquez based the reasonableness of the boarding on earlier automobile search cases. The finding of reasonableness under the fourth amendment was the ultimate basis of the decision, but the Court did give some weight to the validity of section 1581(a) authorizing the boarding.

In 1886, the Supreme Court in Boyd v. United States quoted the history of the customs statute which was a predecessor to Section 1581(a):

As this act was passed by the same Congress which proposed for adoption of the original amendments to the Constitution, it is clear that the members of that body did not regard search and seizure of this kind as "unreasonable" and they are not embraced within the prohibition of the amendment.

The first customs statute, referred to in Boyd, was enacted in 1789, and granted customs officials, "full power and authority" to

41. Respondents argued that since the Court of Appeals vacated their convictions, thus dismissing the indictments against them, the case was moot. However, the Supreme Court held that the case was not moot on appeal since the indictment was merged into the judgment upon their original conviction and since a reversal of the Court of Appeals judgment would have the effect of reinstating the judgment of conviction. 103 S. Ct. 2575-76, n. 2 (1983).

42. 103 S. Ct. at 2582.

43. 3 W. LAFAVE, supra note 11, at § 10.8 p. 135.

44. 116 U.S. 616 (1886).

45. The Coast Guard has authority under § 1581 to enforce the customs laws; see supra note 4.

46. 116 U.S. at 623.
enter and search "any ship or vessel in which they have reason to suspect goods, wares, or merchandise subject to duty shall be concealed. . . ." 47 Thus, the First Congress limited customs officers to a "reasonable ground to suspect" the concealment of goods before entering and searching any vessel in the initial act.

In 1790 the Revenue Cutter Service was established. 48 Section 31 of that act allowed "officers of the revenue cutters to go on board of ships or vessels in any part of the United States . . . for the purpose of demanding manifests . . . and of examining and searching the said ships or vessels." 49 Thus the latter statute did not contain the "reason to suspect" requirement found in the first customs statute. This is important because Boyd refers to the first 1789 statute, yet the Court in Villamonte-Marquez relied on the 1790 statute and still quoted Boyd. The Supreme Court has not considered the constitutionality of a boarding and search based solely on Section 1581(a). The statute, however, has been construed in circuit court decisions. 50

The Ninth Circuit opinion in United States v. Stanley, 51 is typical of the normal judicial construction of section 1581(a). In Stanley, which dealt with the search of a Mexican vessel, the court held that an act of Congress cannot validate searches which offend fourth amendment protections, and a search based solely on Section 1581(a) would be unreasonable unless it fell within an exception to the fourth amendment prohibition against unreasonable

47. Act of July 31, 1789, ch. 5, 1 Stat. 29.
48. Ch. 35, § 62, 1 Stat. 175 (1790).
49. Ch. 35, § 31, 1 Stat. 164 (1790) provides: that it shall be lawful for all collectors, naval officers, surveyors, inspectors, and 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 the ship or vessel.
50. Circuit courts have also construed the validity of 14 U.S.C. § 89 (1976) providing the Coast Guard with similar authority. See United States v. Piner, 608 F.2d 358 (9th Cir. 1979) (search conducted in internal waters of the United States and after dark is subject to at least a reasonable and articulable suspicion); United States v. Odneal, 565 F.2d 598 (9th Cir. 1977), see supra note 9; United States v. Whitmire, 595 F.2d 1303 (5th Cir. 1979), see supra note 10; United States v. Warren, 579 F.2d 1053 (5th Cir. 1978), see supra note 10.
51. 545 F.2d 661 (9th Cir. 1976).
searches and seizures.\textsuperscript{52} Likewise, the Supreme Court has stated that a warrant based on probable cause is required by the fourth amendment "subject only to a few specifically established and well-delineated exceptions."\textsuperscript{53} While it is fair to say that the statute confers some authority upon customs officers, "it can also be said that this statutory provision cannot constitutionally be given a broad or even literal reading."\textsuperscript{54} It is understandable therefore that the statutory language has been judicially construed in a more restrictive manner. Thus, Section 1581(a) authority has been confined to border searches.\textsuperscript{55} Under the border search doctrine, mere entry into the United States is sufficient to make a search reasonable under the fourth amendment. The Court has justified border searches based on the interests of national self-protection and "the long standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country."\textsuperscript{56} Because of the absence of cases dealing with the validity of Section 1581(a) suspicionless boarding of vessels, the Court in \textit{Villamonte-Marquez} based its decision on automobile cases which involve the border search and the administrative stop exceptions to the fourth amendment.

