The Fourth Circuit and the Fourth Amendment: Removing the High from the Seas

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I. INTRODUCTION

Following the Prohibition era, the field of searches and seizures at sea lay dormant and was traversed by legal scholars only on esoteric ventures. However, the influx of drugs from South America (principally Colombia) beginning in the 1960's and the re-
suiting war on the illegal importation of controlled substances by the United States Coast Guard, the Customs Service, and the Drug Enforcement Administration have once again raised questions about the propriety of stopping and searching foreign and domestic vessels on the high seas. Because of the proximity of the southeastern United States to Latin America and the long coastline of the states on the Gulf of Mexico and the South Atlantic, the majority of the maritime search and seizure issues have been raised in the District Courts and the Court of Appeals for the Fifth Circuit. In the fall and winter of 1977-78, however, the seizure of two vessels laden with marijuana off the North Carolina coast and the seizure of a third vessel bound for North Carolina in the Mona Passage brought the issues to the fore for many practitioners in the Eastern District of North Carolina and ultimately for the United States Court of Appeals for the Fourth Circuit.

The purpose of this article is to review the decisions of the United States Court of Appeals for the Fourth Circuit in United States v. Coats and United States v. Harper. Both of these cases arose out of the stopping of the Lady Ellen, an American vessel, by the United States Coast Guard in the Mona Passage on January 26, 1978. These cases provided the first opportunity for the Fourth Circuit to review the authority of the Coast Guard to stop domestic vessels on the high seas without probable cause or even reasonable suspicion to believe that the vessel or crew was engaged in illegal activity. In the Coats decision, the Court never reached the substantive issue, finding instead that the single defendant had no standing to contest the stopping of the Lady Ellen. In Harper, the Court found that the stopping and search of the Lady Ellen on the high seas was reasonable under the fourth amendment. This arti-

1. The Mona Passage is approximately fifty miles wide and lies between the Dominican Republic and Puerto Rico.
2. The Sea Crust and six tons of marijuana were seized on November 22, 1977 by the Coast Guard Cutter Gallatin over 200 miles southeast of Cape Fear, North Carolina. The Sea Crust was a Bahamian vessel. United States v. Dominguez, 604 F.2d 304 (4th Cir. 1979). The Don Elias and eleven tons of marijuana were seized on December 9, 1977 by the Coast Guard southeast of Cape Fear. The Don Elias was a Honduran vessel. United States v. Meinster, 619 F.2d 1041 (4th Cir. 1980).
3. 611 F.2d 37 (4th Cir. 1979). The defendant Coats was tried after the trial of the other conspirators.
5. U.S. Const. amend. IV. “The right of the people to be secure in their per-
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Article will review the legislative and judicial background of the decisions, analyze the decisions themselves with attention to subsequent Supreme Court decisions, and predict the implications for federal law enforcement officers and drug smugglers if the novel approach adopted by the Fourth Circuit is later affirmed.

II. REVIEW OF FACTS

The **Lady Ellen**, an American vessel with a crew of three, was proceeding northwardly on January 26, 1978, in the Mona Passage when it was sighted by the **Alert**, a Coast Guard vessel which had been dispatched to the Mona Passage from Miami. During a prior briefing in Miami, the officers of the **Alert** were directed to the Mona Passage for a surface law enforcement patrol with particular emphasis on drug interdiction. During its patrol, the **Alert** was cooperating through the Commander of the Seventh Coast Guard District with the Drug Enforcement Administration and the Customs Service in “Operation Stopgap,” an effort to stem the flow of drugs from South America. The strategy was to intercept United States-bound ships coming from South America by concentrating Coast Guard ships in the three major passages in the Caribbean Sea used by north-bound vessels. At the same time that the **Alert** was stationed in the Mona Passage on “pot patrol,” two other Coast Guard vessels were in the Yucatan and Westward Passages. It was their policy to board as many United States vessels under 250 feet in length as possible.

The **Lady Ellen** was purchased in Bayou LaBatre, Alabama, on January 4, 1978. The defendant Coats, a resident of Morehead City, North Carolina, located the **Lady Ellen**, recruited the crew, and made preparations for the trip to Colombia. The defendant Govus, the leader of the smuggling operation, arrived in time to give the crew final instructions for the trip and provided two suitcases of purchase money. Govus was also present in Colombia as the **Lady Ellen** was loaded in a cove on the night of January 22,
1978. He instructed the captain, Breslin, to make his return voyage to Morehead City, North Carolina, through the Mona Passage. 8

On the evening of January 26, 1978, the Alert was approximately twenty miles from Cape Engano off the coast of the Dominican Republic. The officer of the deck noticed a light on the horizon and dispatched a helicopter to observe the vessel. The helicopter pilot reported that the vessel was named Lady Ellen and that its home port was in North Carolina. The Alert radioed the Lady Ellen, directed it to stop, and a boarding party was mustered. As the boarding party approached the Lady Ellen, it noted that the home port of Wanchese, North Carolina, was painted on the stern. During the boarding, the Coast Guard personnel detected a strong odor emanating from the vessel. The commanding officer of the boarding party identified himself and asked the captain of the Lady Ellen about the ship’s points of departure and destination. The captain turned away shaking his head and said, “You got me. I’m coming from Colombia and I’ve got a load of marijuana on board.” 9 The Lady Ellen was then searched and twenty-five tons of marijuana were found.

Prior to trial, all of the defendants moved to suppress any evidence that was obtained from the stopping and search of the Lady Ellen on the high seas on the ground that a stop and search of a vessel without probable cause to believe that it contained contraband was an unreasonable seizure under the fourth amendment. The defendants contended that 10

8. Supra note 6.
9. 617 F.2d at 37.
10. 14 U.S.C. § 89 (1976) reads as follows:
(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship’s documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a
ferred to as "Section 89"), which authorizes the Coast Guard to stop and board vessels subject to United States jurisdiction in order to prevent, detect, and suppress violations of the laws of the United States, was subject to the limitations of the fourth amendment. Although the statute on its face gives the Coast Guard carte blanche authority to stop and search vessels on the high seas, the defendants contended that the fourth amendment required that there be probable cause to believe that a violation of United States law was occurring aboard the vessel prior to any stop of the vessel.

