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United States v. Villamonte-Marquez: Administrative Customs Stops - Randomness Is Reasonable on Inland Waters

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United States v. Villamonte-Marquez: Administrative Customs Stops — Randomness is Reasonable on Inland Waters

I. Introduction

In *United States v. Villamonte-Marquez*,[1] the Supreme Court addressed for the first time the constitutionality of vessel stops on inland waters[2] by customs officials acting under the authority of 19 U.S.C. § 1581(a).[3] The Court held that it was rea-

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1. 103 S. Ct. 2573 (1983).

2. "Inland waters" is one of three generally recognized zones of navigable waters. The Coast Guard defines inland waters as "the navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States and the waters of the Great Lakes on the United States side of the International Boundary." U.S. COAST GUARD, U.S. DEP'T TRANSP., NAVIGATION RULES, INTERNATIONAL-INLAND, Rule 3(o) (1982) [hereinafter cited as NAVIGATION RULES]. *Cf.* Carmichael, *At Sea With the Fourth Amendment*, 32 U. MIAMI L. REV. 51, 56 (1977) (inland waters include rivers, most bays, some gulfs, straits, lakes, ports, and roadsteads).

The second zone of waters is the territorial seas. "Territorial seas" extend seaward of the inland waters and extend three nautical miles or approximately 6000 yards from the coastline. *See id.* The third zone is the high seas. The "high seas" extend seaward of the 3-mile territorial limit. *Id.*

The territorial seas and the high seas are further subdivided into the contiguous zone and customs waters. The region between 3 and 12 miles from the coast is known as the contiguous zone, *id.*, in which a nation has certain enforcement powers including the right to enforce customs and immigration laws. *See* Convention on the Territorial Sea & The Contiguous Zone, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, 1612, T.I.A.S. No. 5639, at ___, 516 U.N.T.S. 205, at 220. The area within the 12-mile limit is "customs waters." *See* 19 U.S.C. § 1401(j) (1982). The cases have indicated that "inland waters" are not part of customs waters. *See, e.g.*, United States v. Serrano, 607 F.2d 1145, 1148 (5th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980). In the area beyond the 12-mile contiguous zone each nation is generally responsible for policing its own vessels. *See, e.g.*, United States v. Warren, 578 F.2d 1058, 1064 n.4 (5th Cir. 1978), *cert. denied*, 446 U.S. 956 (1980).

3. Section 1581(a) provides:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act [19 U.S.C. 1701 et seq.], 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

sonable under the fourth amendment[4] for customs officials to stop vessels for document checks[5] pursuant to section 1581(a), without any suspicion of wrongdoing, when the vessel is stopped

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any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

19 U.S.C. § 1581(a) (1982).

The United States Customs Service is charged with enforcing approximately 400 laws and regulations for more than 40 federal agencies, and collecting all duties and taxes owed on merchandise imported into the United States. U.S. CUSTOMS SERVICE, U.S. DEP'T TREASURY, CUSTOMS U.S.A. 5 (1982) (covering activities during fiscal year 1982).

To accomplish this task, the Customs Service is granted broad authority under 46 U.S.C. § 277 (1976) and 19 C.F.R. § 162.3(a)(1) (1983) in addition to 19 U.S.C. § 1581(a). Section 277 provides:

> Any officer concerned in the collection of the revenue may at all times inspect the register or enrollment or license of any vessel or any document in lieu thereof; and if the master or other person in charge or command of any such vessel shall not exhibit the same, when required by such officer, unless the vessel is one which by regulation of the Secretary of the Treasury is not required to have its register or enrollment or license or document in lieu thereof on board, such master or person in charge or command shall be liable to a penalty of $100, unless failure to do so is willful, in which case he shall be liable to a penalty of $1,000 and to a fine of not more than $1,000 or imprisonment for not more than one year, or both.

46 U.S.C. § 277 (1976).

Section 162.3(a)(1) provides:

> (a) *General Authority.* A Customs officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board:
>
> (1) Any vessel at any place in the United States or within the Customs waters of the United States.

19 C.F.R. § 162.3(a)(1) (1983).

The Coast Guard has been granted virtually identical authority under 14 U.S.C. § 89(a) (1982), which provides in part:

> The Coast Guard may make . . . searches . . . 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 . . . and search the vessel . . . .

Id.

4. 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 particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

5. This case did not involve the activities of the officers once on board the vessel. *Villamonte-Marquez*, 103 S. Ct. at 2577 n.3. Thus, respondents did not question the applicability of the "plain view" doctrine or the constitutionality of the general search that followed.

on waters with ready access to the open sea.[6] In doing so, the Supreme Court brought inland waters within the ambit of section 1581(a), while dispensing with the border nexus[7] and reasonable suspicion conditions previously required by the courts of appeals.[8]

In Part II this Note presents traditional Supreme Court approaches to warrantless searches and seizures under the fourth amendment. Part II then discusses how the Fifth Circuit, working within this traditional framework, had previously analyzed vessel stops by customs. Part III relates the facts of *Villamonte-Marquez* and presents the lower court decisions. Part IV sets forth the Supreme Court's decision and the dissent's opinion. Part V analyzes the Court's rationale, focusing on its use of fourth amendment precedent and the vessel-vehicle distinction. Finally, Part VI concludes that the Court's literal construction of section 1581(a) is overly broad, since there are alternatives to random stops which would effectively address both the special problems in policing the sea border and the need for fourth amendment safeguards.[9]

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6. *See id.* 103 S. Ct. at 2575, 2582.

7. The government did not make a border nexus argument before the Supreme Court. *Id.* at 2585 n.6 (Brennan, J., dissenting). The border nexus argument refers to the extended border doctrine. *See infra* note 65. *See also* 9 Supreme Court Oral Arguments, *Villamonte-Marquez*, No. 81-1350, at 18-19 (Oct. Term 1982) (located in the U.S. Supreme Court Library, Washington, D.C.) [hereinafter cited as Oral Arguments] (government stating that the border exception was inapplicable).

