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## Fourth Amendment--Steering Away from Automobile Detention Precedents to Justify Warrantless Searches of Pleasure Boats in Inland Waters

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## FOURTH AMENDMENT—STEERING AWAY FROM AUTOMOBILE DETENTION PRECEDENTS TO JUSTIFY WARRANTLESS SEARCHES OF PLEASURE BOATS IN INLAND WATERS

**United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983).**

### I. INTRODUCTION

United States Customs law, in 19 U.S.C. § 1581(a),<sup>1</sup> grants Customs officers virtually unlimited authority to stop and search vessels located at any place within the United States and to use all necessary force to compel compliance. In *United States v. Villamonte-Marquez*,<sup>2</sup> the United States Supreme Court held that, consistent with the fourth amendment, Customs officials, acting pursuant to this statute and without any suspicion of wrongdoing, may board a vessel located in waters providing ready access to open seas to inspect documents.

In reaching this holding, the Court distinguished its most recent vehicle stop precedent, *Delaware v. Prouse*.<sup>3</sup> In *Prouse*, the Court held that

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<sup>1</sup> 19 U.S.C. § 1581(a) (1980) provides that

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

The term "customs waters" is defined in 19 U.S.C. § 1401(j) (1980) as follows:

[I]n the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States . . . the waters within such distance of the coast of the United States as permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States.

Where American vessels are concerned, Customs waters are waters within 12 nautical miles of the United States coast, but do not include waters inland of the coastline. *United States v. Watkins*, 662 F.2d 1090, 1095 (4th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

<sup>2</sup> 103 S. Ct. 2573 (1983). While Section 1581(a) grants Customs officers such broad authority to stop and search vessels, the Court limited its holding to document checks of vessels in waters providing ready access to the open sea. *Id.* at 2575 n.2.

<sup>3</sup> 440 U.S. 648 (1979).

the fourth amendment prohibits police officers from stopping an automobile and detaining the driver to check his license and registration unless they have at least articulable and reasonable suspicion of a law violation.<sup>4</sup> The *Villamonte-Marquez* Court, however, distinguished *Prouse* on the basis of differences between the nature of waterborne traffic in waters providing ready access to the open sea and the nature of vehicular traffic on highways.<sup>5</sup>

While the distinctions asserted by the Court generally are valid, the Court failed to explain how these distinctions eliminate the need to limit the discretion of officers in the field. This Note argues that the Court applied the principles of its vehicle stop precedents<sup>6</sup> incorrectly in concluding that the fourth amendment does not proscribe suspicionless vessel boardings.

The Court's departure from its vehicle stop precedents is inconsistent with the fourth amendment. In the absence of at least an articulable suspicion of a law violation, the fourth amendment demands that pleasure boats be detained only at fixed checkpoints.

## II. FACTS OF *VILLAMONTE-MARQUEZ*

Near midday on March 6, 1980, Customs officers patrolling the Calcasieu River Ship Channel,<sup>7</sup> some eighteen miles inland from the Gulf Coast, sighted a forty-foot sailboat anchored in the channel.<sup>8</sup> A Louisiana state policeman accompanied the Customs officers, who were following an informant's tip that a vessel in the ship channel might be carrying marijuana.<sup>9</sup> After the wake created by a large freighter caused the sailboat to rock violently, the officers sighted respondent Hamparian on deck and asked if the sailboat and crew were all right. When the respondent only "shrugged his shoulders in an unresponsive manner," one Customs officer and the policeman boarded the sailboat to check the vessel's documentation under the authority of Section 1581(a).<sup>10</sup>

While examining the documentation, the Customs officer smelled what he thought was burning marijuana.<sup>11</sup> The Customs officer arrested both Hamparian and his companion, Villamonte-Marquez, after he ob-

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<sup>4</sup> *Id.* at 663. In *Prouse*, the Court was concerned primarily with the need to protect individuals from arbitrary invasions by Government officials. *Id.* at 661.

<sup>5</sup> *Villamonte-Marquez*, 103 S. Ct. at 2582.

<sup>6</sup> See *infra* note 30.

<sup>7</sup> The majority described the ship channel as "a separate thoroughfare to the west of . . . [Calcasieu] Lake through which all vessels moving between Lake Charles and the open sea of the Gulf must traverse." *Villamonte-Marquez*, 103 S. Ct. at 2576.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2577 n.3.

<sup>10</sup> *Id.* at 2576-77.

<sup>11</sup> *Id.*

served 5,800 pounds of marijuana in burlap-wrapped bags when he looked through an open hatch.<sup>12</sup>

At trial, respondents moved to suppress the marijuana, alleging an unlawful search and seizure of the sailboat. The District Court denied the motion and the jury found respondents guilty of violating federal drug laws.<sup>13</sup> The Court of Appeals for the Fifth Circuit reversed the conviction, holding that Customs officials may board a vessel in inland waters only if they have either "reasonable suspicion of a Customs violation" or reason to believe the vessel has crossed the border.<sup>14</sup> Because at the time the officers boarded the vessel there was neither a nexus with the border nor a reasonable suspicion of a law violation, the Circuit Court ruled that the District Court had erred in denying respondents' motion to suppress.<sup>15</sup> Referring to a conflict among the circuits<sup>16</sup> and the importance of the question presented, the Supreme Court granted certiorari<sup>17</sup> to decide whether Customs officials, acting pursuant to Section 1581(a), constitutionally may board a vessel located in waters pro-

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<sup>12</sup> *Id.*

<sup>13</sup> *United States v. Villamonte-Marquez*, 652 F.2d 481, 484 (5th Cir. 1981), *rev'd*, 103 S. Ct. 2573 (1983).

<sup>14</sup> *Id.* at 485-86.

<sup>15</sup> *Id.* at 486.