III. STANDING TO CONTEST THE STOP

The government alleged in both the Harper and Coats cases that only the defendants who were aboard the Lady Ellen at the time it was seized had standing to object to the seizure. The standing doctrine at that time was an articulation of a judicial philosophy that not every defendant in a criminal case ought to be permitted to complain of police misconduct, even if evidence to be used against the defendant was the product of an illegal act. Otherwise stated, the rule held that evidence would not be subject to constitutional objections unless the defendant could demonstrate not only a violation of the fourth amendment but also that his individual rights had been violated by the police while obtaining the evidence. For example, a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third party's premises or property had no standing to object to the introduction of the evidence. The limitation that this doctrine imposed upon the class of defendants permitted to benefit from the exclusionary rule arose in part out of fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

an awareness that the rule often excluded relevant and reliable information and that the search for truth was often frustrated by its application. 12

The Lady Ellen cases were tried and decided in the district court prior to the Supreme Court's decision in Rakas v. Illinois, 13 the first of three decisions which altered the concept of "standing" to object to the introduction of illegally obtained evidence. 14 The government and the defendants were proceeding under the traditional concept of standing, and the decisions of the district court are couched in the traditional terms. The Fourth Circuit had the benefit of the Rakas opinion but not of the later two opinions. Because of the developments in the concept of standing, the Lady Ellen decisions should be analyzed both in traditional terms and in light of the new decisions. This article will predict how the courts are likely to view fourth amendment objections by the various class of defendants commonly associated with searches and seizures on the high seas (for example, crewmembers and owners-organizers).

During the motion hearings, neither side questioned the vitality of Brown v. United States. 15 In that case, the Supreme Court held that there was no standing to contest a search and seizure when the defendants:

(a) were not on the premises at the time of the contested search and seizure;
(b) alleged no proprietary or possessory interest in the premises; and
(c) were not charged with an offense that included, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. 16

There were three persons on the Lady Ellen at the time it was stopped: Captain Breslin and two crewmen, the defendants Harper and Rowe. 17 They represent the first class of defendants in the typical marijuana seizure case — the persons on board the vessel stopped. The government conceded at all levels that the crewmen

14. The other opinions were United States v. Salvucci, 100 S. Ct. 2547 (1980) and Rawlings v. Kentucky, 100 S. Ct. 2556 (1980).
16. Id. at 229.
17. Captain Breslin was given immunity by the government in exchange for his cooperation and testimony. Harper and Rowe were tried with the co-conspirators arrested in North Carolina and convicted following a bench trial.
had standing, presumably on the theory that the boat constituted a "premise" and that the crewmen were "present" at the time of the stopping. That concession, it now appears, may have been unnecessary.

In Rakas, the petitioners were charged with armed robbery. At their trial, the prosecution introduced into evidence a sawed-off rifle and rifle shells which had been seized by police during a search of an automobile in which petitioners had been passengers. Neither petitioner owned the automobile nor asserted that he owned the rifle or shells seized. In holding that the evidence was admissible against the petitioners, the Court effectively overruled the first part of the Brown decision holding that an individual's legitimate presence on a searched premises automatically conferred standing. Instead, the Court reasoned, the proper determination is whether the search violated the defendant's fourth amendment rights and in particular, his personal expectation of privacy. 18

By analogy, the defendants Harper and Rowe occupied much the same position as the petitioners in Rakas. Neither defendant contended that he owned the boat or the marijuana stored in its hold. They were passengers (albeit working passengers) aboard a vessel captained by a third party. Nothing of evidentiary value was taken from them personally, as the government introduced only the marijuana stored below the deck. In Rakas, the evidence was seized not from the passengers but from the glove compartment and under the front passenger seat. 19 If the Rakas defendants were unable to demonstrate an expectation of privacy in the close confines of an automobile, it appears unlikely that either Harper or Rowe had any expectation of privacy in the interior of the ship. 20 After Rakas, certainly the defendants' presence alone will not be sufficient to allow them to question the search of certain areas of the vessel. 21

18. 439 U.S. at 149.
19. Id. at 130.
20. After Rakas, a panel of the Fifth Circuit held that there was "no legitimate expectation of privacy in the hold of a merchant vessel" under the circumstances of United States v. Williams, 589 F.2d 210, 214 (5th Cir. 1979). A district court reached the same conclusion prior to Rakas in United States v. May May, 470 F. Supp. 385 (S.D. Tex. 1979).
21. The Fourth Circuit's opinion in United States v. Dominguez, 604 F.2d 304 (4th Cir. 1979) was issued after Rakas. The defendant, Nollie Alexander, the captain and owner of the Sea Crust, was on board at the time of seizure. On the standing question, the Judge Butzner noted at page 309 as follows: "Alexander,
If the government seeks to introduce more than the marijuana found in the hold of the vessel, the crew members may be able to demonstrate a breach of some expectation of privacy. For example, a crew member may well have an expectation of privacy in his personal living quarters aboard the vessel, since they are analogous to his home or apartment on shore. If incriminating documents or controlled substances are seized from this area, then the defendant crew member should be able to litigate the fourth amendment question. Likewise, crew members should be able to establish an expectation of privacy in their work areas. For example, the captain or navigator could have a map on the bridge that would indicate the destination of the vessel to be the North Carolina coast. The value of this evidence to the prosecution in a conspiracy case where the vessel is seized hundreds of miles from North Carolina is obvious. The defendant should be able to demonstrate an expectation of privacy by analogizing the bridge or engine room of the vessel to an office or work place on shore.22

For those persons aboard the vessel, a distinction is readily made between the initial stopping of the vessel and its subsequent search. In the Lady Ellen cases, the primary objection was to the initial boarding, not to the search of the vessel, as the comments of Captain Breslin to the boarding officers gave adequate probable cause to search the vessel. The defendants contended instead that if the initial stop was constitutionally faulty, the discovery of the marijuana was a fruit of an earlier illegality and the marijuana was excludable evidence.23 The circumstances under which domestic vessels can now be stopped on the high seas is discussed later in this article; however, it should be noted that even if the Supreme Court ultimately upholds the full power of the Coast Guard to conduct Section 89 boardings, the subsequent searches of the vessels are subject to scrutiny as being outside the scope necessary to effectuate the statute and enforce the laws. Hence, the crew members’ expectations of privacy in various places aboard the vessel remain relevant.