Although the Court has never considered the constitutionality of a border search of a vessel,\textsuperscript{57} in recent decisions the Court has limited the scope of border searches of automobiles.\textsuperscript{58} In \textit{Almeida-Sanchez} v. United States, 413 U.S. 266 (1973), see infra text accompanying note 59; \textit{United States v. Brignoni-Ponce}, 422 U.S. 873 (1975), see infra text accompanying note 62; \textit{United States v. Martinez-Fuerte}, 425 U.S. 543 (1976).

\begin{itemize}
  \item 52. \textit{Id.} at 665.
  \item 54. 3 W. LaFave, \textit{supra} note 11, at § 10.8, p. 131 (referring to 14 U.S.C. § 89(a) (1976) granting similar authority to the Coast Guard).
  \item 55. \textit{United States v. Ramsey}, 431 U.S. 606, 616 (1977) (referring to predecessors to § 1581 as border search statutes). The "border search" is a well established practice under which persons crossing the international borders of the country and their luggage and effects may be searched without warrants and in the absence of probable cause. See 19 U.S.C. §§ 507, 1581, 1582 (1930). See also \textit{Carroll v. United States}, 267 U.S. 132, 154 (1925).
  \item 56. 431 U.S. 606, 616 (1977).
\end{itemize}
Sanchez v. United States, a case involving the stop of a vehicle about twenty-five miles from the Mexican border by a roving border patrol, the Court held that the search violated the fourth amendment because it was based on neither consent nor probable cause to believe a violation had occurred. The Court also found that routine border searches were only permissible at the border or its functional equivalent. The Court found that although the government had legitimate interests in preventing the illegal entry of aliens, this was outweighed by the individual's interests in freedom from the arbitrary intrusion based upon the sole discretion of an officer.

In United States v. Brignoni-Ponce the Court held that "except at the border and its functional equivalents, officers on roving patrols may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." The Court used a balancing approach, stating that the reasonableness of government intrusion depends on the balance between public interest and the individual's right to personal security, free from arbitrary interference by law officers. The Court found that the legitimate governmental interest in preventing the illegal entry of aliens was outweighed by the individual's fourth amendment protection from the governmental intrusion.

In United States v. Martinez-Fuerte, the Court upheld the authority of the Border Patrol to maintain permanent checkpoints at or near intersections of important roads leading away from the border at which a vehicle would be stopped for brief questioning of its occupants even if there is no reason to believe the particular

(1976), see infra text accompanying note 67; United States v. Ortiz, 422 U.S. 891 (1975) (held warrantless search by border patrol without probable cause at traffic checkpoints removed from the border or its functional equivalent violated fourth amendment).

59. 413 U.S. 266 (1973).
60. Id. at 273.
61. Id. at 272-73.
62. Id. at 275.
63. 422 U.S. 873 (1975).
64. Id. at 884.
65. Id. at 878.
66. Id. at 882-83.
vehicle contains illegal aliens. The Court in Martinez-Fuerte found that the practice of checkpoint operations was a lesser intrusion upon the motorist's fourth amendment interests, thus a brief stop and questioning was not unreasonable.

In addition to the border search exception, the fourth amendment also yields to the administrative search exception. An administrative agency may make a warrantless stop for purposes of inspection, based on neither consent nor probable cause, of a vehicle if related to strictly regulated industries. Although the Supreme Court has not decided the constitutionality of administrative stops of vessels, in the recent decision of Delaware v. Prouse, the Court held a random administrative stop of an automobile unconstitutional. The Court found that the patrolman's intrusion to ensure that only qualified persons were operating vehicles, that the vehicles were fit for safe operation, and that licensing, registration and safety inspection requirements were being observed—each furthering legitimate governmental interests—was outweighed by the individual's fourth amendment interests. In each of these cases, all of which the Court relied on in its analysis in Villamonte-Marquez, the single consistent factor for determining whether the fourth amendment was offended was the balancing test for the reasonableness of the intrusion. The test the Court used was the intrusion of a particular law enforcement practice on an individual's fourth amendment interest balanced against its promotion of a legitimate governmental interest. This is most significant because it is the ultimate basis on which the Villamonte-Marquez decision is based.