<sup>16</sup> 103 S. Ct. at 2577. While the Court professed to have granted certiorari in part to resolve a conflict among the circuits, the lower courts that have dealt with the issue uniformly have required a reasonable suspicion of a law violation to support an investigatory stop of a vessel in inland waters pursuant to Section 1581(a). *See, e.g.*, *Blair v. United States*, 665 F.2d 500, 505 (4th Cir. 1981); *United States v. Guillen-Linares*, 643 F.2d 1054, 1056 (5th Cir. 1981). The Court, however, stressed that the *Villamonte-Marquez* decision is limited to waters providing ready access to the open sea. Only the Fifth Circuit seems to have addressed this issue. In *United States v. Serrano*, 607 F.2d 1145, 1148 (5th Cir. 1979), *cert. denied*, 445 U.S. 965, *cert. denied sub nom. Hernandez v. United States*, 446 U.S. 910 (1980), the Fifth Circuit held that a reasonable suspicion of illegal activity will justify an investigatory stop of a vessel in inland waters adjacent to the open Gulf of Mexico. The circuits disagree on the standard of suspicion required to sustain a stop of a vessel in Customs waters. *See United States v. Alonso*, 673 F.2d 334 (11th Cir. 1982); *United States v. Freeman*, 579 F.2d 942 (5th Cir. 1978) (Customs officers may stop vessels in Customs waters in the absence of "even a modicum of suspicion"). *But see United States v. Odneal*, 565 F.2d 598 (9th Cir.), *cert. denied*, 435 U.S. 952 (1977) (Customs officers may stop vessels with articulable facts to support suspicion that the vessel is carrying contraband). The *Odoneal* court, however, did not mention the fact that the boarding, which occurred 16 miles from the coast, was outside of Customs waters and therefore not within Customs' jurisdiction under Section 1581(a). *See supra* note 1.

<sup>17</sup> The Court declined several opportunities to declare the case moot and thereby avoid a decision on the merits. First, the Government's deportation of respondents after the Circuit Court's reversal could have rendered the case moot. *Villamonte-Marquez*, 103 S. Ct. at 2575 n.2. Second, the Court could have found the case mooted by the Government's voluntary dismissal of respondents' indictments after the Circuit Court's reversal. *Id.*

Relying upon *United States v. Sarmiento-Rozo*, 592 F.2d 1318 (5th Cir. 1979), respondents contended that their deportation made the case moot. In *Sarmiento-Rozo*, after the District Court dismissed indictments against eight Columbian seamen charged with attempted importation of marijuana, the Government immediately deported the defendants. *Id.* at 1319. On appeal of the dismissal of the indictments, the Fifth Circuit dismissed the case as

viding ready access to open seas to check documents without any suspicion of wrongdoing.<sup>18</sup>

### III. THE SUPREME COURT DECISION

#### A. THE MAJORITY OPINION

The Supreme Court reversed the Fifth Circuit, with Justice Rehnquist speaking for the majority.<sup>19</sup> Recognizing that the language of Section 1581(a) seems to grant Customs officers almost unlimited authority and discretion, the Court noted that the fourth amendment<sup>20</sup> prohibition against unreasonable searches and seizures limits such authority.<sup>21</sup> In upholding the reasonableness of Section 1581(a), the Court rested its decision almost exclusively upon two arguments. First, the enactment of the lineal ancestor of Section 1581(a) by the same Congress that promul-

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moot because the deportation of the defendants "deprived the controversy . . . of any 'impact of actuality.'" *Id.* at 1320.

While Justice Rehnquist recognized that *Sarmiento-Rozo* provided "some authority for respondents' argument," he rejected the respondents' contention. *Villamonte-Masquez*, 103 S. Ct. at 2575 n.2. Relying on *United States v. Campos-Serano*, 404 U.S. 293 (1971), he noted that "as a collateral consequence of the convictions, the Government could bar any attempt by respondents to voluntarily re-enter this country." *Id.* Furthermore, if the respondents managed to re-enter the United States they would be subject to arrest and imprisonment for the convictions. *Id.*

Respondents also argued that the voluntary dismissal of the indictment in the District Court, following the reversal by the Court of Appeals, rendered the case moot. Apparently, no court has decided whether an indictment may be reinstated after a voluntary dismissal by the prosecution under Rule 48(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE. The majority in *Villamonte-Masquez* held that a successful effort by the Government to reverse the judgment of the Court of Appeals would reinstate the judgment of conviction because upon a defendant's conviction, an indictment is merged into the conviction and the sentencing. 103 S. Ct. at 2576 n.2. In his dissent, however, Justice Brennan correctly noted that the doctrine of merger means only "that the indictment can be attacked on appeal from the conviction, and if it is defective, the entire conviction and sentence falls." *Id.* at 2584 (Brennan, J., dissenting).

Justice Brennan distinguished *Villamonte-Marquez* from cases in which the Court has allowed appeals from a mandatory dismissal entered to comply with a lower court's mandate. *See, e.g., Mancusi v. Stubbs*, 408 U.S. 204 (1972). In *Villamonte-Marquez*, however, the Government was not compelled to dismiss the indictment and *Mancusi* is not applicable.

Finally, the Court could have refused certiorari because the United States permitted both the stay and an extension granted by the Court of Appeals to expire before it filed its petition for writ of certiorari. *Villamonte-Marquez*, 103 S. Ct. at 2583 (Brennan, J., dissenting).

<sup>18</sup> *Villamonte-Marquez*, 103 S. Ct. at 2575, 2577.

<sup>19</sup> Chief Justice Burger and Justices Powell, O'Connor, White and Blackmun joined Justice Rehnquist.

<sup>20</sup> 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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>21</sup> *Villamonte-Marquez*, 103 S. Ct. at 2578.

gated the Bill of Rights gives the statute an "impressive historical pedigree."<sup>22</sup> Second, the nature of waterborne traffic in waters providing ready access to the open sea is sufficiently different from the nature of vehicular traffic on highways to make alternatives to random stops less likely to accomplish the governmental purposes involved.<sup>23</sup>

In 1790 the First Congress enacted the Act of August 4, 1790 "to provide more effectually for the collection of the duties imposed by law on goods . . . imported into the United States."<sup>24</sup> The Court regarded Section 31 of that Act as the lineal ancestor of 19 U.S.C. § 1581(a), upon which the government sought to sustain the vessel boarding in *Villamonte-Marquez*.<sup>25</sup> Conceding that "no Act of Congress can authorize a violation of the Constitution," the Court agreed with respondents' contention that the fourth amendment prohibition against unreasonable searches and seizures circumscribes the statute.<sup>26</sup> Because the same Congress that had promulgated the Bill of Rights also enacted Section 31, the Court believed that "the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment."<sup>27</sup>

Continuing its inquiry into the constitutionality of the boarding,

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2582.

<sup>24</sup> Act of August 4, 1790, ch. 35, 1 Stat. 145 (1845).

<sup>25</sup> Section 31 of the Act of August 4, 1790 grants Customs officials almost identical authority to that granted by 19 U.S.C. § 1581(a). The Act was adopted during the second session of the First Congress. During its first session, the First Congress had promulgated the Act of July 31, 1789, which had not granted such broad authority to Customs officials.