A second category of defendants found in the Lady Ellen on the other hand, owned the vessel and was aboard when it was searched. He therefore had standing to move for suppression of the evidence.2 This holding should not be taken as authority for granting standing to any person solely because he was aboard the vessel at the time of the search. Presence and ownership in tandem present a much stronger case for an expectation of privacy.

23. 611 F.2d at 39; 617 F.2d at 37.
cases, the operators and owners of the smuggling venture, has been affected by recent Supreme Court decisions. In Brown, the Supreme Court afforded standing to those alleging a proprietary or possessory interest in the premises or the evidence seized. Both the defendants Coats and Govus alleged standing under this category.

Coats alleged a proprietary interest in the Lady Ellen and its cargo, but elected not to testify at the suppression hearing or through an affidavit. Instead he relied upon the testimony of Captain Breslin. The evidence adduced showed that Coats recruited Breslin for the trip, located the Lady Ellen in Bayou LaBatre, Alabama, and negotiated for its purchase. Coats argued that this evidence showed that he was the owner of the boat and an investor in the operation; therefore, he should be afforded standing. Both the district court and the Fourth Circuit rejected that argument. 24

The Fourth Circuit found that Coats was actually a subordinate of the defendant Govus and was charged with locating a vessel and a crew. The right of possession and control of the vessel shifted to Govus when he arrived in Bayou LaBatre with the two suitcases and money and gave directions for the trip to Colombia, where he once again rendezvoused with the Lady Ellen. The clear and not surprising import of the Coats decision is that without more, the mere leasing of a boat for another and outfitting it for a voyage, will not raise an expectation of privacy aboard the vessel when it is stopped on the high seas. 25

In Harper, the Fourth Circuit found it unnecessary to decide whether each defendant had standing because it found the search to be reasonable under the fourth amendment. It did, however, note that only some of the defendants actually had standing. 26 In particular, the Court found that Govus had the right of possession and control of the Lady Ellen, bringing him within the second of

24. 611 F.2d at 40.
25. United States v. Warren, 550 F.2d 219, 228 (5th Cir. 1977), rev’d on other grounds, 578 F.2d 1058 (5th Cir. 1978).
26. The majority of the defendants were arrested at Back Creek in Craven County, North Carolina. After the Lady Ellen was boarded, Captain Breslin and the crew agreed to cooperate in a “controlled drop” in North Carolina, the original destination. Unbeknownst to the other conspirators, the Coast Guard ferried the Lady Ellen to North Carolina, placed the original crew back aboard, and surveilled it as it proceeded through the Beaufort Inlet and northward to Back Creek. As the Lady Ellen was being unloaded, federal and state officers converged on the area, reseizing the marijuana and arresting many of the ultimate defendants.
the Brown criteria; that is, a possessory interest in the premises. In addition, Govus had alleged at the trial court a proprietary interest in the marijuana itself. It now appears in light of recent cases discussed below that the latter allegation alone would not have been enough to confer standing.

In Rawlings v. Kentucky, the Supreme Court considered the search of a pocketbook which resulted in the seizure of a quantity of illegal drugs. Rawlings had placed the drugs in a companion’s pocketbook prior to the arrival of the police. Nevertheless, Rawlings contended that he should be allowed to challenge the search because he claimed ownership of the drugs in the pocketbook. In rejecting this claim, the Court noted that it had in Rakas “emphatically rejected the notion that ‘arcane’ concepts of property law ought to control the ability to claim the protection of the Fourth Amendment.” Although ownership of the drugs may be a factor, the pivotal inquiry after Rawlings was once more whether the defendant had any expectation of privacy in the place searched. After this decision, it is unlikely that there will be any successful challenges to searches of vessels by persons not on the vessel at the time of the search who merely allege ownership of the contraband aboard.

The Rawlings decision does however, leave open the possibility that the defendant will be able to establish an expectation of privacy in a vessel on the high seas by showing a possessory or ownership interest in the vessel itself as opposed to its cargo. For example, the Fourth Circuit found that Govus had the “right of possession and control of the vessel.” That showing may continue to be sufficient to demonstrate an expectation of privacy aboard the vessel; however, in light of the Supreme Court’s reevaluation of the “standing” concept as enunciated in Brown, the possessory or proprietary interest in the premises standard as an independent grounds for standing may be short-lived. A person who sends his vessel outside the country with other persons aboard on a voyage of several thousand miles, including a stop in a foreign country,

27. 100 S. Ct. 2556 (1980).
28. Id. at 2562.
29. In United States v. Jackson, 585 F.2d 653, 656-59 (4th Cir. 1978), the Court anticipated the Rawlings decision and held that an allegation of a “proprietary or possessory” interest in the thing seized would not by itself confer standing. The Court relied upon United States v. Lisk, 522 F.2d 228 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976).
30. 611 F.2d at 40.
arguably has little expectation of personal privacy when the vessel is stopped hundreds of miles from where he is. The evidence in *Coats* and *Harper* indicated that not only was Govus at Bayou LaBatre when the vessel left the United States; he was also in Columbia for the loading, and was later in North Carolina awaiting its arrival at Back Creek. Govus also gave Breslin the exclusive directions for the voyage. Since Govus took such an active role in guiding and meeting the *Lady Ellen*, he was able to advance a stronger claim of expectation of privacy than an owner-organizer who remained in the United States and whose only contact with the vessel was through subordinates.