68. Id. at 545.
69. Id.at 558.
70. The administrative search was created to deter violations of regulations by subjecting certain industries to random inspections. See Camara v. Municipal Court, 387 U.S. 523 (1967); and Colonnade Catering Corp. v. United States, 397 U.S. 648 (1979).
72. Id. at 654-55.
73. The purpose of the fourth amendment is to maintain a standard of "reasonableness" upon the discretionairy power of government officials. See Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).
75. 103 S. Ct. at 2579.
In *United States v. Villamonte-Marquez*, the Court held that the suspicionless boarding of a sailboat anchored in inland waters was consistent with the fourth amendment’s protections against unreasonable search and seizure. In an opinion by Justice Rehnquist, the Court began its analysis by noting the lineal history of Section 1518(a), tracing its ancestry to an act by the First Congress in 1790 which authorized the suspicionless boarding of vessels by governmental officials. Finding the 1790 act as the statute appearing to be the ancestor of the present provision, Section 1851(a), the Court, citing *Boyd v. United States*, stated that the statute reflected that in the First Congress’ view, the same Congress that promulgated the Constitutional amendments, such boardings are not contrary to the fourth amendment. The Court then promptly dispensed with statutory discussion and moved on to the real basis of its holding, the reasonableness of officers’ actions under the fourth amendment. The court relied on recent automobile search cases holding that while random stops of vehicles away from the Nation’s borders without any articulable suspicion of unlawful conduct are not permissible, vehicle stops at fixed checkpoints or at roadblocks are. In stating that this type of cases focuses on the fourth amendment question of “reasonableness,” the court quoted *Prouse*: “The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s fourth amendment interest against its promotion of legitimate governmental interests.”

The Court stated that if customs officers had stopped a car on a highway near the border, rather than a sailboat in a ship channel,

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76. 103 S. Ct. 2573 (1983).
77. Id.
78. Ch. 35, § 31, 1 Stat. 164 (1790), see supra note 49.
79. 116 U.S. 616 (1886). Note, *Boyd* referred to the original customs act of July 31, 1789, ch. 5, 1 Stat. 29 which provided for a “reasonable cause to suspect” before a boarding was permissible.
80. 103 S. Ct. at 2578.
81. Id. at 2579.
84. 440 U.S. at 654.
the stop would have clearly violated the "reasonableness" principle embodied by the fourth amendment. The stop and boarding of the sailboat in Villamonte-Marquez was found to be reasonable for four reasons.

First, the factual differences between vessels located in waters offering ready access to the sea and automobiles on highways were found sufficient to require a different result. The Court found permanent checkpoints on waters such as the Calcasien River Ship Channel impractical, since vessels can move in any direction at any time and need not follow established avenues as automobiles. It found no practical alternatives in spotting all vessels which might have come from the open sea and herding them into a canal to make fixed checkpoint stops. Although rivers and canals in inland waters may make a roadblock approach more feasible, waters providing ready access to the sea do not. Moreover, if checkpoints were fixed at ports, as petitioners argued, then the boat captain could merely anchor in an obscure location, or transfer the cargo from one vessel to another and avoid the checkpoints.

Secondly, documentation requirements with respect to vessels are significantly different from the system of vehicle licensing used throughout the states. Vessel documentation is very complex and more extensive, so customs officers cannot tell, merely by observing the standard license plate or inspection sticker found on vehicles, whether the laws are being complied with.

Thirdly, the enforcement of documentation law serves the public interests in assuring environmental standards, the collection of customs duties, regulations of imports and exports, and particularly the prevention of entry into the United States of controlled substances, illegal aliens, prohibited medicines, dangerous chemicals and the like. Those interests were found most substantial in waters which connect the open sea with a Custom Port of Entry.