8. *See Villamonte-Marquez*, 103 S. Ct. at 2582. *See, e.g.*, United States v. Helms, 703 F.2d 759, 763 (4th Cir. 1983) (stop on inland waters valid without reasonable suspicion where border nexus established under the functional equivalent of border doctrine); United States v. Gollwitzer, 697 F.2d 1357, 1360 (11th Cir. 1983) (stops of small pleasure craft require reasonable suspicion); United States v. Demanett, 629 F.2d 862, 863 (3d Cir. 1980), *cert. denied*, 450 U.S. 910 (1981) (reasonable suspicion standard satisfied for a coast guard stop on inland waters); Blair v. United States, 665 F.2d 500, 505 (4th Cir. 1980) (stop on inland waters requires reasonable suspicion in absence of a border crossing); United States v. D'Antignac, 628 F.2d 428, 434 (5th Cir. 1980), *cert. denied*, 450 U.S. 967 (1981) (same); United States v. Odneal, 565 F.2d 598, 601 (9th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978) (same).

9. This Note discusses the constitutional issue. It does not address the mootness issue, which the respondents' counsel raised before the Supreme Court, based on the fact that the respondents had been deported after the court of appeals decision. *See Villamonte-Marquez*, 103 S. Ct. at 2575 n.2. The respondents' counsel argued that, since the government deported the respondents, no actual controversy existed at this stage of the appellate review. They argued that under *Roe v. Wade*, "[a]n actual controversy must exist at all stages of appellate or certiorari review and not simply at the date the

II. The Legal Context of *Villamonte-Marquez*

The fourth amendment protects individuals from unreasonable searches and seizures. The probable cause and warrant requirements of the fourth amendment[10] represent limits on gov-

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action is initiated." Brief for Respondent at 40, *Villamonte-Marquez*, 103 S. Ct. 2573 (1983) (citing Roe v. Wade, 410 U.S. 113, 125 (1973)).

At oral argument, it was suggested that the case became moot due to the government dismissing the indictment instead of seeking a stay of the court of appeals' mandate. Oral Arguments, *supra* note 7, at 6-7. The government conceded that procedurally this would have been preferable, but that a motion to stay the mandate was not necessary to maintain a live controversy. *Id.* at 13. The government argued that, as a practical matter, since the principal evidence was suppressed, they were complying with the court of appeals' mandate by dismissing the indictment. *Id.* at 9-10. Its decision to dismiss the indictment preceded the final decision to appeal. *Id. See also Villamonte-Marquez*, 103 S. Ct. at 2583.

The majority concluded that, even without a reinstated indictment, a reversal by the Supreme Court would reinstate the judgment of conviction and the sentence by the district court. *Id.* at 2576 n.2. This was because once the respondents were convicted and sentenced the valid indictment would merge with their convictions and sentences, thus making a separate reinstatement of the indictment unnecessary. *Id.* "[P]reliminary steps in a criminal proceeding are 'merged' into a sentence once the defendant is convicted and sentenced." *Id.*

In addition, deportation of the respondents did not remove the controversy because, as a practical matter, a reversal of the decision below would permit either extradition and imprisonment or arrest and imprisonment if the respondents voluntarily re-entered the country. *Id.* The government could also bar any attempts by the respondents to voluntarily re-enter. *Id.*

The dissent argued that, under FED. R. CRIM. P. 48(a), once the government requested and the district court issued the order of dismissal, the prosecution terminated. *Id.* at 2583 (Brennan, J., dissenting). In response to the majority's claim that the merger rule made separate reinstatement of the indictment unnecessary, *id.* at 2575 n.2, the dissent asserted that: (1) the rule does not change the "fundamental principle that an indictment is the necessary . . . predicate for a felony prosecution, conviction, or sentence," and (2) the rule simply means that preliminary steps may be attacked on appeal from the final judgment. *Id.* at 2584 (Brennan, J., dissenting). Since the prosecution had terminated with the government's dismissal of the indictment, notwithstanding the government's ultimate decision to appeal, and since the Supreme Court had no authority to revive the prosecution, the dissent concluded that the case was moot. *Id.* (Brennan, J., dissenting).

10. The fourth amendment requires that "no Warrants shall issue, *but upon probable cause.*" U.S. CONST. amend. IV (emphasis added). Although the plain meaning of the fourth amendment does not make warrants a per se requirement, it is often stated that an informed and deliberate decision by a magistrate to issue a warrant is preferred over the decisions of officers in the field. *See, e.g.*, United States v. Lefkowitz, 285 U.S. 452, 464 (1932). *See also* Johnson v. United States, 333 U.S. 10, 14 (1948) (fourth amendment protection "consists in requiring that . . . inferences be drawn by a neutral and detached magistrate").

ernmental authority to search premises[11] and to stop[12] and search individuals.[13] The Supreme Court has, however, developed several exceptions to accommodate law enforcement efforts where obtaining a warrant would be unduly burdensome.[14] Each exception seeks to strike a balance between a particular governmental interest in law enforcement and the extent of the intrusion into individual privacy interests protected by the fourth amendment.[15] To ensure that the balance comports with the requirements of the fourth amendment, the Court has insisted that each exception be accompanied by a discretion-limiting factor to protect against the threat of arbitrary conduct by law enforcement officials.[16] Among the exceptions are inspections of premises for administrative purposes[17] and vehicle stops,[18] in-

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11. *See, e.g.*, Payton v. New York, 445 U.S. 573, 590 (1980) ("Absent exigent circumstances, [the threshold of a premises] may not reasonably be crossed without a warrant."); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (*Weeks* exclusionary rule extended to state violations of fourth amendment); Weeks v. United States, 232 U.S. 383, 390 (1914) ("[T]he principle which was enacted into the fundamental law in the Fourth Amendment, [was] that a man's house was his castle and not to be invaded by any general authority to search and seize . . . .").

12. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 16 (1968) (a stop is a seizure within the meaning of the fourth amendment).

13. *See, e.g.*, Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places.").

14. *See, e.g.*, Chimel v. California, 395 U.S. 752, 762-63 (1969) (search incident to a lawful arrest); Carroll v. United States, 267 U.S. 132 (1925) (automobiles); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Zap v. United States, 328 U.S. 624, 628 (1946), *vacated*, 330 U.S. 800 (1947) (consent); United States v. Santana, 427 U.S. 38, 42 (1976) (hot pursuit of a fleeing felon); Schmerber v. California, 384 U.S. 757, 770 (1966) (evidence in process of destruction); Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971) (plain view); United States v. Ramsey, 431 U.S. 606 (1977) (border searches); Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative searches).

15. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654 (1979); Camara v. Municipal Court, 387 U.S. at 536-37; Johnson v. United States, 333 U.S. at 14-15.

16. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 557-60 (1976) (fixed checkpoint required for random vehicle stop); United States v. Biswell, 406 U.S. 311, 314-15 (1972) (statute as a discretion-limiting factor); Camara v. Municipal Court, 387 U.S. at 537-39 (area warrant as a discretion-limiting factor).

17. *See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972); Camara v. Municipal Court, 387 U.S. 523 (1967).

18. *See, e.g.*, Carroll v. United States, 267 U.S. at 151. In *Carroll*, the Court asserted that those crossing a border may be stopped for that reason alone based on the need for national self-protection. *Id.* at 154. Automobile travelers lawfully within the country may only be stopped without a warrant if a competent official has probable cause to suspect some illegality. *Id.*

cluding license and registration[19] and border[20] stops. The Court, in *United States v. Villamonte-Marquez*,[21] used this jurisprudence[22] to distinguish vessel stops from automobile stops, and to extend the administrative inspection exception to the maritime setting.

A. *Administrative Inspections*

Administrative inspections have long been conducted by municipalities in search of fire and health hazards in private premises.[23] Although the Supreme Court, in *Camara v. Municipal Court*,[24] recognized the need for inspections by administrative agencies of the government, the Court was unwilling to waive the fourth amendment warrant requirement as unduly burdensome. Instead, the Court held that absent an emergency situation,[25] an administrative warrant[26] was required before an

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19. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979).

20. Professor LaFave characterizes border searches as "yet another variety of administrative search." 3 W. LAFAVE, SEARCH AND SEIZURE § 10.5, at 275 (1978). A reason invoked to justify the border search exception is the need for national self-protection. Caroll v. United States, 267 U.S. at 154. *See also* Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). In addition to national self-protection, the border search rationale is also predicated on the universal understanding that crossing a border may entail a search. *See, e.g.*, United States v. Weil, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

21. 103 S. Ct. 2573 (1983).

22. *See Villamonte-Marquez*, 103 S. Ct. at 2579-82; *id.* at 2585-91 (Brennan, J., dissenting). *See also infra* Part V.

23. *See* 3 W. LAFAVE, *supra* note 20, § 10.1, at 178.

24. 387 U.S. 523 (1967).

25. *Id.* at 539 (defining an emergency situation as a compelling urgency to act at a particular time on a particular day). People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, *cert. denied*, 426 U.S. 953 (1976), sets forth guidelines for invoking the emergency exception:

> (1) [There must be] reasonable grounds to believe that there is an emergency at hand and an immediate need for . . . the protection of life or property.
>
> (2) The search must not be primarily motivated by intent to arrest and seize evidence.
>
> (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Id. at 177-78, 347 N.E.2d at 609, 383 N.Y.S.2d at 248.

26. An administrative warrant is a warrant issued for an area inspection. It is not issued based upon an inspector's belief that a particular dwelling violates the administrative code, but rather upon the reasonableness of the enforcement agency's appraisal of the conditions in the area as a whole. *See* Camara v. Municipal Court, 387 U.S. at 538.

inspection could be conducted.[27] The *Camara* Court asserted that for purposes of the fourth amendment, the reasonableness of such searches should be determined by balancing the need to search against the resulting intrusion.[28] The Court found that administrative warrants sufficed to protect an individual's privacy without placing an insurmountable burden on the efforts of administrative bodies to protect the public's interest in safety.[29]

The balancing process employed in *Camara* was refined in *United States v. Biswell*.[30] The Court in *Biswell* addressed the constitutionality of warrantless searches of commercial premises pursuant to statutes specifically authorizing such searches.[31] In addressing the potential for abuse occasioned by statutes which authorized warrantless searches, the Court suggested several factors that should be considered in a fourth amendment balancing analysis. First, the inspection must be made pursuant to a valid statute, limiting the inspections in time, place, and scope.[32] Second, the regulations and licensing requirements affecting the commercial occupant's business must be so pervasive as to reduce his reasonable expectation of privacy;[33] these requirements must constitute notice as to the purpose and limits of the inspections.[34] Finally, the possibility of abuse must be negligible.[35] When these conditions are satisfied, warrantless inspections pursuant to a valid statute are reasonable under the fourth amendment.[36]

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27. *Id.* at 539. In dicta, the Court indicated that if entry to a particular dwelling is denied, a warrant should be obtained specifying the particular property to be searched. *Id.* at 539-40.

28. *Id.* at 537.

29. *Id.* at 538-40.

30. 406 U.S. 311 (1972).

31. *See id.* at 311-12, 317.

32. *Id.* at 315.

33. *Id.* at 316.

34. *See id.*

35. *Id.* at 317.

36. *Id. See also* 3 W. LAFAVE, *supra* note 20, § 10.2(f); Carmichael, *supra* note 2, at 84 n.154.

In discussing routine building inspections, the Court in Michigan v. Tyler, 436 U.S. 499, 507 (1978), stated that "a reasonable balance between competing concerns is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections." In United States v. Biswell, 406 U.S. at 316, the Court noted that certain industries are so heavily regulated that no proprietor could have a reasonable expectation of privacy. *Cf.* Marshall v. Barlow's, Inc.,

B. *Administrative Vehicle Stops*

Administrative vehicle stops[37] are comparable to administrative building inspections in that both are conducted pursuant to regulatory statutes intended to safeguard the public. In a series of cases, including two border stops[38] and one license and registration stop,[39] the Supreme Court enunciated a reasonable suspicion standard[40] applicable to a regulatory vehicle stop made without a warrant. The Court reasoned that a standard less burdensome than probable cause was justified in the case of vehicles;[41] a lower standard was held to be reasonable because of the traditional distinction the Court has drawn between automobiles and dwellings.[42] This distinction is based on the fact that a vehicle can be moved out of the jurisdiction before a warrant is obtained.[43] This initial justification for affording automobile passengers less protection from governmental intrusion was subsequently supplemented by an analysis of an individual's subjective expectation of privacy in an automobile.[44]

In 1975, the Supreme Court, in *United States v. Brignoni-Ponce*,[45] held that officers on roving patrols near the border must have a reasonable suspicion of illegality before stopping a vehicle. The Court balanced the governmental interest furthered

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436 U.S. 307, 313, 316 (1978) (requiring warrants for OSHA inspections and recognizing that the closely regulated industry is the exception); United States v. Watson, 678 F.2d 765, 771 (9th Cir.), *cert. denied*, 103 S. Ct. 451 (1982) (administrative guidelines employed in vessel setting).