The defendants in the *Lady Ellen* cases were convicted only of conspiracy to import marijuana. At the time it was not a violation of United States law to possess marijuana aboard an American vessel on the high seas, and the government was forced to rely upon the conspiracy violation. Nevertheless, the defendants sought to establish standing by expanding upon the third criteria in the *Brown* decision, an indictment that alleges an offense in which possession of the item seized is an essential element. The defendants argued that the indictment alleged that they all

shared in a common venture that had a proprietary or possessory interest in the *Lady Ellen* and the evidence found in the search of her. As business partners all had interests in the property belonging to the joint venture. Although they might share unequally in the property, they had in common a reasonable expectation of privacy in it regardless of whether they were nominal title holders.

In effect, the defendants were contending that all members of a conspiracy had standing.

As noted earlier, neither side questioned at the time the vitality of *Brown*; nor did either party challenge the rule of *Jones v. United States*. Both cases held that a defendant charged with a crime that includes possession of the seized item as an essential element has automatic standing to contest its seizure. This exception to the requirement that each defendant affirmatively establish standing was based in part upon the unwillingness of the Supreme

31. *Id.*
32. 611 F.2d at 37-8; 617 F.2d at 35.
Court to allow the government to allege the contradictory positions that the defendant possessed the seized goods for purposes of criminal liability, while simultaneously alleging that he did not possess them for purposes of claiming the protections of the fourth amendment.

The government instead argued that the *Jones* rule was inapplicable because the defendants were not charged with possession of marijuana but rather with conspiracy to import marijuana, and that possession of marijuana was not an essential element of the conspiracy charge. Although the Fourth Circuit never decided the standing issue in the *Harper* decision, the government's argument was well supported by an earlier Fourth Circuit decision. 35 36 On the same day that it rendered the *Rawlings* decision, the Supreme Court decided the case of *United States v. Salvucci*. 36 In that case, *Jones* and the third prong of *Brown* were specifically overruled and the automatic standing doctrine for possessory offenses was laid to rest. The Supreme Court considered in *Salvucci* the search of one of the defendant's mother's rented apartment during which stolen mail matter was recovered. The defendants, charged with possession of stolen mail, questioned the sufficiency of the affidavit for the warrant. The Supreme Court held that possession would still be considered but declined "to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." 37

This decision had little effect on searches and seizures on the high seas at the time. It was not a violation of any criminal statute for a United States citizen to possess controlled substances aboard a domestic vessel on the high seas. 38 However, on September 15, 1980, President Carter signed into law an amendment to the Comprehensive Drug Abuse Control and Prevention Act of 1970 which

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35. In *United States v. Crowell*, 586 F.2d 1020, 1026 (4th Cir. 1978), the Court held that the defendant charged with conspiracy to manufacture and possess a controlled substance and traveling in interstate commerce in aid of a racketeering enterprise had no standing to contest the validity of the seizure of the controlled substances because possession of the items seized was not an essential element of the offenses charged.

36. 100 S. Ct. 2547 (1980).

37. Id. at 2553.

made it unlawful for any person on board a United States vessel or any vessel subject to the jurisdiction of the United States on the high seas to possess a controlled substance with intent to distribute. The amendment also made it unlawful for a United States citizen to possess with intent to distribute a controlled substance aboard any vessel. 39

Following the decisions in Coats and Harper and the recent Supreme Court pronouncements, it is apparent that fewer and fewer defendants are going to be able to contest stops and searches on the high seas. The former categories which gave "automatic standing" have been abrogated and the burden is now on each defendant to establish an expectation of privacy in the area searched. There will apparently be no ready categories but rather an ad hoc decision in each case as to whether there is an expectation of privacy. In light of the Supreme Court's clear trend to restrict the "exclusionary rule," it is likely that the burden will indeed be a tough one. The persons who seem to be in the best position are the owners of the boats and their cargos. The owner of the vessel is most often the organizer or at least the financial backer. The emerging trend raises the spectre that attorneys, both defense and prosecution, have criticized — that the party most culpable may be the only party with an expectation of privacy and who escapes prosecution, while those with lesser roles are not allowed the benefits of the exclusionary rule.

In the 1980 amendment, Congress gave federal prosecutors a powerful weapon in their apparently never-ending battle with the smugglers. 40 The Salvucci decision gave added force to the new


40. The following comments appeared in the Narcotics Newsletter, Vol. II, No. 9 (September, 1980), a publication of the Criminal Division of the United States Department of Justice:

The measure will fill a void existing in the Comprehensive Drug Abuse Prevention and Control Act which fails to proscribe possession of controlled substances on the high seas. In the past, controlled substance offenders apprehended on the high seas have been prosecuted for unlawfully conspiring or attempting to import controlled substances. Such prosecutions have involved troublesome evidentiary difficulties. The measure should make it much easier to prosecute the officers and crews of such vessels as well as other individuals involved in drug smuggling operations.

Federal prosecutors in the Eastern District wasted no time in implementing the new statute. The grand jury returned indictments on January 6, 1981 under the
statute. Prior to the decision, each person charged under the new statute would have had "automatic standing." That is no longer the case, inasmuch as each defendant will now have to demonstrate some measure of expectation of privacy in the area searched or item seized. As noted above, that task has become increasingly difficult.

IV. REASONABLENESS OF THE STOP

A. STATUTORY AUTHORITY

The primary statutory source of authority for searches and seizures of domestic vessels on the high seas is 14 U.S.C. § 89(a), which reads in part as follows:

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of the 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.

This statute and its antecedents are almost as old as the country itself. The country's first customs statute was enacted in 1789, and granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they have reason to suspect goods, wares, or merchandise subject to duty shall be concealed . . ." The Revenue Cutter Service was established the following statute against four crewmen of the Terry and Jo which was seized thirty-eight miles off the North Carolina coast. United States v. Bradley, No. 81-1-CR-7 (E.D.N.C., filed Jan. 6, 1981).