Section 24 of the 1789 Act granted Customs officials the authority to enter vessels in which they had reason to suspect dutiable goods were concealed. Act of July 31, 1789, ch. 5, 1 Stat. 29, 43 (1845). Section 24 was re-enacted by the First Congress in 1790, with only minor punctuation changes, as Section 48 of the Act of August 4, 1790. Section 31 of the 1790 Act, however, granted Customs officials broader authority to board "vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United States" for the purposes of demanding manifests and of searching the vessels, the cabin, and every other part of the vessel." Act of August 5, 1790, ch. 35, 1 Stat. 145, 164 (1845).

It is unclear why Congress omitted the "reason to suspect" standard contained in Section 24 of the 1789 Act and Section 48 of the 1790 Act. Two facts may explain the lack of an explicit standard in Section 31. The two provisions appear to serve different purposes: the primary purpose of Section 31 was to provide for manifest checks, while that of Section 48 was to provide for inspections for dutiable goods. Since Section 31 also grants almost identical authority to inspect for dutiable goods without any suspicion, this argument seems unsatisfactory. Alternatively, Section 31 could grant broader authority because it was intended to provide a more effective law enforcement tool. While the 1789 Act was entitled "An Act to regulate the Collection of the Duties," Congress entitled the 1790 Act "An Act to provide more effectually for the collection of the duties."

<sup>26</sup> *Villamonte-Masquez*, 103 S. Ct. at 2578 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)).

<sup>27</sup> *Id.* at 2579 (original emphasis removed) (quoting *Boyd v. United States*, 116 U.S. 616 (1886)).

the Court noted that its focus in fourth amendment law has been on the reasonableness of the governmental intrusions.<sup>28</sup> The Court has analyzed the reasonableness of a particular law enforcement practice by balancing the practice's intrusion on an individual's fourth amendment interests against its promotion of substantial governmental interests.<sup>29</sup> In *Villamonte-Marquez*, the Court began by examining the balance previously struck in its vehicle stop and search cases.<sup>30</sup> The majority noted that these past decisions generally required that officers stop citizens at roadblock-type stops or on the basis of some degree of particularized suspicion. Justice Rehnquist contended that the less intrusive and less awesome nature of fixed checkpoints was responsible in part for the difference in outcomes between the roving patrol stop struck down in *United States v. Brignoni-Ponce*<sup>31</sup> and the fixed checkpoint stop upheld in *United States v. Martinez-Fuerte*.<sup>32</sup> Citing *Brignoni-Ponce*, *Martinez-Fuerte* and *Delaware v. Prouse*,<sup>33</sup> the Court conceded that "if the Customs officer in this case had stopped an automobile on a public highway near the border, rather than a vessel in a ship channel, the stop would have run afoul of the Fourth Amendment because of the absence of articulable suspicion."<sup>34</sup>

The Court, however, distinguished investigatory stops of vessels in waters offering ready access to the open sea from stops of automobiles on principal thoroughfares in the border area.<sup>35</sup> First, permanent checkpoints like those upheld in *Martinez-Fuerte* are not "practical on waters such as these where vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do."<sup>36</sup> Second, documentation requirements applicable to vessels differ significantly from the system of vehicle licensing that prevails generally

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g.*, *Delaware v. Prouse*, 440 U.S. 648 (1979) (in the absence of at least a reasonable suspicion that the car is being driven contrary to law, the fourth amendment prohibits stopping an automobile at random to check driver's license and vehicle registration); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (the fourth amendment permits stopping an automobile at a fixed checkpoint for brief questioning of its occupants, even where there is no reason to believe the particular car contains illegal aliens); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1974) (the fourth amendment forbids stopping an automobile at random to ask the occupants about their citizenship without reasonable suspicion that they may be aliens); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (the fourth amendment prohibits the search of an automobile, without probable cause or consent, on a road at least 20 miles north of the Mexican border).

<sup>31</sup> 422 U.S. 873 (1974).

<sup>32</sup> 428 U.S. 543 (1976).

<sup>33</sup> 440 U.S. 648 (1979).

<sup>34</sup> *Villamonte-Marquez*, 103 S. Ct. at 2579.

<sup>35</sup> *Id.* at 2579-80.

<sup>36</sup> *Id.* at 2580.

throughout the United States.<sup>37</sup> Document checks of highway vehicles are not necessary because police officers patrolling highways often can determine merely by observing a vehicle's license plate whether that vehicle is in current compliance with state law.<sup>38</sup> Neither the federal nor state governments issue comparable "license plates" or "stickers" for vessels.<sup>39</sup> Furthermore, the statutes and regulations governing maritime documentation are more complex than the typical state requirements for vehicle licensing.<sup>40</sup>

After distinguishing *Brignoni-Ponce* and *Martinez-Fuerte*, the Court balanced the competing interests, ignoring the balance previously struck in the automobile stop cases. The Court found that the need to make document checks is great and that enforcement of documentation laws substantially furthers the public interest.<sup>41</sup> The Court deemed the resultant intrusion on fourth amendment interests to be quite limited, involving "only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents."<sup>42</sup> Because the government interest in assuring compliance with documentation laws is substantial, particularly in waters where the need to deter smuggling is great, and

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 660-61 (1979)).

<sup>39</sup> *Id.* The Court noted that

[b]oth of the required exterior markings on documented vessels—the name and the hailing port—as well as the numerals displayed by undocumented American boats, are marked at the instance of the owner. . . . [W]here the vessel is of foreign registry it carries only the markings required by its home port.

*Id.*

<sup>40</sup> *Id.* at 2580-81. A vessel must be documented to engage in many commercial marine activities such as coastwise trade, 46 U.S.C. § 65(i) (Supp. IV 1980); trade on the Great Lakes, 46 U.S.C. § 65(j); and the fishing trade. 46 U.S.C. § 65(k). A vessel may not be employed in trades other than those covered by its certificate of documentation. 46 U.S.C. § 65(m).

While pleasure vessels need not be documented, 46 U.S.C. § 65(1), all undocumented vessels equipped with any type of propulsion machinery must have a state-issued number displayed on the exterior of the vessel, 46 U.S.C. §§ 1466, 1470 (1976), and a certificate of number available for inspection on the vessel. 46 U.S.C. § 1469(a) (1976).

The master of every vessel which is required to make entry upon arriving in the United States must have on board a "manifest." 19 U.S.C. § 1431(a). Such vessels of foreign registry, must deliver a copy of the "manifest" to Customs officials. 19 U.S.C. §§ 1431, 1439. Before foreign vessels proceed from one Customs district to another, the master must obtain a permit to proceed. 46 U.S.C. § 313 (1958). Before any vessel departs American waters, its master must deliver its manifest to Customs officials and obtain clearance. 46 U.S.C. § 91 (1958).