37. Administrative vehicle stops include stops at the border and license and registration stops. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

38. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

39. Delaware v. Prouse, 440 U.S. 648 (1979).

40. Under the reasonable suspicion standard, a law enforcement officer must be able to show that sufficient facts existed to give rise to a reasonable and articulable suspicion of some illegality. *See, e.g.*, Delaware v. Prouse, 440 U.S. at 661; United States v. Brignoni-Ponce, 422 U.S. at 881. *See also* Terry v. Ohio, 392 U.S. at 21.

41. Delaware v. Prouse, 440 U.S. at 663; United States v. Brignoni-Ponce, 422 U.S. at 884.

42. *See, e.g.*, Carroll v. United States, 267 U.S. at 153.

43. *Id.*

44. *Compare* Carroll v. United States, 267 U.S. at 153 (vehicles are easily moved out of the jurisdiction) *with* United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (diminished expectation of privacy surrounding an automobile).

45. 422 U.S. 873, 884 (1975).

by the stop with the subjective fear such stops elicited in lawful travelers.[46] The Court observed that suspicionless stops would interfere with a large number of lawful travelers who also travel in the vicinity of the border.[47] Furthermore, the Court maintained that it was not necessary to permit such an encompassing interference with lawful traffic, because "the characteristics of smuggling operations tend to generate articulable grounds for identifying violators."[48]

The following Term, in *United States v. Martinez-Fuerte*,[49] the Court held that the reasonable suspicion standard did not apply to brief stops for questioning conducted at *fixed checkpoints* away from the border. The Court concluded that suspicionless stops were reasonable because the intrusion was minimal[50] and the purpose was legitimate.[51] The reasonable suspicion standard was deemed impractical[52] because the flow of traffic was believed too heavy on major routes inland to allow the necessary study of any given car to give rise to a reasonable suspicion.[53] In addition, the Court maintained that a reasonable suspicion requirement would tend to confound efforts to deter well-disguised smuggling operations.[54] Moreover, the Court asserted

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46. *Id.* at 879-84.

47. *Id.* at 882.

48. *Id.* at 883. The Court identified several characteristics which might constitute articulable grounds for identifying smugglers. First, officers may consider the nature of the area in which they encounter a vehicle and any extraordinary traffic patterns. *Id.* at 884. Second, officers may consider any previous experience with illegal traffic and recent information about illegality. *Id.* at 885. Third, the driver's behavior, such as erratic driving or obvious evasive maneuvers, is relevant. *Id.* Finally, officers may consider aspects of the vehicle itself, such as appearing to be heavily loaded, and any other facts which in light of the officer's experience trigger suspicion. *Id.*

49. 428 U.S. 543, 545 (1976).

50. *Id.* at 557-58. The intrusion was considered minimal because the detention is brief; the subjective intrusion (concern or fright generated by the stop) is less; and a visual inspection is limited to what can be seen without a search.

51. *See id.* at 551-53, 562. The legitimate purpose was the need to limit immigration and the formidable law enforcement problems.

52. *Id.* at 557. The Court also rejected the respondents' less-restrictive-alternative arguments, such as legislation prohibiting the knowing employment of illegal aliens. *Id.* at 556-57 n.12.

53. *Id.* at 557.

54. *Id.* In addition, the Court asserted that checkpoint operations are also less discretionary 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 resources." *Id.* at 559.

that checkpoint stops generate less fear on the part of lawful travelers than roving patrol stops, and thus the subjective intrusion is less.[55] Similarly, the danger of officers' abusing their discretion was perceived to be reduced by routine checkpoint stops because fixed checkpoints interfere minimally with legitimate traffic.[56] The location of the checkpoint is known and travelers know they will not be stopped elsewhere.[57]

In 1979, relying on its decision in *Brignoni-Ponce*, the Supreme Court, in *Delaware v. Prouse*,[58] held that *random* automobile license and registration stops were unreasonable under the fourth amendment. The Court concluded that for license and registration stops to be constitutional, there must be some reasonable suspicion that either the motorist is unlicensed or the vehicle is unregistered.[59] Thus the Court required that these stops, which were regulatory in nature[60] and seizures under the fourth amendment,[61] comply with the reasonable suspicion standard.[62]

C. *Vessel Stops By Customs in the Circuit Courts*

Working within the framework of fourth amendment doctrine developed in administrative vehicle stops, several circuits have addressed the question of the constitutionality of random vessel stops.[63] The Fifth Circuit had concluded that random stops by customs were reasonable in customs waters.[64] On inland waters, however, either a reasonable suspicion of illegality or some connection with the border[65] was a prerequisite for a stop

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55. *Id.* at 558.
56. *Id.* at 559.
57. *Id.*
58. 440 U.S. 648, 663 (1979).
59. *Id.*
60. *See id.* at 658.
61. *Id.* at 653.
62. *Id.* at 663.
63. The circuits addressing the question include the first, third, fourth, fifth, ninth, and eleventh circuits. *See* cases cited *infra* notes 64 & 67.
64. *See, e.g.*, United States v. Alfrey, 620 F.2d 551, 554-55 (5th Cir. 1980). *See also* United States v. Helms, 703 F.2d 759, 762-63 (4th Cir. 1983); United States v. Alonso, 673 F.2d 334, 336 (11th Cir. 1982). Customs waters extend 12 miles from the coast. *See supra* note 2.
65. The border at sea is an imaginary line three miles from the coast marking the boundary of the territorial waters. For an explanation of the divisions of the water, see

under 19 U.S.C. § 1581(a)[66] to be held constitutional.[67] Under section 1581(a), customs officers are authorized to stop vessels or vehicles to conduct document checks or searches at any time and at any place in the United States or within customs waters.[68] Adhering to the traditional approach, however, the Fifth Circuit in *United States v. Villamonte-Marquez*[69] required a showing of either a reasonable suspicion of illegality or a border nexus.