85. 103 S. Ct. at 2579. See also United States v. Brignoni-Ponce, 422 U.S. 873 (1975).
86. 103 S. Ct. at 2579-80.
87. Id. at 2580.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id. at 2581.
94. Id.
Finally, the Court found that while the need to make documents checks was great, the resulting intrusion on fourth amendment interests was limited. Conceding that the intrusion did interfere with one's ability to make "free passage without interruption," the Court found that it involved a brief detention where officers boarded, visited public areas of the vessel and inspected documents, all of which was limited to what could be seen without a search. Thus the interference created only a "modest intrusion."

In the majority's opinion these factors tended to make the suspicionless boarding of the *Henry Morgan II* a special case; thus it was reasonable procedure.

In a dissent by Justice Brennan, joined by Justice Marshall, the majority was criticized for upholding the boarding and search on the grounds that there are differences between cars and boats sufficient to justify such a "blatant departure from solid and recent constitutional precedent." The dissent pointed out the precedents, *Almeida-Sanchez, Brignoni-Ponce, Ortiz, Martinez-Fuerte* and *Prouse*, which uniformly held that any stop or search requires probable cause, reasonable suspicion, or another discretion-limiting feature such as the use of fixed checkpoints instead of roving patrols. The dissent criticized the majority for overlooking the primary concern guiding previous decisions which was the unqualified and consistent rejection of "standardless and unconstrained discretion." Justice Brennan added that it does not follow "that because police in a given situation claim to need more intrusive and arbitrary enforcement tools than the fourth amendment has been held to permit, we may therefore dispense with the fourth amendment's protections."

The dissent also argued against the majority's supposed fac-

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95. *Id.*
97. 103 S. Ct. 2581.
98. *Id.* at 2582.
99. *Id.*
100. Justices Brennan, Marshall and Stevens first criticized the Court's holding that the case was not moot, despite the voluntary dismissal of the prosecution by the government. *Id.*
101. 203 S. Ct. at 2585-91.
102. *Id.* at 2585.
104. 103 S. Ct. at 2586.
tual differences. It pointed out that the boarding took place in a channel which all vessels moving between Lake Charles and the Gulf must travel, thus relevant traffic could be funneled into a checkpoint. Also, Justice Brennan argued that most safety defects are detectable by visual means without the necessity of random stops and that the nature of illegal traffic and the characteristics of smuggling operations generate articulable means of spotting violators. The dissent questioned why the non-uniform documentation of vessels was a necessary or permanent state of affairs. It asserted that a uniform and more simple means of vessel documentation could be achieved easily and inexpensively. In stating that the intrusion was more than modest, the dissent went on to criticize the majority for overlooking the obviously greater expectation of privacy people enjoy on boats since boats often serve as temporary dwellings. Finally, the dissent questioned why an actual boarding was necessary anyway, since the officer could simply pull along side and request someone from the vessel to come on board the police vessel with the appropriate documents.

The dissenting opinion was proper because it held to the precedent cases which indicate that the primary concern in this area of the fourth amendment is to protect the individual from unbridled police discretion, and the dissent applied the test of reasonableness with more careful scrutiny. The majority fell short, but the dissent was prepared to consider alternatives such as the possibility of a uniform system of documentation for vessels, alternative use of fixed checkpoints for vessels when available, and the possibility of having the documentations inspection conducted aboard the officer's vessel instead of the individual's. The dissent properly seeks to exhaust all alternatives before derogating from the fundamental right as set forth by our forefathers against unreasonable search and seizures.

The majority pointed out that boats, unlike automobiles, need not follow established routes, thus checkpoints fixed along water-

105. Id.
106. Id. at 2589.
107. Id. at 2590.
108. Id.
109. Id.
110. Id. at 2588-89.
111. Id. at 2590.
ways and at Customs Ports of Entry could be averted. However, the dissent was correct in examining the facts at hand. There was no other avenue available for the *Henry Morgan II* since the Calcasien Ship Channel was the only passageway between Lake Charles and the Gulf. True, there are numerous waterways providing ready access to the sea on our Nation's coast which do offer unestablished avenues for sailing and make roadblock type stops impractical. However, the facts in *Villamonte-Marquez* show that the waterway in question did not have alternative routes and made very feasible a roadblock type of stopping device. Thus, the Court erred in generalizing about all inland waterways rather than analyzing the facts as presented.