<sup>41</sup> *Villamonte-Marquez*, 103 S. Ct. at 2581. The Court found that the documentation laws are "the linchpin for regulation of participation in certain trades, such as fishing, salvaging, towing, and dredging, as well as areas in which trade is sanctioned, and for enforcement of various environmental laws." *Id.* Furthermore, the Court noted that documentation checks play a vital role in the collection of duties, assist the Government in preventing the smuggling of contraband, and contribute to ensuring safety on American waterways. *Id.*

<sup>42</sup> *Id.* at 2581.



the resultant intrusion is only modest, the Court concluded that the boarding was consistent with the fourth amendment.<sup>43</sup>

## B. THE DISSENT

After devoting substantial attention to the mootness issue,<sup>44</sup> Justice Brennan's dissent<sup>45</sup> focused on the Court's holdings in the automobile stop and search cases.<sup>46</sup> Justice Brennan contended that these "cases uniformly hold that any stop or search requires probable cause, reasonable suspicion, or another discretion-limiting feature such as the use of

<sup>43</sup> *Id.* at 2582.

<sup>44</sup> *See supra* note 17.

<sup>45</sup> In a footnote, Justice Brennan also attacked the "impressive historical pedigree" of Section 1581(a), relying in part upon *Maul v. United States*, 274 U.S. 501 (1927). *Villamonte-Masquez*, 103 S. Ct. at 2586 n.7 (Brennan, J., dissenting).

Justice Brennan first contended that Section 31 authorized suspicionless boardings of only those vessels that were bound to the United States. Section 31 authorized the boarding of vessels "in any part of the United States, or within four leagues of the coast thereof, if bound to the United States. . . ." Act of August 4, 1790, ch. 35, 1 Stat. 145, 165 (1845) (emphasis added). Justice Brennan contended that the phrase "if bound to the United States" qualifies both clauses that precede it. *Villamonte-Masquez*, 103 S. Ct. at 2586 n.7 (Brennan, J., dissenting). The majority rejected Justice Brennan's construction of Section 31, recognizing the absurdity of a statute that would authorize the boarding of a vessel found "in any part of the United States" only if that vessel were "bound to the United States." *Id.* at 2578 n.4.

Justice Brennan also argued that, to preserve Section 48's "reason to suspect" standard, Section 31 must be read to apply only to ships entering the country. *Id.* at 2586 n.7; *see also supra* note 25. Justice Rehnquist noted in the majority opinion that Section 48 applied only to searches and seizures of dutiable goods, while only Section 31 deals with boardings to inspect documents. *Id.* at 2578 n.4. Because the two sections were concerned with different matters, nothing in one section could be read to limit the other. Section 31's broad grant of authority to search for and seize dutiable goods, however, undermines Justice Rehnquist's argument.

The First Congress may have intended the "reason to suspect" standard to apply only to those vessels that were either on the high seas or within four leagues of the coast, but not bound for the United States. While Section 31 only applied to those vessels that were either in the United States or within four leagues of the coast and bound for the United States, Section 48 included no similar jurisdictional restriction.

Finally, Justice Brennan argued that in *Maul v. United States*, 274 U.S. 501 (1927), the Court had recognized that "it was not until the enactment of the present statute in 1922 that Congress purported to authorize suspicionless boardings of vessels without regard to whether there had been any border crossing." *Villamonte-Marquez*, 103 S. Ct. at 2586 n.7. The majority correctly noted that Justice Brennan had misread Justice Brandeis' concurring opinion in *Maul*. *Id.* at 2578 n.4. In *Maul*, Justice Brandeis was referring to a change that Congress had made to a predecessor of Section 1581(a) in 1922, omitting the phrase "if bound to the United States." 274 U.S. at 528-29. Justice Brandeis concluded that it was not until 1922 that Congress had authorized document boardings of a vessel within four leagues of the coast without regard to whether or not that vessel was bound to the United States. *Id.* Justice Brandeis' concurring opinion offers no support for Justice Brennan's position, however, because the vessel stopped in *Villamonte-Marquez* was in inland waters, and not Customs waters. *See supra* note 1.

<sup>46</sup> *See supra* note 30.

fixed checkpoints instead of roving patrols.”<sup>47</sup> Reaffirming the need to limit the discretion of officers in the field, Justice Brennan took issue with the majority’s departure from *Brignoni-Ponce* and *Prouse*, finding three basic flaws in the reasoning of the majority.<sup>48</sup>

First, he contended that the majority had overlooked the “primary and overarching” concern that has guided the Court in previous decisions: an unqualified and consistent rejection of “standardless and unconstrained discretion” that would subject individual liberties to the whims of police officers in the field.<sup>49</sup> Second, the supposed factual differences between vehicle and vessel stops are either insubstantial or of the government’s own making.<sup>50</sup> Finally, Justice Brennan asserted that it is “a non sequitur to reason that because the police in a given situation claim to need more intrusive and arbitrary enforcement tools than the Fourth Amendment has been held to permit,” the Court may dispense with the amendment’s protections.<sup>51</sup>

Justice Brennan reminded the Court that there were two reasons that the Court upheld the fixed checkpoint in *Martinez-Fuerte* while striking down the roving-patrol stop of *Brignoni-Ponce*. Fixed checkpoints both decrease the intrusiveness of the stop<sup>52</sup> and significantly limit the discretion of officers in the field and the consequent potential for its abuse.<sup>53</sup> The Court reaffirmed the holding in *Brignoni-Ponce* by striking down the roving-patrol stop of an automobile for a random license and registration check in *Delaware v. Prouse*.<sup>54</sup>

Justice Brennan maintained that the Court could not justify its departure from *Brignoni-Ponce* and *Delaware v. Prouse* by asserting a difference in the degree of intrusiveness.<sup>55</sup> The intrusion here was

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<sup>47</sup> *Villamonte-Marquez*, 103 S. Ct. at 2585 (Brennan, J., dissenting).

<sup>48</sup> *Id.* at 2586. While Justice Brennan later elaborated on the first two flaws, he confined his discussion of the third flaw to a restatement of his first proposition. *See id.* at 2590-91.

<sup>49</sup> *Id.* at 2586 (Brennan, J., dissenting).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2587. Fixed checkpoint stops intrude less than roving patrol operations because they generate less fear and concern on the part of stopped travelers. “At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers’ authority, and he is much less likely to be frightened or annoyed by the intrusion.” *United States v. Ortiz*, 422 U.S. 891, 894-895 (1975); *see also Martinez-Fuerte*, 428 U.S. at 558-59.