41. Supra note 10.

42. Act of July 31, 1789, ch. 5, 1 Stat. 29. This act was passed by the same Congress that proposed the fourth amendment. The historical importance of this is noted in Boyd v. United States, 116 U.S. 616, 623 (1886):

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

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year. 43 Section 31 of that act provided as follows:

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. 44

This authority remained unchanged until 1866, when in an Act "to further prevent smuggling and for other purposes," Congress eliminated the previous language of the customs statutes, (that is, "within four leagues of the coast hereof if bound to the United States") and broadened the explicit law enforcement authority of the Revenue Cutter Service. 45 The Coast Guard was created in 1915 to replace the Revenue Cutter Service and the Life-Saving Service of the Treasury. 46 At that time, the duties and powers previously exercised by the Revenue Cutter Service were transferred to the Coast Guard. 47

B. PRIOR DECISIONS CONSTRUING SECTION 89

The constitutional limitations of Section 89 and the ability of the Coast Guard to search American vessels on the high seas were explained by two courts of appeal prior to the Harper decision. The Fifth Circuit had repeatedly held that the Coast Guard has plenary power to stop and board any American flag vessel anywhere on the high seas in the complete absence of probable cause or any particularized suspicion of criminal activity. In the United States v. Warren, 48 the Fifth Circuit sitting en banc considered the stopping of a shrimp boat in the Windward Passage 700 miles from the United States. The Court reversed an earlier panel decision, finding instead that Coast Guard personnel may conduct documen-

43. Ch. 35, § 62, 1 Stat. 175 (1790).
44. Ch. 35, § 31, 1 Stat. 164 (1790).
45. Ch. 301, § 201, 14 Stat. 178 (1866).
47. An exhaustive review of the historical background of Section 89 is found in Carmichael, At Sea with the Fourth Amendment, 32 U. MIAMI L. REV. 51 (1977).
tation and safety inspections and, if during the course of such an inspection, circumstances arise that generate probable cause to believe that a crime is being committed, the Coast Guard may conduct searches, seize evidence, and make arrests. The Fifth Circuit continued to sustain the plenary authority of the Coast Guard, but it has indicated in a more recent opinion that it may not condone searches under the safety and documentation label if the label is merely a blatant pretext for a search to uncover contraband.

The Ninth Circuit addressed the issue in United States v. Piner, a case involving the Coast Guard search of a vessel in the San Francisco Bay. Despite the authority of Section 89(a), the Court held that the random stop and boarding of a vessel after dark for safety and registration inspection without cause to suspect noncompliance was not justified by the governmental need to enforce compliance with safety regulations, and constituted a violation of the fourth amendment. The Ninth Circuit further held that a stop after dark must be for cause, requiring at least a reasonable and articulable suspicion of noncompliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer. Although the Ninth Circuit is apparently the first court to engraft a reasonable suspicion requirement on Section 89, its application to high seas searches may be limited. Significantly, the search in that case was conducted in the internal waters of the United States and the Court emphasized that the search was defective only because it was conducted after dark.

C. Analysis by the Fourth Circuit

The Fourth Circuit held in Harper that the stop and boarding of the Lady Ellen "was lawful, absent any particularized suspicion of criminal activity aboard, because it was undertaken as a system-

49. United States v. Williams, 617 F.2d 1063, 1075 (5th Cir. 1980) (dictum); United States v. Erwin, 602 F.2d 1183, 1184 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980).


51. 608 F.2d 358 (9th Cir. 1979), aff'd 452 F. Supp. 1335 (N.D. Cal. 1978).

52. Id. at 361.

53. Id.
atic 'border' stop and inquiry." Justice Hall, writing for the panel, noted that Section 89(a) by its terms gave the Coast Guard plenary authority to stop and board vessels on the high seas. He also noted that the Fifth Circuit in *Warren* held that Section 89 authorized discretionary boardings of American vessels on the high seas without particularized suspicion about criminal activities aboard to conduct random safety and documentary inspections, and to look for obvious customs and narcotics violations.

The stop and boarding of the *Lady Ellen* was found to be reasonable for four reasons. First, the systematic nature of the boardings did not allow for the "will and whim" of the officers; the boarding arose out of a coordinated effort by several government agencies to stop all American flag ships which passed the maritime checkpoint in a sea lane known for its smuggling traffic.

Secondly, there was a lowered expectation of privacy aboard the *Lady Ellen* because it was a commercial vessel sailing on the high seas. Relaxed fourth amendment standards are reasonable for industries which are historically subject to close supervision and inspection. Commercial shipping, like the liquor and firearms industries, has such a history of government regulation that there is no reasonable expectation of privacy within the industry.

Thirdly, there are great practical difficulties in policing American vessels. A ship is easily lost on the seas and has little contact with government vessels. The mobility and anonymity of the boat require that the government exercise control when there is an opportunity.

To require some particularized suspicion concerning individual vessels in order to carry out a systematic inspection of all vessels in some area of the sea would encourage outright flaunting of the navigation, safety and administrative laws of the United States at the expense of our government's sovereign obligation under international law to police its flag ships.

Finally, the stopping of the *Lady Ellen* was not unlike roadside truck weigh-stations and inspection points which the Supreme Court had found to be reasonable intrusions on privacy interests.

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54. 617 F.2d at 37.
55. *Id.*
56. *Id.* at 38.
57. *Id.*
58. *Id.* at 39.
In the collective mind of the panel, all of these factors coalesced to make the search on the high seas a "special case" and in this instance at least, a reasonable police practice.\(^{60}\)

D. REVIEW OF BORDER SEARCH LAW

An analysis of the Harper decision begins of necessity with a review of the "border search" exception to the warrant requirement: all routine searches which are conducted at the border are per se reasonable within the meaning of the fourth amendment. There is no requirement of probable cause or reasonable suspicion of illegal activity. This rule is a longstanding, historically recognized exception to the fourth amendment's general principle that a warrant be obtained prior to a search. The exception is grounded in the right of a sovereign to control, subject to constitutional restraints, who and what may cross its borders. It is also based upon the lowered levels of expectation of privacy at the border as international travelers are generally aware of the procedures established for border security and knowingly subject themselves to those procedures by crossing the border.\(^{61}\)