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supra note 2. To require that all border searches occur at this imaginary line would, for all practical purposes, make the border search exception useless. Under the functional equivalent of the border doctrine, however, border searches are allowed even if the actual border is far away. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) ("[S]earches . . . in certain circumstances [may] take place not only at the border itself, but at its functional equivalent as well."). *See also* United States v. Diaz-Segovia, 457 F. Supp. 260, 275 (D. Md. 1978) (valid extended border search does not implicate fourth amendment considerations). The extended border doctrine applies to both land, *see, e.g.*, Alexander v. United States, 362 F.2d 379, 382-83 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966) (despite distance from border, search valid because vehicle under constant surveillance after crossing the border), and sea searches, *see, e.g.*, United States v. Helms, 703 F.2d 759, 763 (4th Cir. 1983) (stop on inland waters valid without reasonable suspicion where border nexus is established under functional equivalent of border doctrine).

The need for the extended border doctrine is particularly apparent with respect to vessels because of the impossibility of setting up roadblocks at sea. *See, e.g.*, United States v. Hilton, 619 F.2d 127, 133 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980); United States v. Hayes, 479 F. Supp. 901, 908 (D.P.R. 1979), *aff'd in part and rev'd in part*, 653 F.2d 8 (1st Cir. 1981). *But cf.* United States v. Harper, 617 F.2d 35, 38 (4th Cir.), *cert. denied*, 449 U.S. 887 (1980) (shrimping trawler boarded as part of Coast Guard policy of stopping all United States vessels less than 250 feet travelling Caribbean sea lanes; boarding upheld because not done at "will and whim of the officer in the field").

Not only must border searches occur within an area recognizable as the extended border, but there must also be some evidence of a border crossing. *See generally* 3 W. LaFave, *supra* note 20, § 10.5(d)-(e) (discussing searches not conducted at the immediate border). It is not necessary that there be an actual sighting of the border crossing. *See, e.g.*, United States v. Ingham, 502 F.2d 1287, 1290 (5th Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *cf.* United States v. Freeman, 579 F.2d at 943-46 (search justified on 19 U.S.C. § 1581(a) (1982) authority rather than border search exception despite some evidence of a crossing). Mere access to international waters, however, has been held to be insufficient. *See, e.g.*, United States v. Williams, 544 F.2d 807, 810 (5th Cir. 1977).

66. 19 U.S.C. § 1581(a) (1982). *See supra* note 3.

67. *E.g.*, United States v. D'Antignac, 628 F.2d 428, 433 (5th Cir. 1980), *cert. denied*, 450 U.S. 167 (1981). *See also* Blair v. United States, 665 F.2d 500, 505 (4th Cir. 1981); United States v. Zuroksky, 614 F.2d 779, 787 (1st Cir. 1979), *cert. denied*, 446 U.S. 967 (1980); United States v. Odneal, 565 F.2d 598, 601 (9th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978).

68. 19 U.S.C. § 1581(a) (1982). *See supra* note 3.

69. 652 F.2d 481, 486-88 (5th Cir. 1981), *rev'd*, 103 S. Ct. 2573 (1983).

III. *United States v. Villamonte-Marquez*: Factual Setting and Lower Court Opinions

A. *The Facts*

On March 5, 1980, a customs officer in Louisiana received information from an informant that two boats manned by foreigners and containing marijuana were located in the vicinity of two fishing villages located on the Calcasieu River Ship Channel.[70] On March 6, 1980, a customs officer and several state officers, patrolling the channel, were eighteen miles inland from the coast when they sighted a forty-foot sailboat anchored on the west side of the channel.[71] As the patrol boat approached the sailboat, the officers witnessed a freighter create a huge wake that severely rocked the sailboat.[72] When the patrol boat passed behind the sailboat, the officers observed on the stern the vessel's name, the *Henry Morgan II*, and its home port of *Basilea*.[73]

The officers sighted respondent Hamparian on deck and, hailing from their boat, inquired whether the sailboat and crew were all right.[74] Hamparian responded by shrugging his shoulders.[75] The customs officer, accompanied by a state policeman, then boarded the *Henry Morgan II* and requested to see the vessel's documentation.[76] Hamparian proffered a document written in French and dated one month earlier that appeared to be a request to change a vessel from Swiss to French registry.[77] While talking to Hamparian, the customs officer smelled burning marijuana.[78] The officer looked through an open hatch door and ob-

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70. *Id.* at 482. The area involved inland waters with ready access to the open sea. Vessels have access to the channel from the sea and from Lake Calcasieu. The channel runs south from Lake Charles, Louisiana, to the Gulf of Mexico, and it runs on the west side of the Calcasieu Lake. Lake Charles is a designated customs port of entry in the Houston, Texas region. United States v. Villamonte-Marquez, 103 S. Ct. 2573, 2576 (1983). Lake Charles is approximately 50 land miles from the entrance to the ship channel near Cameron. Brief for United States at 2, *Villamonte-Marquez*, 103 S. Ct. 2573 (1983).

71. *Villamonte-Marquez*, 103 S. Ct. at 2576.

72. *Id.*

73. *Id.*

74. *Id.* at 2576-77.

75. *Id.* at 2577.

76. *Id.*

77. *Id.*

78. *Id.*

served Villamonte-Marquez lying on a sleeping bag atop burlap-wrapped bags that later proved to contain marijuana.[79] The respondents were arrested and given *Miranda* warnings; a subsequent search of the vessel disclosed 5800 pounds of marijuana.[80]

B. *The Lower Court Opinions*

Hamparian and Villamonte-Marquez unsuccessfully sought to suppress the marijuana evidence, claiming that it was found as a result of an unlawful search and seizure.[81] The district court concluded that the boarding of the sailboat for a document check had been based on articulable facts[82] giving rise to a reasonable suspicion that the people on board were of foreign origin.[83] For this reason the district court refused to suppress the evidence.[84] Subsequently, a jury found the respondents guilty of various conspiracy and possession of marijuana offenses.[85]

The Fifth Circuit Court of Appeals reversed the conviction,[86] finding that "[t]he broad language of the statute [19 U.S.C. § 1581(a)[87]] . . . is circumscribed by the reasonableness requirement of the Fourth Amendment."[88] The court further asserted that the constitutionality of the boarding of a vessel in inland waters under section 1581(a) turns on whether the board-

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79. *Id.*

80. *Id.*

81. *See* United States v. Villamonte-Marquez, 652 F.2d 481, 482 (5th Cir. 1981), *rev'd*, 103 S. Ct. 2573 (1983).