<sup>53</sup> Fixed checkpoint operations limit the discretion of the officers in the field because [t]he location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. . . . And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals. . . .” *Martinez-Fuerte*, 428 U.S. at 559; *see also Ortiz*, 422 U.S. at 894.

<sup>54</sup> *Prouse*, 440 U.S. 648; *see Villamonte-Marquez*, 103 S. Ct. at 2587 (Brennan, J., dissenting).

<sup>55</sup> *Villamonte-Marquez*, 103 S. Ct. at 2588.

significantly more severe than those in *Brignoni-Ponce* and *Delaware v. Prouse*, which the Court held permissible only on reasonable suspicion.<sup>56</sup> Unlike those cases, the intrusion here involved not only a mere stopping and questioning, but an actual boarding of a private vessel, more similar to the entry of a private house.<sup>57</sup> Since boats often serve as a temporary residence, persons on boats have a greater expectation of privacy than do persons in cars.<sup>58</sup>

Justice Brennan next contended that supposed special law enforcement problems in the maritime setting did not justify the majority's departure from *Brignoni-Ponce* and *Delaware v. Prouse*. First, the geography of the Calcasieu River Ship Channel is sufficiently similar to an interstate highway to permit the establishment of a fixed checkpoint.<sup>59</sup> Even if fixed checkpoints were impractical, Justice Brennan argued that Customs officials could implement a neutral selection system that would decrease the opportunity for arbitrariness or harassment.<sup>60</sup> Furthermore, adequate law enforcement does not require random stops because the characteristics of smuggling operations tend to generate articulable grounds for identifying law violators.<sup>61</sup> Finally, Justice Brennan noted several alternatives that would obviate the need for documentation

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2588-89.

<sup>59</sup> See *supra* note 7.

<sup>60</sup> *Villamonte-Marquez*, 103 S. Ct. at 2590 n.10.

<sup>61</sup> *Id.* at 2590. As Justice Brennan noted, the case law suggests that Customs officials have conducted many boardings in response to at least a reasonable suspicion of a violation of the law. See, e.g., *United States v. Glen-Archilla*, 677 F.2d 809, 812 (11th Cir.), *cert. denied*, 103 S. Ct. 165 (1982) (Customs officers detected marijuana odor while offering assistance to disabled vessel); *Blair v. United States*, 665 F.2d 500, 503 (4th Cir. 1981) (Customs officers observed vessel riding low in the water with vessel lettering improperly displayed); *United States v. Streifel*, 665 F.2d 414, 416 (2d Cir. 1981) (Coast Guard officers first observed vessel drifting dead in the water with no visible cargo and then starting its engines when sighted by a Coast Guard patrol airplane); *United States v. Williams*, 617 F.2d 1063, 1070 (5th Cir. 1980) (Coast Guard observed crew members "waving clothes, toilet paper, and flashlights and giving hand signals"; one crewman dove overboard and informed the Coast Guard that there was "dirty business" on board); *United States v. Zurosky*, 614 F.2d 779, 788 (1st Cir. 1979), *cert. denied*, 446 U.S. 967, *stay denied sub nom. Brazas v. United States*, 445 U.S. 949 (1980) (police officer observed vessel at loading dock of warehouse shortly before large amounts of marijuana were discovered in the warehouse); *United States v. Serrano*, 607 F.2d 1145, 1149 (5th Cir. 1979), *cert. denied*, 445 U.S. 965, *cert. denied sub nom. Hernandez v. United States*, 446 U.S. 910 (1980) (Customs officers observed shrimping vessel, traveling at midnight in a ship channel without navigation lights, extinguish all lights and enter an area not normally frequented by shrimping vessels, and then rendezvous with a darkened vessel after an exchange of lights); *United States v. Castro*, 596 F.2d 674, 675 (5th Cir. 1979), *cert. denied*, 444 U.S. 963 (1980) (Florida marine patrol officer observed shrimping vessel in an area known for smuggling with high speed boats going to and from the vessel); *United States v. Whitmire*, 595 F.2d 1303, 1306 (5th Cir. 1979), *cert. denied*, 448 U.S. 906 (1980) (Customs officers observed vessel riding heavy in the bow and speeding through the intercoastal waterway and several "no wake" areas).

boardings.<sup>62</sup>

#### IV. ANALYSIS

The *Villamonte-Marquez* decision is flawed in two respects. First, the majority placed too much emphasis upon the lineal ancestry of Section 1581(a). Second, in applying the fourth amendment balancing test, the majority overstated the interests of the government while understating the interests of individuals.

##### A. LINEAL ANCESTRY

As part of its inquiry into the constitutionality of Section 1581(a), the Court examined the constitutionality of Section 31 of the Act of August 4, 1790, which was the lineal ancestor of Section 1581(a). Justice Rehnquist contended that the enactment of Section 31 demonstrated that the first Congress believed it was reasonable to allow Customs officers to board vessels to search for dutiable goods without any suspicion of customs violations.<sup>63</sup> Justice Rehnquist, however, ignored those arguments that undermine his premise that Acts of the first Congress are indicative of what is reasonable today.<sup>64</sup>

Even if the first Congress considered suspicionless vessel boardings reasonable, the Court should have interpreted the fourth amendment in light of what is reasonable today. Construing Section 1581(a) in *United States v. Streifel*,<sup>65</sup> the Second Circuit rejected the same historical argument relied upon by Justice Rehnquist, reasoning that the intent of the first Congress is not dispositive of what is reasonable today. While in 1789 boardings were probably the only means by which documentation could be checked, radio communication today enables officials to obtain

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<sup>62</sup> *Villamonte-Marquez*, 103 S. Ct. at 2590. Justice Brennan suggested that the Government could provide uniform license plates giving visible evidence of compliance with registration laws. *Id.* Alternatively, rather than boarding a vessel, officials could merely come alongside the subject vessel or request that someone come aboard the Customs vessel. *Id.* Furthermore, Customs officials could use radio communication to keep track of documentation and registration matters. *Id.*

<sup>63</sup> *Villamonte-Marquez*, 103 S. Ct. at 2578.

<sup>64</sup> Courts and commentators have undermined the historical argument relied on by the majority to establish the reasonableness of Section 1581(a). *See, e.g.*, *United States v. Streifel*, 665 F.2d 414, 420 n.8 (2d Cir. 1981) (even if First Congress intended to allow boardings without probable cause, courts are bound to interpret the fourth amendment in light of contemporary notions of privacy as well as contemporary technology); *United States v. Williams*, 617 F.2d 1063, 1081 (5th Cir. 1980) (First Congress' construction of the fourth amendment is not dispositive of what is reasonable today); Comment, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1011 (1968) (changes in the community's standard of reasonableness and the underlying facts may make a search that was reasonable in 1789 unreasonable today).