During the 1970's, the Supreme Court recognized in a series of cases that certain searches, although not occurring at the actual border, may nevertheless come under the border search umbrella. In Almeida-Sanchez v. United States,\(^{62}\) the Court considered the stopping and search of an automobile by a roving patrol on a California road that at all points lay at least twenty miles north of the Mexican border. The search by the Border Patrol was authorized by a federal statute providing for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States."\(^{63}\) The Court, however, held that any search of a vehicle under the statute by a roving patrol away from the border or its functional equivalent would have to be based upon probable cause or consent.\(^{64}\)

Although it did so by dictum, the Almeida-Sanchez Court solidified the concept of the "functional equivalent" of the border — places away from the actual border that have many of the char-

\(^{60}\) Id. at 39.
64. 413 U.S. at 273.
characteristics of the border and where it is reasonable to allow searches without probable cause to believe that a vehicle is being used to commit a crime. Examples given by the Court included an established station near the border or a point marking the confluence of two or more roads that extend from the border. Another example suggested was an inland airport where nonstop international flights arrive.\textsuperscript{65}

In its later decisions, the Supreme Court delineated the standards for detentions and searches near the border but at places that did not qualify as the functional equivalent of the border. A roving patrol away from the border may conduct brief investigative stops of a vehicle (as opposed to full searches) only when there is a reasonable suspicion to believe that the vehicle may contain illegal aliens.\textsuperscript{66} The Court in \textit{United States v. Ortiz}\textsuperscript{67} extended the rule of \textit{Almeida-Sanchez} and required probable cause for a full search of a vehicle at a fixed checkpoint away from the border. However, a vehicle may be stopped for brief questioning routinely conducted at a permanent checkpoint. Any further detention or search at the checkpoint must be based upon consent or probable cause. The different standards for brief investigatory stops at fixed checkpoints as opposed to roving patrols were not rationalized by any difference in the intrusiveness of the stop, but rather because the generation of "concern or even fright on the part of lawful travelers" is appreciably less in the case of a checkpoint.\textsuperscript{68}

Because of their proximity to Mexico and the Latin American sources of illegal aliens and drugs, the Fifth and Ninth Circuits have been primarily responsible for the development of the rules relating to border searches. However, even prior to the \textit{Harper} decision, the Fourth Circuit had developed a modest body of border search law, most of it of recent vintage. In \textit{United States v. McGlone},\textsuperscript{69} the Court found that a warrantless search of a longshoreman's automobile inside a fenced dock area for pilfered imported goods was reasonable, even though there was no showing that the custodian of the automobile had crossed the border. Likewise, in

\textsuperscript{65} Id. at 272-73.


\textsuperscript{67} 422 U.S. 891, 896-97 (1975); \textit{see also} United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976).

\textsuperscript{68} 422 U.S. at 894-95; \textit{see also} 428 U.S. at 558.

\textsuperscript{69} 394 F.2d 75 (4th Cir. 1968).
United States v. Gallagher,\textsuperscript{70} the defendant shipped a Volkswagen camper from Europe to Baltimore, where it was taken under customs custody and seal to Norfolk, Virginia. Prior to releasing the camper to the defendant, customs officials searched it without a warrant and found hashish. The Fourth Circuit found that the dock area constituted the border, that the search was therefore reasonable under the fourth amendment, and that the defendant conceded the searching officers had "reasonable cause to suspect" a violation of law as required by 19 U.S.C. § 482.\textsuperscript{71} Finally, in United States v. Milroy,\textsuperscript{72} the Court upheld the warrantless search of envelopes in San Francisco that were mailed at an APO postal unit as a valid border search.

The Fourth Circuit was first presented with an "extended border search" in United States v. Bilir.\textsuperscript{73} In that case, agents searched without a warrant a suitcase carried by one of the defendants in a railroad station and discovered a large quantity of heroin. Although the search was made three to four miles from the actual border and seven hours after the observed border crossing (suspect left ship in Baltimore harbor), the Court found that the search was justifiable as an extended border search primarily because the suspects had been under practically continuous surveillance in the interval between the search and the border crossing. The Court summarized the extended border search doctrine as follows:

\begin{quote}
It holds that some searches by customs officials, although con-
\end{quote}

\textsuperscript{71} 19 U.S.C. § 482 (1976) reads as follows:

\begin{quote}
Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.
\end{quote}
\textsuperscript{72} 538 F.2d 1033 (4th Cir.), \textit{cert. denied}, 426 U.S. 924 (1976).
\textsuperscript{73} 592 F.2d 735 (4th Cir. 1979).
ducted at points physically away from an actual border and removed in time from the precise item of importation, may nevertheless be treated as border searches. (citation omitted) The test of validity is one of reasonableness under the circumstances. For this no rigid formula can be prescribed. Time and distance factors may be of importance, but are not alone decisive. Ultimately the question is simply whether under all the circumstances — time and distance factors included — the customs officials had a reasonable basis for the suspicion leading to the search away from the actual border (emphasis added).\textsuperscript{74}

Although Judge Phillips expressed considerable confusion in the opinion as to whether there was a difference between “extensions of the border” and the “functional equivalent of the border,”\textsuperscript{75} it is clear from the opinion that unless the search is actually conducted at the border or its functional equivalent, it must be based upon some reasonable suspicion that material recently illegally imported would be disclosed. (It is likewise apparent that the Court’s requirement of reasonable suspicion was based upon a constitutional standard in addition to the requirement of 19 U.S.C. § 482).