On the other hand, the dissent's suggestion that a uniform system of documentation could be provided easily and inexpensively is without substantiation. A thorough study into possible alternatives and their implementation is necessary before reaching such a conclusion. Moreover, as the majority point out, "[s]o long as the method chosen by Congress is constitutional, then it matters not that alternative methods exist." Oddly enough, the majority began its analysis with a discussion of our forefathers' intentions when enacting the lineal ancestor to Section 1581(a). It then asserted that the present law had quite an impressive history in allowing the suspicionless boarding of vessels. The Court mistakenly referred to *Boyd v. United States* when it asserted that boardings of this kind were not considered unconstitutional by the framers of the fourth amendment. The Court in *Boyd* referred to the first customs statute of 1789 in its holding that suspicionless boardings were not unreasonable. However, that statute contained a provision requiring "reasonable cause to suspect," before customs officers could enter and search any vessel. The initial reasonable suspicion requirement of our Nation's first customs statute suggests that the "impressive historical pedigree" of the current statute is not quite as impres-

112. *Id.* at 2580.
113. *Id.* at 2576.
115. 103 S. Ct. at 2578.
117. Act of July 31, 1789, ch. 5, 1 Stat. 29.
118. 116 U.S. at 623.
120. 103 S. Ct. at 2573.
sive. Although the statute confers some authority upon the customs officers, it "cannot constitutionally be presumed to be given a broad or even literal reading." Moreover, every statute enacted by the First Congress cannot be presumed to be constitutional since they too were imperfect humans.

Most importantly is the majority's mistake not to consider circuit courts' construction of Section 1581(a). Although the circuit courts have disagreed on the issue of reasonableness, they seem to be in accord with the view taken in United States v. Stanley which held that a search based solely on Section 1581(a) would be unreasonable unless it fell into an exception to the fourth amendment prohibition against unreasonable searches and seizures. In any event, the Court did not devote a lot of time to carefully analyzing the statute, but properly recognized that the boarding and search in Villamonte-Marquez would have to be found reasonable in order to withstand constitutional attack. In basing its decision on the reasonableness of the intrusion, the Court, in effect, indicated that the statute by itself is insufficient to justify the officers' suspicionless boarding, or at least, left the question open.

Villamonte-Marquez approved an entirely random seizure and detention of individuals and a boarding of a private, noncommercial premises by police officers, without any limits on the officers' discretion or safeguards against abuse. The Court did not assert that such a result was warranted by precedent permitting such broad and unchecked authority. Rather, the Court recognized that the applicable cases were those governing search or stops of vehicles by officers on random patrol or at a fixed checkpoint. The most significant flaw in the Court's reasonableness application was its failure to adhere to the principles as set forth by these precedents requiring probable cause, articulable suspicion or some kind of discretion-limiting device such as fixed checkpoints. In Almeida-Sanchez the Court held that police on roving patrols must have probable cause before stopping and searching a vehicle near

121. 3 W. LaFave, supra note 11, at § 10.8, p. 131.
122. 545 F.2d 661 (9th Cir. 1976). For cases that hold some articulable suspicion or probable cause is required for a search based on 14 U.S.C. § 89 (1976), the present law's sister statute, see supra note 50.
123. 545 F.2d at 665.
the border. In *United States v. Ortiz* the Court held that the police must have probable cause to search a vehicle at fixed checkpoints. In both of those cases the discretion of the police was limited by probable cause. In *Brignoni-Ponce*, the Court held that Border Patrol officers on roving patrol could stop vehicles and question occupants only if there was a reasonable suspicion of a law violation. Likewise in *Martinez-Fuerte*, the court held that officers could stop and question vehicles without suspicion only at fixed checkpoints. In *Prouse*, these precedents were affirmed as the Court held that stops of vehicles were allowed only if made on a reasonable suspicion or at fixed checkpoints. The Court in *Prouse* properly recognized that the "marginal contribution of random highway stops 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." Thus, the majority overlooks the primary principle embodied in each of these cases, the "standardless and unconstrained discretion" of police officers in the field.