<sup>65</sup> 665 F.2d 414, 419 n.8 (2d Cir. 1981).

answers to various questions and speedy confirmation.<sup>66</sup> Furthermore, in 1789 Customs officers could reasonably suspect that any merchant vessel contained dutiable goods because most sea-going vessels were either merchant ships or warships.<sup>67</sup>

#### B. APPLICATION OF FOURTH AMENDMENT PRINCIPLES

As a general rule, the fourth amendment prohibits searches without warrants, even if the facts establish probable cause.<sup>68</sup> The Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizens and the police. . . ."<sup>69</sup> There are, however, specifically established and well-delineated exceptions to this rule.<sup>70</sup> The courts have employed several of these exceptions to justify warrantless boardings and searches of vessels:<sup>71</sup> (1) "stop and frisk" detentions; (2) automobile searches; (3) border searches;<sup>72</sup> and (4) ad-

<sup>66</sup> *Id.*

<sup>67</sup> *Williams*, 617 F.2d at 1080. While in 1789 most vessels were either commercial or military in nature, "[t]oday, over eight million recreational craft are numbered under the federal and state numbering systems for undocumented pleasure vessels. . . . These figures do not include pleasure yachts whose owners have voluntarily obtained federal documentation, or sailboats having no propulsion machinery, which are generally exempt from the numbering requirements." Brief for Respondents at 19 n.8, *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983) (citing UNITED STATES DEPARTMENT OF TRANSPORTATION, BOATING STATISTICS 1981 at 10 (May, 1982)).

<sup>68</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>69</sup> *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963)).

<sup>70</sup> *Id.* at 357.

<sup>71</sup> See generally Carmichael, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51, 81 (1977); Comment, *Searches at Sea*, 93 HARV. L. REV. 725, 727 (1980).

<sup>72</sup> Officers may conduct warrantless searches of vessels without any suspicion of a law violation where they have grounds to believe the vessel has entered from international waters. See, e.g., *United States v. Ingham*, 502 F.2d 1287, 1291-92 (5th Cir. 1974), *cert. denied*, 421 U.S. 911 (1975) (upholding warrantless non-probable cause search of a vessel where sightings of the vessel "proved quite convincingly that the vessel had been at a foreign port or place"); cf. *United States v. Whitmire*, 595 F.2d 1303, 1307-08 (5th Cir.), *cert. denied*, 448 U.S. 906 (1980) (refusing to uphold search of vessel as a border search because officers did not have articulable facts from which they could reasonably infer that the boat had come from international waters).

Entrance into the United States justifies border searches even when they are conducted without warrants and without suspicion. *United States v. Ramsey*, 431 U.S. 606, 619 (1977). The Court has stated that "[t]ravellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in." *Carroll v. United States*, 267 U.S. 132, 154 (1925) (dictum).

Border searches, however, may be conducted only at the border or its functional equivalent. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). The Court has noted two functional equivalents of the border: (1) an established checkpoint at the confluence of two or more roads that extend from the border; and (2) a domestic airport upon the arrival of a non-stop flight from another country. *Id.*

The border search exception did not apply in *Villamonte-Marquez* because there were no grounds to believe that the vessel had entered from international waters. The Court only

ministrative searches of pervasively regulated industries.<sup>73</sup> In *Villamonte-Marquez*, however, only the "stop and frisk" and the automobile exceptions provide guidance in determining whether the boarding was reasonable.

The "stop and frisk" exception, as typified by *Terry v. Ohio*,<sup>74</sup> and the automobile exception, as typified by *Carroll v. United States*,<sup>75</sup> are both based upon unforeseeable encounters that present officers only a fleeting opportunity to conduct a search. In both situations the Court relied on the limited nature of the intrusion and the strong governmental need for swift action.

The *Terry* Court authorized a warrantless "stop and frisk" detention of a suspect where officers had reason to believe that the individual was armed and dangerous.<sup>76</sup> The stop did not require probable cause because a limited search for weapons entails a lesser intrusion than a full-scale search.<sup>77</sup> Although *Terry* was predicated upon swift action necessitated by on-the-spot observations, the Court warned that "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."<sup>78</sup>

Under the "automobile exception," law enforcement officers may

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considered the issue of whether Customs officers could stop a vessel in inland waters to check its documentation. 103 S. Ct. at 2575.

<sup>73</sup> The "administrative search" exception to the warrant requirement generally has been restricted to those businesses that historically have been subjected to close government regulation. *See, e.g.*, *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining industry); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms industry); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor industry); *United States ex rel. Terrauano v. Montanye*, 493 F.2d 682 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974) (pharmaceutical industry). The Court has upheld warrantless inspections of these businesses based on both the need for unannounced inspections to promote effective enforcement and the implied consent of the businessman, who in effect consents to such inspections by entering into a regulated industry. *Biswell*, 406 U.S. at 316.

At least one court has attempted to analyze warrantless vessel boardings in the context of the administrative search exception to the warrant requirement. *United States v. Hilton*, 619 F.2d 127, 132 (1st Cir.), *cert. denied*, 449 U.S. 854 (1980). Clearly, because of a vessel's mobility, a warrant requirement would frustrate effective law enforcement. Furthermore, extensive maritime regulation may have diminished vessel occupants' expectations of privacy.

In *Almeida-Sanchez*, the Court refused to extend the administrative search exception to include searches of automobiles. Users of automobiles are not businessmen who must accept the burdens as well as the benefits of their trade in a regulated industry. 413 U.S. at 271. While the exception may extend to commercial vessels because of the long history of maritime regulation, it cannot be applied to pleasure boats. The Court in *Villamonte-Marquez* rightly ignored the administrative search exception in its analysis.

<sup>74</sup> 392 U.S. 1 (1968) (a veteran police officer, suspecting three men of "casing" a store, spun one man around, patted the outside of his clothing, and found a revolver).

<sup>75</sup> 267 U.S. 132 (1925) (Federal prohibition agents, passing a car that they reasonably believed was transporting illegal liquor, stopped and searched the car without a warrant).

<sup>76</sup> 392 U.S. at 27.

<sup>77</sup> *Id.* at 25.