The \textit{Bilir} Court also anticipated the issues that would be raised in the \textit{Harper} opinion. The Court noted that 19 U.S.C. § 482 authorized a search of any trunk or envelope “wherever found,” but opined that the “statute’s literal assertion of an unlimited geographical and temporal extension of border search authority . . . is assuredly subject to ultimate constitutional constraints.”\textsuperscript{76} Later the \textit{Bilir} Court noted that the Supreme Court still considers open the question of the geographical limits to which the border search authority embodied in such statutes as 19 U.S.C. § 482 may constitutionally be taken.\textsuperscript{77}

\section*{E. Analysis of the Opinion}

In the \textit{Harper} opinion, the Fourth Circuit did not decide the broad issue advanced by the defendants, that is, whether the Coast Guard may stop and board American ships without probable cause or even reasonable suspicion of criminal activity. Instead, the Court decided only that upon the specific facts of the case, both

\begin{itemize}
  \item \textsuperscript{74} \textit{Id.} at 740.
  \item \textsuperscript{75} \textit{Id.} at 742, nn. 11 & 12.
  \item \textsuperscript{76} \textit{Id.} at 739, n. 6.
  \item \textsuperscript{77} \textit{Id.} at 742, n. 13.
\end{itemize}
the stop and search of the *Lady Ellen* were reasonable without any particularized suspicion. Not only does the opinion leave many questions unanswered; it also raises new questions about the scope of the "border search" exception to the requirement that searches and seizures be based upon probable cause.

The Fourth Circuit held that the *Harper* search was reasonable "because it was undertaken as a systematic 'border' stop and inquiry." The government had indeed argued that the stop was under the border search umbrella, contending that the Mona Passage was the "functional equivalent of the border." It asked the Court to give the term "border" a geographically flexible meaning and to extend it to the well-defined sea lane, even though it was outside the continental United States and 800 miles from the North Carolina coast. It argued that the shipping lanes from Colombia were easy to identify and that the Coast Guard had placed ships in the three narrow passages in the Caribbean because it knew that marijuana-laden vessels traversed them on the way to the United States. It further argued that the chances of detecting marijuana headed for the United States were considerably greater at these "checkpoints" than would be the case along the actual border. Therefore, according to the government, the passages became the functional equivalent of the border or a fixed checkpoint as approved in *United States v. Martinez-Fuerte,* even though they are located outside the continental United States. The government advanced no direct authority for this extension of the border outside the territorial limits, but relied upon the *Bilir* opinion that refused to lay down any hard and fast rules for extended border searches.

The language of the opinion produces doubt as to whether the Fourth Circuit actually considered this to be a border search. In the first place, it chose to place the term "border" in quotation marks, a recognition perhaps that it was in some respects like a border search but without actually being one. Secondly, the Court noted that the search on the high seas is a special case, "in much the same sense that a border search is." This is a further indication that the Court was not trying to place the stop directly in the

78. 617 F.2d at 37.
81. 617 F.2d at 39.
border search pigeon hole.

Furthermore, the stop of the Lady Ellen does not fall into the definitions of extended border searches developed by the Supreme Court and the Fourth Circuit. If the Fourth Circuit has adopted the government's "convex-concave" approach to border searches, it is the first court to justify a search outside the territorial waters of the United States as an extended border search when there is no reason to believe there has been a recent crossing of the international border. Although numerous decisions note that border searches may be conducted at places other than the actual border, all of the searches occurred to the interior of the border and there is no discussion of whether the border may be extended outward.

In the overview of border search law as developed by the Supreme Court and Fourth Circuit, it was noted that there must be at least reasonable suspicion of criminal activity before a car is stopped unless the stop occurs at the actual border, its functional equivalent, or at a permanent checkpoint. There is no requirement of any suspicion at the functional equivalent or permanent checkpoint, but at the checkpoint, a vehicle may be stopped only for brief questioning routinely conducted there. Since the Harper opinion does not discuss the stopping of the vessel in traditional terms, it is not clear whether the Fourth Circuit considered the stop as coming within the internal border search categories of functional equivalent or fixed checkpoint; however, at one point in the decision, the Court noted that the stop "was conducted at a checkpoint in waters well known as sea lanes for such clandestine operations." This may be an indication that the Court considered the positioning of the Alert in the Mona Passage to be the establishment of a fixed checkpoint as discussed in Martinez-Fuerte.

In that opinion, the Supreme Court held that the maintenance of a traffic-checking program in the nation's interior on important highways was necessary because the flow of illegal aliens could not be controlled effectively at the border. The Court approved the brief stopping of automobiles at these permanent checkpoints for questioning and visual inspection without any individualized suspicion of wrongdoing; however, it held there could be no full search of the car at these checkpoints unless probable cause was developed.

Although the Fourth Circuit did not directly analogize the

82. Id. at 38.
83. 428 U.S. at 566-67.
facts of the *Harper* case to the roadside checkpoint, it discussed the same factors that justified the stop at the checkpoints removed from the border. For example, the position of the *Alert* was fixed in the Mona Passage and all vessels under 250 feet in length were boarded, thus reducing the discretion of the officers aboard. Further, the mere stopping and boarding of the vessel for the production of documents and a brief inquiry pose a minimal intrusion on privacy interests. Also, the establishment of checkpoints on the high seas is necessary, since it is impossible to control the flow of drugs by screening each ship at the border. Finally, the Fourth Circuit directly compared the *Alert* to a roadside inspection point.

Although the comparison of the stop of the *Lady Ellen* to the roadside checkpoint is appealing, there are significant differences between the two. In the first place, the checkpoint inspection on a major highway may be accomplished by stopping the vehicle and an officer making a brief inquiry and visual search of the interior of the car. This process averaged five minutes at the San Clemente, California, checkpoint. On the other hand, the stopping of the *Lady Ellen* was much more intrusive than a stop at the highway checkpoint. The *Lady Ellen* was detected by radar from a distance of many miles and a helicopter was dispatched to identify the vessel. The helicopter pilot shone a bright light over the deck and determined the name, registry and home port of the vessel. Radio contact was then established between the ship and the *Lady Ellen* was directed to "heave to." The stop of the *Lady Ellen* illustrates the differences between the highway checkpoint and the maritime checkpoint; the vessels to be checked do not pass directly by the Coast Guard vessel and must be hailed from a distance or sought out. It is not uncommon for the complete process to last over an hour or even as much as three hours, depending on the distances included and the weather conditions. Further, as practiced by the Coast Guard, the stop involves more than a direction to stop, to allow the Coast Guard to dispatch a helicopter or come closer to make observations, and to question the captain of the vessel by radio or by hailing from close distances. The Coast Guard instead actually comes aboard the vessel with an armed boarding party.