82. The articulable facts were: (1) information from a reliable informant that two boats, manned by foreigners, carrying marijuana, would be in the area; (2) discovery of one boat at midnight running without lights and carrying cans of diesel fuel while it burned gasoline; (3) sighting of the *Henry Morgan II* anchored in the channel which in the experience of the officers was unusual; (4) the home port displayed on the stern appeared to be of foreign origin; and (5) the unresponsiveness of Hamparian when questioned, indicating that he might have not understood because he was foreign. Petition for a Writ of Certiorari at 19a-20a, *Villamonte-Marquez*, 103 S. Ct. 2573 (1983).

83. *Id.* at 20a.

84. *Id.*

85. *Villamonte-Marquez*, 103 S. Ct. at 2577. The offenses were: (1) conspiring to import marijuana in violation of 21 U.S.C. § 963 (1976); (2) importing marijuana in violation of *id.* § 952(a); (3) conspiring to possess marijuana with intent to distribute in violation of *id.* § 846; and (4) possessing marijuana with intent to distribute in violation of *id.* § 841(a)(1).

86. United States v. Villamonte-Marquez, 652 F.2d at 488.

87. 19 U.S.C. § 1581(a) (1982). *See supra* note 3.

88. United States v. Villamonte-Marquez, 652 F.2d at 484.

ing is pursuant to a border search or to a limited investigatory stop based upon a reasonable suspicion of illegality.[89]

The government contended that the facts were sufficient to support a valid border search.[90] The Fifth Circuit disagreed, observing that "the district court upheld the boarding solely on the basis of a reasonable suspicion of a customs violation."[91] There was no finding that the facts supported a suspicion that the vessel had crossed the border.[92] Furthermore, the court stated that prior Fifth Circuit cases required a greater showing of a border crossing than was present in *United States v. Villamonte-Marquez*.[93] In addition, the court concluded that the reasonable suspicion prong of its constitutional test was not satisfied, since the articulable facts available to the officers supported no more than a generalized suspicion of a crime.[94] For these reasons, the court found the seizure and subsequent search unreasonable under the

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89. *Id.* at 485 (quoting United States v. D'Antignac, 628 F.2d 428, 433 (5th Cir. 1980), *cert. denied*, 450 U.S. 167 (1981)).

The government argued in its brief that the Fifth Circuit's test for constitutionality was based on a misinterpretation of United States v. Serrano, 607 F.2d 1145 (5th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980). Brief for United States at 45 n.26, *Villamonte-Marquez*, 103 S. Ct. 2573 (1983). It argued that earlier cases merely supported the view that under § 1581(a), customs officers *may* make an investigatory stop of a vessel on inland waters adjacent to the open sea when they have reasonable grounds to suspect illegal activity. *Id.* The government argued that this is different from establishing a *constitutional requirement* for a reasonable suspicion of wrongdoing when the facts do not indicate a border crossing. *Id.* The government reasoned that the question of the minimum constitutional requirement was not addressed in these cases, because in each instance a reasonable suspicion was present. *Id.*

Apparently, the Fifth Circuit believed a constitutional requirement existed. There was an implicit assumption that, absent evidence of a border crossing, some justification for seizing vessels was constitutionally required. *Compare* United States v. D'Antignac, 628 F.2d at 433 (assuming constitutionality turns on border nexus or reasonable suspicion) *with* United States v. Demanett, 629 F.2d 862, 868 (3d Cir. 1980), *cert. denied*, 450 U.S. 910 (1981) (explicitly recognizing that the constitutional threshold was not reached because the reasonable suspicion standard was satisfied).

90. United States v. Villamonte-Marquez, 652 F.2d at 486.

91. *Id.*

92. *Id.*

93. *Id.* On appeal to the Supreme Court, the government did not make a border search argument. *Villamonte-Marquez*, 103 S. Ct. at 2585 n.6 (Brennan, J., dissenting). Nevertheless, the government argued that waters which connect the open sea with a customs port of entry implicate customs interests. *See* Brief for United States at 49 n.27, *Villamonte-Marquez*, 103 S. Ct. 2573 (1983).

94. United States v. Villamonte-Marquez, 652 F.2d at 487-88.

fourth amendment and suppressed the evidence.[95]

IV. The Supreme Court Opinions

A. *The Majority*

In *United States v. Villamonte-Marquez*,[96] the Supreme Court reversed the court of appeals. The Court concluded that it was reasonable, and therefore comported with the fourth amendment, for customs to randomly stop vessels for the purpose of checking documents on waters that provide ready access to the open sea.[97] The Court maintained that on balance "[w]hile the need to make document checks is great, the resultant intrusion on Fourth Amendment interest[s] is quite limited."[98] In support of its position, the Court contended that the need for such checks was great because documentation laws further the public interest in many ways.[99] In contrast, the interference was characterized as "modest," since a vessel stop only entails a brief detention in which officials board the vessel, visit public areas, and inspect documents.[100]

Justice Rehnquist, writing for the majority, began the Court's analysis with the observation that section 31 of the Act of Aug. 4, 1790[101] "appears to be the lineal ancestor" of the statute invoked by the government to board the *Henry Morgan II*.[102] The Court cited *Boyd v. United States*[103] for the proposi-

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95. *Id.* at 488.

96. 103 S. Ct. 2573 (1983).

97. *See id.* at 2582.

98. *Id.* at 2581 (footnote omitted).

99. *Id.* The Court stated:

> These documentation laws serve the public interest . . . . They 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. The documentation laws play a vital role in the collection of Customs duties and tonnage duties. They allow for regulation of imports and exports . . . .

Id.

100. *Id.* at 2581-82.

101. Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164-65.

102. *Villamonte-Marquez*, 103 S. Ct. at 2577. *Accord* Barnett, *A Report on Search and Seizure at the Border (Customs Problems)*, 1 AM. CRIM. L. QTLY. 36, 36-48 (1974); Carmichael, *supra* note 2, at 65-75. *See also* United States v. Williams, 617 F.2d 1063, 1079-81 (5th Cir. 1980); United States v. Freeman, 579 F.2d 942, 946-47 (5th Cir. 1978).