<sup>78</sup> *Id.* at 20.

conduct warrantless searches of automobiles where they have probable cause to believe that contraband is present. The *Carroll* Court recognized that often "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."<sup>79</sup> Again, however, the Court warned that "where the securing of a warrant is reasonably practicable, it must be used. . . ."<sup>80</sup>

The Court analyzed *Villamonte-Marquez* in the context of the automobile investigatory detention cases,<sup>81</sup> which are a hybrid of the "stop and frisk" exception and the "automobile exception." While vehicle detention cases are characterized by the mobility that concerned the Court in *Carroll*, they also exhibit the lesser intrusion that the Court addressed in *Terry*. Because of the limited nature of the intrusion, investigatory stops<sup>82</sup> by roving patrols do not require probable cause, but only articulable and reasonable suspicion of a law violation.<sup>83</sup> Where roving patrols conduct such stops, the police must comply with the reasonable suspicion standard because the fourth amendment's reasonableness requirement demands that the government be restrained from exercising "broad and unlimited discretion" when conducting investigatory stops.<sup>84</sup> Suspicionless detentions at fixed checkpoints are constitutionally permissible because they are less intrusive and involve less discretionary enforcement activity than those conducted by roving patrols.<sup>85</sup>

As the Court stated in *Prouse*, "the permissibility of a particular law

<sup>79</sup> 267 U.S. at 153.

<sup>80</sup> *Id.* at 156. The Court has not adhered to its warning that police must obtain a warrant where it is practicable. See *Cardwell v. Lewis*, 417 U.S. 583 (1974) (upholding a warrantless seizure of an automobile and search of its exterior at a police impoundment area after police had arrested the owner and removed the car from a public lot); *Chambers v. Maroney*, 399 U.S. 42 (1970) (upholding an unwarranted search of a car after the occupants had been arrested and the car had been driven to the police station). The *Cardwell* court cited another distinguishing factor in automobile cases: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as a repository of personal effects." *Id.* at 590. Commentators have criticized the Court's willingness to extend *Carroll*. See Comment, *The Warrantless Automobile Search: Exception Without Justification*, 32 HASTINGS L.J. 127, 128 (1980); Comment, *The Automobile Exception to the Warrant Requirement, Speeding Away from the Fourth Amendment*, 82 W. VA. L. REV. 637, 637 (1980).

<sup>81</sup> See *supra* note 30.

<sup>82</sup> Investigatory stops differ from searches. An investigatory stop of an automobile consists of questioning occupants about citizenship, as in *Brignoni-Ponce*, 422 U.S. at 874, or checking a driver's license and vehicle registration, as in *Prouse*, 440 U.S. at 650. Although an investigatory stop does not constitute a search, detention of an automobile and its occupants is a "seizure" within the meaning of the fourth amendment, even though the purpose of the stop is limited and the resulting detention is brief. See *Prouse*, 440 U.S. at 653; *Martinez-Fuerte*, 428 U.S. at 556; *Terry*, 392 U.S. at 16.

<sup>83</sup> *Prouse*, 440 U.S. at 663; *Brignoni-Ponce*, 422 U.S. at 881; cf. *Terry*, 392 U.S. at 27.

<sup>84</sup> *Prouse*, 440 U.S. at 654-655; *Brignoni-Ponce*, 422 U.S. at 882; *Terry*, 392 U.S. at 21-22.

<sup>85</sup> See *supra* notes 52-53.

enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."<sup>86</sup> In *Villamonte-Marquez*, Justice Rehnquist contended that the enforcement of documentation laws substantially furthered the public interest.<sup>87</sup> Although the Court did not explicitly address the issue, it is likely that it also considered enforcement of anti-smuggling laws<sup>88</sup> a substantial government interest because of "[t]he recent increase in the smuggling of drugs into the United States by sea transportation."<sup>89</sup>

The question of the constitutionality of a particular law enforcement practice does not end with the determination that the government has substantial interests at stake. The Court must determine whether the practice sufficiently furthers the government interests to justify its intrusion upon fourth amendment interests.<sup>90</sup> Where commercial vessels are involved, random document checks are more likely to further the government's interest in proper documentation<sup>91</sup> than were the random license and registration checks that the Court struck down in *Delaware v. Prouse*.<sup>92</sup> Because the documentation laws are largely commercial in nature, however, it is unlikely that random boardings of pleasure boats will further the government's interest in their enforcement.<sup>93</sup>

There was no evidence before the Court indicating that the government's interest in enforcing the anti-smuggling laws would be ham-

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<sup>86</sup> *Prouse*, 440 U.S. at 654.

<sup>87</sup> *Villamonte-Marquez*, 103 S. Ct. at 2581; see also *supra* notes 39-40.

<sup>88</sup> See 19 U.S.C. §§ 1701-1711 (1980) (the act is cited as the "Anti-Smuggling Act").

<sup>89</sup> W. LAFAVE, SEARCH AND SEIZURE 104 (Supp. 1983) (footnote omitted); see *Villamonte-Marquez*, 103 S. Ct. at 2582; *id.* at 2588 n.8. (Brennan, J., dissenting).

<sup>90</sup> *Prouse*, 440 U.S. at 659.

<sup>91</sup> See *supra* notes 40-41.

<sup>92</sup> Finding no evidence to the contrary, the *Prouse* Court assumed that "finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers." 440 U.S. at 659. Therefore, the Court concluded that random checks did not substantially further the Government's interest in highway safety.

<sup>93</sup> The Court argued that it is difficult to draw lines between commercial vessels and pleasure boats: "Respondents assert that they were in a 'pleasure boat,' yet they proved to be involved in a highly lucrative commercial trade." *Villamonte-Marquez*, 103 S. Ct. at 2581 n.6.

The Supreme Court cannot partially justify a warrantless search by measuring the yields of that search. Searches must be reasonable at the time they are conducted: "[A] search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. Di Re*, 332 U.S. 581, 595 (1948) (footnote omitted). One commentator has noted: "[U]nless the Fourth Amendment controls tompeeping and subjects it to a requirement of antecedent cause to believe that what is inside any particular window is indeed criminal, police may look through windows and observe a thousand innocent acts for every guilty act they spy out." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974).



pered by requiring Customs officers to have at least reasonable suspicion of illegal activity before boarding pleasure boats. In fact, as Justice Brennan noted, the case law suggests that maritime smuggling operations tend to generate articulable grounds for identifying violators.<sup>94</sup>

The majority seemed to assert that the government's need for suspicionless boardings was especially substantial because no effective alternative exists for enforcement of documentation laws. Since the balance struck by the Court in the vehicle stop precedents only permits suspicionless document checks at fixed checkpoints,<sup>95</sup> the majority's holding turned upon their conclusion that "no reasonable claim can be made that permanent checkpoints would be practical on waters . . . where vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do."<sup>96</sup> Justice Brennan, however, noted that the boarding took place in a ship channel, which provided an opportunity for effective fixed checkpoint inspection.<sup>97</sup>

Even if fixed checkpoints were impractical in the *Villamonte-Marquez* case, the Court's previous search and seizure cases do not support the conclusion that the fourth amendment permits suspicionless stops. Justice Rehnquist ignored the central requirement of *Carroll*, *Terry*, *Brignoni-Ponce*, *Martinez-Fuerte* and their progeny: the Court has consistently insisted that "standardless and unconstrained . . . discretion of the official in the field be circumscribed, at least to some extent."<sup>98</sup> The majority in *Villamonte-Marquez* made no attempt to restrain the discretion of Customs officers acting pursuant to Section 1581(a), apparently concluding that, because the nature of waterborne commerce in waters providing ready access to the open sea makes the use of fixed checkpoints impractical, the fourth amendment requires no limit on the discretion of Customs officers.