The second significant difference is the permanency of the highway checkpoint. In *Martinez-Fuerte*, the Supreme Court noted that the checkpoint was permanent in place and in operation

84. *Id.* at 551.
seventy percent of the time. The assignment of the Alert to the Mona Passage by no means created a permanent checkpoint. Its assignment there was limited, and there was no evidence that the Coast Guard maintained a vessel in the Passage on a permanent basis. Rather, the Alert was there only as a part of "Operation Stopgap." Further, the Alert was not stationed at a fixed point in the fifty mile wide Mona Passage; instead, it roamed at will throughout the passage in much the same manner as the roving patrols condemned in Almedia-Sanchez. Moreover, the Alert was incapable of stopping all of the ships steaming through the Mona Passage because of its size and the lack of a uniform route through the passage.

The other traditional exception to the probable cause requirement associated with the searches away from the border is that searches conducted at the functional equivalent of the border do not require probable cause. The Mona Passage would not appear, however, to qualify as a functional equivalent of the border.

The lower federal courts have developed three factors to determine whether checkpoints near an international border are the functional equivalents of border searches. These factors have assumed that the search was inside the international border. The first factor is the relative permanence of the checkpoint; that is, does it function like a permanent border checkpoint or like a roving patrol? As discussed above, the voyage of the Alert was roving in nature. The second factor is the relatively minimal interruption of purely domestic traffic; that is, the checkpoint should not intercept anything approaching a majority of domestic traffic. The Alert met this criterion by stopping only American vessels; however, because of the distance from the border, the Alert could not determine whether the American flag vessels were bound for domestic or foreign ports. There was no evidence presented by the government that would indicate the percentage of north bound American flag vessels in the passage that were bound for the United States. The third criterion is the capability to monitor portions of international traffic not otherwise practically controllable. It appears that the government could overcome this hurdle since

85. Id. at 554.
there is no effective way to monitor all incoming ships at the actual border. Despite the similarities, the checkpoint established by the Coast Guard failed to meet the criteria established for internal functional equivalents of the border.

The determination by the Fourth Circuit that the stop of the Lady Ellen was a valid border search raises numerous questions, the answers to which are not obvious. The first question is whether the border search exception is limited to searches conducted only in the three major passages in the Caribbean, or whether there are other places outside the border where border searches may be conducted. The only requirements intimated by the Court in Harper were that a checkpoint be established "in waters well known as sea lanes for such clandestine operations" and that it be conducted in a "well-traveled sea lane."87 Under this criteria, it would appear that the Coast Guard could isolate an area on the Colombian coast which was known for loading American vessels with marijuana and post enough vessels in international waters just outside the border to intercept all outgoing American vessels. The stopping and boarding should qualify as a border search even though it is further from the United States. If a border search could be conducted 800 miles from the actual border, there is no reason why a border search could not be conducted anywhere in international waters.

Secondly, the question of what constitutes a maritime checkpoint remains subject to elucidation. How long does a boat have to be in a specified area before it becomes a checkpoint? What is the size of the area that the boat can patrol? Is it limited to a relatively narrow passage such as the Mona Passage or may the Coast Guard select a sea lane on the open seas? Do all American flag vessels that are detected in the area of surveillance have to be stopped and boarded? May American vessels that are sailing away from the mainland be stopped as well as those sailing in the general direction of the mainland? And lastly, are actual boardings always justified or are there situations when the intrusion must initially be limited to observations from other vessels and radio contact?

After this discussion of the Fourth Circuit's handling of the Lady Ellen matter, it may be well to remember the admonition of Judge Butzner in United States v. McGlone:

The numerous cases dealing with "border searches" uniformly

87. 617 F.2d at 38-9.
recognize that validity of a search and seizure made by a customs officer does not depend simply upon whether it can be categorized as a "border search." The term is simply descriptive. Regardless of its label, the standard for search by customs, as for any search, is the constitutional requirement of reasonableness...

There is no question that the Fourth Circuit found the stop of the Lady Ellen to be reasonable. That conclusion is supported by the many factors that the Court cited as coalescing "to make the search on the high seas a special case." As noted above, the appellation given to the stop is not only novel but also raises serious questions about its later application. Written opinions in criminal cases are intended not only to be notice to the litigants in that case but are also intended to be a guide for police and defendants in the future. Although the term "border" is nothing more than a label, it does provide established guidelines for determination of reasonableness, at least for searches within or at the border. By finding that a border search can be conducted on the high seas, the Fourth Circuit has utilized a descriptive term, the guidelines for which do not always readily fit searches on the high seas.

In any event, it is clear that the Fourth Circuit did not adopt wholesale the position of the Fifth Circuit. It stopped short of holding that the Coast Guard had unbridled discretion in stopping, boarding, and searching American vessels under Section 89(a). Instead, it apparently established a new category of "external border searches," albeit a category whose parameters are not well-defined.

V. Conclusion

The task of the attorney defending the smuggler whose boat is seized on the high seas has indeed been toughened by the Supreme Court and the Fourth Circuit. Not only may his client be foreclosed from litigating the validity of the seizure of the marijuana-laden vessel; he may find, if he is able to pass the initial hurdle, that the courts will sustain the reasonableness of the search itself. It has long been the feeling of many defense attorneys 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. The recent rulings by the Supreme Court restricting the scope of the fourth amendment have merely fueled the claims that the protections of the fourth amendment are being

88. 394 F.2d 75, 77 (4th Cir. 1968).
sacrificed to combat a law enforcement problem of great magnitude.

The willingness of the Fourth Circuit in Harper to fashion a new exception to the requirement of probable cause is a part of that trend. In its decision in Bilir, the Fourth Circuit stated that there were ultimate geographic limitations on border searches. After the Harper decision, the defense attorney must ask himself if there are in fact any geographic limitations on the border search authority or any circumstances under which a search on the high seas will be unreasonable in the Fourth Circuit.