103. 116 U.S. 616 (1886).

tion that since the same Congress which passed this Act also proposed the fourth amendment, the members of the First Congress must have believed that seizures of this kind were reasonable within the meaning of the fourth amendment.[104]

The Court noted that the court of appeals had relied on *United States v. Brignoni-Ponce*[105] in holding that the boarding of the *Henry Morgan II* required a reasonable suspicion.[106] Justice Rehnquist observed that the distinction drawn by the Supreme Court between roving patrol stops and checkpoint stops has been "what the Court deemed the less intrusive and less awesome nature of fixed checkpoint stops."[107] He then suggested that checkpoints are impractical on water because, while automobiles are confined to "established avenues," vessels have the capacity to move in any direction at any time.[108] Thus, the Court reasoned that "the important factual differences between vessels located in waters offering ready access to the open sea" and automobiles on main roads near the border make the vehicle cases inapposite.[109] Based upon this distinction by which checkpoint stops are practical for vehicles but impractical for vessels, the Court concluded that roving customs patrols on water are free from any reasonable and articulable suspicion requirement.[110]

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104. *Villamonte-Marquez*, 103 S. Ct. at 2578-79.

105. 422 U.S. 873 (1975).

106. *Villamonte-Marquez*, 103 S. Ct. at 2579.

107. *Id.* at 2580. In Delaware v. Prouse, 440 U.S. 648 (1979), Justice Rehnquist characterized the fear caused by random stops as "the most diaphanous of citizen interests." *Id.* at 666.

108. *Villamonte-Marquez*, 103 S. Ct. at 2580.

109. *Id.* at 2579-80.

110. *See id.* The Court further asserted that differences between the requirements for vessel documentation and vehicle licensing make stops necessary in the case of vessels. *Id.* at 2580. While license plates, observable without an official stop, are often sufficient to indicate whether a vehicle is in compliance with a state's licensing requirements, vessels are not issued anything comparable to license plates. *Id.* In addition, the Court noted that the outward markings that are required for vessels are put on "at the instance of the owner," *id.*, and are therefore presumably more easily counterfeited than vehicle license plates. *See* Brief for United States at 29 n.22.

Commercial and pleasure vessels under five tons are not eligible for documentation. 46 U.S.C. §§ 65b, 65f(a), 65h-65k (Supp. V 1981). Undocumented American vessels do not need to bear a federally-issued identification number, but if "equipped with propulsion machinery," they must bear state-issued identification numbers. 46 U.S.C. § 1466 (1976). Otherwise, it is not necessary to display any number, name or hailing port. Brief

In addition, the Court maintained that document checks are necessary to ensure that the extensive and complex regulatory scheme functions.[111] The Court indicated that the extensiveness of the scheme illustrates the substantial public interest which is protected by enforcement of the laws.[112] This public interest was found to be "most substantial" in areas, like the ship channel in *Villamonte-Marquez*, which connect the open sea with a customs port of entry.[113] In the majority's opinion, the fact that the public interest in making document checks was great justified the potential intrusion on individual privacy occasioned by random checks.[114]

B. *The Dissent*

Justice Brennan, writing for the dissent,[115] perceived the majority's holding as a complete and unnecessary departure from Supreme Court precedent.[116] The dissent maintained that prior cases had required "probable cause, reasonable suspicion, or another discretion-limiting feature such as the use of fixed checkpoints instead of roving patrols."[117] In addition, the dissent found the intrusion greater in the case of vessel boardings than in the case of vehicle stops, because such boardings are more akin to an entry of a private house than to an automobile stop.[118]

The dissent was not convinced by the majority's argument that there are "special enforcement problems" associated with

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for United States at 28. Foreign vessels must display whatever markings are required by the laws of their home countries. *Id.*

111. *Villamonte-Marquez*, 103 S. Ct. at 2580-81. The Court illustrated the extensiveness and complexity of the regulatory scheme by noting that document checks assist "government officials in the prevention of entry into this country of controlled substances, illegal aliens, prohibited medicines, adulterated foods, dangerous chemicals, prohibited agricultural products, diseased or prohibited animals and illegal weapons and explosives." *Id.* at 2581.

112. *Id.* For the public interest protected by the regulatory scheme, see *supra* note 99.

113. *Villamonte-Marquez*, 103 S. Ct. at 2581.

114. *See id.*

115. Justice Brennan's dissent was joined by Justice Marshall. Justice Stevens joined the dissenters on the mootness issue only.

116. *See id.* at 2585 (Brennan, J., dissenting).

117. *Id.* (Brennan, J., dissenting).

118. *Id.* at 2588 (Brennan, J., dissenting).

documentation checks in the maritime setting.[119] It argued that the ship channel involved in *Villamonte-Marquez* is analogous to a limited-access interstate highway which allows the border patrol to funnel most of the relevant traffic through checkpoints.[120] The dissent observed that despite foreseeable problems in setting up effective checkpoints or temporary roadblocks in urban and suburban networks of highways and streets, *Delaware v. Prouse*[121] made no exception for such settings.[122] Furthermore, it maintained that less intrusive means are available to law enforcement officials, making random stops unnecessary.[123] Vessels and vehicles are analogous in that "safety defects are readily detectable by visual means," and vessels could easily and inexpensively be equipped with some form of identification comparable to automobile license plates.[124] Finally, the dissent asserted that even if special law enforcement problems did exist, they would not justify dispensing with the fourth amendment's protections against arbitrary police intrusion, especially since " 'the characteristics of smuggling operations tend to generate articulable grounds for identifying violators.' "[125]

Justice Brennan compared section 31[126] with section 48[127] of

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119. *Id.* at 2589 (Brennan, J., dissenting).

120. *Id.* (Brennan, J., dissenting) (all vessels between Lake Charles and open sea must take Calcasieu River Ship Channel).

121. 440 U.S. 648 (1979).

122. *Villamonte-Marquez*, 103 S. Ct. at 2589 (Brennan, J., dissenting).

123. *Id.* (Brennan, J., dissenting).

124. *Id.* at 2590 (Brennan, J., dissenting).

125. *Id.* (Brennan, J., dissenting) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975)). As with vehicles, safety defects are observable without a need for random stops and the case law suggests vessels engaged in smuggling generate grounds for suspicion. *Villamonte-Marquez*, 103 S. Ct. at 2590 n.11 (Brennan, J., dissenting).