Not only does the Court fail to uphold the same type of discretion-limiting standard, but it also fails to properly weigh other factors in its balancing approach. In judging the boarding of the *Henry Morgan II* by balancing the intrusion upon petitioner's fourth amendment interest against the promotion of enforcing documentation law, the Court should have given more weight to three significant factors. First, the Court should have given more weight to one's greater expectation of privacy aboard a pleasure vessel which may even be used as a temporary dwelling. Certainly persons traveling in a 40-foot sailboat, which may serve as a residence and a repository of personal effects, and where both its occupants and contents are not actually in plain view to the public, have a

125. 413 U.S. at 273.
126. 422 U.S. 891, 896 (1975).
127. *Id.* at 896.
128. *Id.* at 884.
129. 428 U.S. at 562.
130. 440 U.S. at 654.
131. *Id.* at 661.
132. *Id.*
greater expectation of privacy than automobile travelers. Second, and related to the first factor, the Court should have weighed heavier the nature of the boarding because it was more intrusive than the condemned stops made in the automobile cases. In the case of a vessel stop, the officer actually boards the vessel and is automatically in a position to view its contents including personal belongings just inside an open hatch. Third, and most importantly, the Court should have given more weight to the fundamental protection of the fourth amendment, which extends even to wrongdoers. Furthermore, the Court failed to realize the extent to which acceptable results could be achieved without a system of “random stops.” In Prouse it was noted that enforcement interests could be substantially furthered by stopping drivers who are actually observed committing violations. There is no reason why the same is not true for vessels.

A question which the Court did not address and which may be raised in cases interpreting Villamonte-Marquez is how far inland does a vessel have to be before it is no longer in waters providing ready access to the sea? The Henry Morgan II was anchored 18 miles inland, and it would seem that once spotted, a boat of its size and speed capabilities could not reach the open sea from that distance without being tracked or even overcome by the sophisticated government vessels and aircraft. Would the result be the same if the Henry Morgan II had been anchored 25 or 35 miles inland? Another point avoided by the Court but likely to arise in future cases is the potential for abuse of official discretion. Could a boarding be held invalid because the officers were searching solely for drugs, disguised by a documentation inspection? Thus, a major question remains as to whether there is really an objectionable limitation to random stops.

In addition to its other shortcomings, the majority failed to explore other alternatives to the suspicionless boarding that would further the governmental interest while protecting the individual’s fourth amendment interest. First, an “area warrant” as suggested in Camara v. Municipal Court could be issued by a magistrate before customs officers set out on patrol. The warrant, while not specifying a particular vessel or vessels, could set out circumstances and manners in which vessels inspections could be carried

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133. Id. at 659-60.
134. 103 S. Ct. at 2576.
out.

A second alternative, and related to the first, is to require customs officers boarding vessels without suspicion to first find certain objective criteria characteristics of smugglers' vessels, or at least insure that stops are carried out in accordance with a neutral administrative plan that minimizes officers' discretion.

Third, searching could be conducted at the "functional equivalent" of a border as suggested in Almeida-Sanchez. A "functional equivalent" of the border is most likely to be the port of entry, but a bay adjacent to the ocean could serve as well.

Fourth, as pointed out in the dissent, the government's job could be accomplished by simply pulling along the boat and asking a crewman to board the officer's boat with the appropriate documents. The officer could merely question occupants of a vessel without boarding, and if the responses were found inadequate or gave rise to some probable cause to suspect criminal activity then a boarding could be warranted.

Fifth, possible alternatives to current registration markings should be explored in order to provide a more uniform and efficient system. Finally, the government might establish temporary or permanent inspection stations that could issue a colored decal signifying compliance. To ensure routine inspection, the decal colors could be changed from time to time and boats without current decals could be stopped and inspected.