After overstating the governmental interest in conducting random documentation checks,<sup>99</sup> the Court substantially understated the resulting impact upon vessel owners' expectations of privacy. Even without the physical intrusion of an actual boarding, a stop to check documents is a seizure within the meaning of the fourth amendment and therefore is governed by its reasonableness requirement.<sup>100</sup>

The *Prouse* Court characterized the physical and psychological intrusions that result from random document checks of automobiles as

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<sup>94</sup> See *supra* note 61.

<sup>95</sup> See *supra* notes 52-53.

<sup>96</sup> *Villamonte-Marquez*, 103 S. Ct. at 2580.

<sup>97</sup> *Id.* at 2589 (Brennan, J., dissenting).

<sup>98</sup> *Prouse*, 440 U.S. at 661.

<sup>99</sup> See *supra* notes 90-93 and accompanying text.

<sup>100</sup> See *supra* note 82.

involving an unsettling show of authority, interfering with freedom of movement, and creating substantial anxiety.<sup>101</sup> Vessel occupants have even greater privacy expectations than do passengers in automobiles. Vessels are more likely to serve as residences, even if only temporarily.<sup>102</sup> While the majority deemed investigatory detentions to be only a minor inconvenience, safety and documentation checks may encompass a significantly greater intrusion than automobile stops, including a thorough examination of virtually all areas of the vessel.<sup>103</sup> As Justice Brennan realized, the intrusion upheld here was substantial; it not only involved "a mere stopping and questioning . . . but an actual boarding of a private vessel . . . more similar to entry of a private house than to the stops in *Brignoni-Ponce* and *Prouse*."<sup>104</sup>

The Court incorrectly struck the balance between the governmental interests furthered by random vessel boardings and the intrusion on fourth amendment interests that boardings entail. The basic objective of the fourth amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."<sup>105</sup> Absent some restriction on the discretion of officers in the field, the intrusion on vessel occupants' privacy expectations outweighs the governmental interests furthered by such boardings.

The *Villamonte-Marquez* decision effectively authorizes the use of suspicionless document boardings as a pretext for conducting smuggling investigations. Even if the Court was correct in its conclusion that such random stops are necessary to further the government's interest, the Court could have imposed constraints upon the authority of Customs

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<sup>101</sup> *Prouse*, 440 U.S. at 657.

<sup>102</sup> The privacy expectation of vessel owners exceeds that of automobile drivers because "a vessel is far more likely to serve as the temporary residence of the owner or crew, and is generally less open to public view, than an automobile." Comment, *supra* note 71, at 728 (footnote omitted); see also *United States v. Cadena*, 588 F.2d 100, 101 (5th Cir. 1979) ("The ship is the sailor's home. There is hardly the expectation of privacy even in the curtained limousine or the stereo-equipped van that every mariner or yachtsman expects aboard his vessel"); *United States v. Whitaker*, 592 F.2d 826, 829-30 (5th Cir.), *cert. denied*, 444 U.S. 950 (1979) (while extensive regulation and large area within plain view of public may result in somewhat decreased privacy expectations, vessel occupants may have a heightened expectation of privacy with respect to certain areas of a boat, such as living quarters or locked compartments on the bridge).

<sup>103</sup> Inspectors routinely compare the vessel's main beam number with the number on its registration papers, which requires entering the hold of a commercial or semi-commercial craft or the main living area of a pleasure vessel. "[O]ther areas of the vessel, including the engine room or compartment and the marine toilet, are also routinely subject to inspection." Comment, *supra* note 71, at 743; see also *United States v. Jones*, 639 F.2d 200 (5th Cir. 1981) (during documentation check, Coast Guard boarding crew entered cabin area and/or forward hold); *United States v. Shelnut*, 625 F.2d 59, 60 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981) (same); *United States v. Odom*, 526 F.2d 339, 341 (5th Cir. 1976) (same).

<sup>104</sup> *Villamonte-Marquez*, 103 S. Ct. at 2588 (Brennan, J., dissenting).

<sup>105</sup> *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

officials conducting document checks pursuant to Section 1581(a). Such constraints would limit officer discretion and thereby reduce the intrusion upon vessel occupants' privacy expectations. First, the Court could have required document checks to be conducted in a reasonable and unintrusive manner, prohibiting, for example, Customs officials from conducting such document checks at night. Second, the inspections could have been limited to examination of documents and papers unless probable cause develops to support an increase in the scope of the search. Courts should not permit vessel identification checks to take officials into the living areas of any vessel, without either probable cause or consent of the owners. Finally, the Court could have required officials, before boarding, to give a statement to the vessel occupants delineating both the purpose of the boarding and the permissible scope of the inspection.

## V. CONCLUSION

The Court's decision in *Villamonte-Marquez* allows Customs officers to substantially invade the fourth amendment rights of citizens without sufficiently furthering a substantial government interest. Furthermore, the decision offers citizens no protection from Customs officials, who may now use their unconstrained discretion to stop, board and search any vessel in inland waters providing ready access to the open sea without any suspicion of wrongdoing.

Random vessel boardings are not consistent with the fourth amendment. A requirement of reasonable suspicion of illegal activity would adequately protect the public interest because random document inspections of pleasure boats are unlikely to further the public interest in enforcement of documentation laws. While the intrusiveness of vessel boardings exceeds that of the automobile stop invalidated in *Delaware v. Prouse*, such random detentions are no more likely to further the professed governmental interest. Since maritime smuggling activities tend to generate articulable grounds for identifying smugglers, a reasonable suspicion requirement would minimize the intrusion upon the rights of individuals and, at the same time, allow law enforcement officials sufficient authority to detect smuggling and other law violations.

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