As far as North Carolina is concerned, the impact of Villamonte-Marquez could be felt due to the State's long coast line and numerous inlets and rivers. In United States v. Harper, the Court of Appeals for the Fourth Circuit found that stopping and searching a 250-foot vessel in the high seas while bound for Morehead City was reasonable. The Coast Guard, acting pursuant to 14 U.S.C. § 89, stationed itself in a traveling route of boats bound to the United States from South America. The boarding, although without suspicion, was found reasonable because of its systematic nature which did not allow for the will and whim of the

136. Id. at 273.
137. See United States v. Solmes, 527 F.2d 1370, 1372 (9th Cir. 1976); see also Note, High On The Seas: Drug Smuggling, The Fourth Amendment, and Warrantless Searches at Sea, 93 Harv. L. Rev. 724, 733 (1980).
138. 103 S. Ct. at 2590.
139. Note, supra note 137, at 744.
140. 617 F.2d 35 (4th Cir. 1980).
141. Id. at 37.
officers, the lowered expectation of privacy of a commercial vessel sailing on high seas, and the practical difficulties in policing American vessels on the high seas. Thus, the Court of Appeals also found it necessary to go beyond statutory authority for the validity of the boarding. Since the officers in Harper were following an administratively neutral plan which limited their discretion and since the vessel was in a well traveled sea lane where commercial vessels could expect document inspections, the boarding was valid. This case involved a high seas search. North Carolina courts have not dealt with an inland stop and search such as Villamonte-Marquez, but it is likely that since the Villamonte-Marquez holding allows full discretion to government officials in boarding inland vessels, then the discretion-limiting feature of the Harper approach may be disregarded. Thus, vessels in inland water of North Carolina providing ready access to the sea are subject to suspicionless boardings by customs officers to make documents inspections, absent any discretion-limiting device.

CONCLUSION

The suspicionless boarding in Villamonte-Marquez was held reasonable because of the substantial differences between the waterborne setting and that of public highways which prevent the practical use of discretion-limiting fixed checkpoints, the complexity of vessel documentation as compared to vehicle documentation, the important public interests in the enforcement of documentation laws which deter smuggling, and the limited nature of the intrusion. The effect of Villamonte-Marquez in regard to vessel owners who travel in waters near the open seas that their expectations of privacy are severely diminished since they are now subject to being stopped and having customs officers board their vessels to inspect documents. The boarding need not be based on probable cause, reasonable suspicion, or any other objective criteria save the officer’s unbridled discretion.

Concerning the automobile stop and search cases relied on, the Court consistently held that any search and seizure requires probable cause, a reasonable suspicion or another discretion-limiting device such as the use of a fixed checkpoint. These cases provide a

142. Id. at 38.
143. Id.
144. Id. at 39.
145. 103 S. Ct. at 2582.
strong foundation of precedent for issues arising out of the search and seizure of persons traveling in their personal vehicles. The majority in *Villamonte-Marquez* departs from this precedent and fails to apply the fourth amendment principle against arbitrary governmental intrusion in an analytically sound manner.

The decision in *Villamonte-Marquez* reinforces the statement that the fourth amendment protections shrink in proportion to the quantity of drugs involved. It serves notice that the “reasonableness” requirement may be restricted to further governmental interest in extensive social problems. However, the decision does not clearly indicate exactly how Section 1581(a) applies to suspicionless boardings since the statute is not the real basis of the decision.

Also, the majority’s only limit to the suspicionless boarding is that it be conducted in inland waters providing ready access to the sea. The question remains as to how far inland a vessel owner has to be before he can object. Another problem left unresolved by the decision is the possibility it opens for the abuse of police discretion. May customs officers initiate a sweeping battle against smuggling disguised as an attempt to step up documentation inspection?

While enlarging the authority of customs officers will probably increase their effectiveness in stopping drug traffic into our Nation via numerous inland waterways, we are reminded that the court which “sat during a period in our history when the Nation was confronted with a law enforcement problem of . . . enforcing the Prohibition laws . . . [r]esisted the pressure of official expedience against the guarantee of the fourth amendment.”

*Wallace R. Young, Jr.*

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146. *See supra* note 1.