126. Section 31 provides in part:

> That it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters . . ., to go on board of ships or vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests . . . and of examining and searching the said ships or vessels; and the said officers respectively shall have free access to the cabin, and every other part of a ship or vessel: and if any . . . package, shall be found in the cabin, steerage or forecastle of such ship or vessel, or in any other place separate from the residue of the cargo, it shall be the duty of the said officer to take particular account of every such . . . package . . . and if he shall judge proper to put a seal or seals on every such . . . package . . . .

Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164.

the Act of Aug. 4, 1790 and found support for the conclusion that customs stops must be justified by a reasonable suspicion of wrongdoing where there is no border nexus.[128] He reasoned that despite the majority's arguments to the contrary,[129] section 31 applied only to boardings and searches of ships "if bound to the United States."[130] In contrast, Justice Brennan observed, section 48, which had no limitation as to the vessel's point of origin or location when it was stopped, had instead a "reason to suspect" limitation.[131] Thus, the dissent maintained that in order to have authority to board and search a vessel without reference to its location, that is, without evidence of a border crossing, customs officers must have had "reason to suspect" that goods subject to duty were concealed on board.[132]

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127. Section 48 provides in part:

> That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed: and therein to search for, seize and secure any such goods, wares or merchandise.

Id. § 48, 1 Stat. at 170.

128. *Villamonte-Marquez*, 103 S. Ct. at 2586 n.7 (Brennan, J., dissenting).

129. *See id.* at 2578 n.4.

130. *Id.* at 2586 n.7 (Brennan, J., dissenting).

131. *Id.* (Brennan, J., dissenting). The majority rebutted this statutory analysis with two arguments. First, it claimed the dissent had ignored that part of § 31 which authorized boarding of ships "in any part of the United States." *Id.* at 2578 n.4. The dissent, on the other hand, interpreted "in any part of the United States" to mean that customs document checks did not have to be at the border. They could also be done when the ship reached port. *Id.* at 2586 (Brennan, J., dissenting). The majority construed the phrase "if bound to the United States" to qualify only the phrase "within four leagues of the coast," because "[i]t would make no sense whatsoever to say that the statute authorizes the boarding of vessels found 'in any part of the United States' only so long as such vessels are 'bound to the United States.'" *Id.* at 2578 n.4 (quoting Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. at 164). For the text of § 31, see *supra* note 126.

Second, the majority asserted that §§ 31 and 48 address "different matters and nothing in one can be read to limit the other." *Villamonte-Marquez*, 103 S. Ct. at 2578 n.4. It asserted that § 31 deals with boardings for inspection of documents, whereas § 48 "applies only to seizures of 'goods, wares or merchandise subject to duty' and thought to be concealed." *Id.* (quoting Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. at 170). For the text of § 48, see *supra* note 127.

132. *See Villamonte-Marquez*, 103 S. Ct. at 2586 n.7 (Brennan, J., dissenting).

V. Analysis

The impact of *United States v. Villamonte-Marquez*[133] is likely to be widespread in part because it brings inland waters within the ambit of 19 U.S.C. § 1581(a),[134] while dispensing with the border nexus and reasonable suspicion conditions previously required by the Fifth Circuit for inland waters situations.[135] As a result, the decision is likely to affect the large number of pleasure boaters who are required to carry documents or have numbered boats.[136] These boaters have previously had a basis in fourth amendment *vehicle* cases from which to protest random stops by roving customs officers on inland waters.[137] That basis no longer exists on any waters which afford ready access to the sea.[138]

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133. 103 S. Ct. 2573, 2582 (1983).

134. 19 U.S.C. § 1581(a) (1982). *See supra* note 3.

135. *See* cases cited *supra* note 67 and accompanying text.

136. Under federal law, pleasure vessels and commercial vessels under five tons are not eligible for documentation. 46 U.S.C. §§ 65b, 65f(a), 65h-65k (Supp. V 1981). Undocumented American vessels do not need to bear a federally-issued identification number. However, if these boats are "equipped with propulsion machinery," they must bear state-issued identification numbers. 46 U.S.C. § 1466 (1976). The Customs Service indicated that there are now more than 80,000 documented commercial vessels and 67,000 documented pleasure vessels. *See* Brief for United States at 23 n.15, *Villamonte-Marquez*, 103 S. Ct. 2573 (1983). In addition, there were 9,073,972 state-numbered boats in 1982. U.S. COAST GUARD, U.S. DEP'T OF TRANSP., BOATING STATISTICS 1982, at 8 (1983).

137. *See* Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). *See also* United States v. Demanett, 629 F.2d 862, 867-68 (3d Cir. 1980) (comparing vessels and vehicles); United States v. Piner, 608 F.2d 358, 360-61 (9th Cir. 1979) (focusing on subjective intrusion analysis of *Prouse* and *Martinez-Fuerte*); United States v. Whitmire, 595 F.2d 1303, 1306-08 (5th Cir. 1979) (reasonable suspicion standard required based on *Brignoni-Ponce*). *Cf.* United States v. Gollwitzer, 697 F.2d 1357, 1360-61 (11th Cir. 1983) (distinguishing vessels due to large number of maritime regulations, but based on *Prouse*, suggesting that reasonable expectation of privacy is a function of the type of vessel). *See also supra* notes 37-48 & 58-62 and accompanying text.

138. *See Villamonte-Marquez*, 103 S. Ct. at 2582. When 19 U.S.C. § 158(a) (1982) is read literally, it allows stops on any United States waters. *See supra* note 3. This fact was noted by the Court at oral argument, but it was not resolved. *See* Oral Arguments, *supra* note 7, at 28-29.

Justice Brennan, in the dissent, observed that the Court "held in *Prouse* that random, roving-patrol traffic stops of vehicles are unconstitutional in any setting," despite the fact that effective checkpoints and temporary roadblocks would be ineffective in urban and suburban networks of highways and streets. *Villamonte-Marquez*, 103 S. Ct. at 2589 (Brennan, J., dissenting).

A. *The Vessel-Vehicle Distinction*

The majority found the physical and regulatory distinctions between vessels and vehicles decisive. It relied upon this distinction in rejecting the reasonable suspicion standard.[139] The Court's analysis focused on the fixed checkpoint exception to the reasonable suspicion requirement while ignoring the rationale used to justify both the reasonable suspicion standard and the fixed checkpoint exception.[140] The rationale used in both instances is that random stops: (1) interfere with a large number of legitimate travelers;[141] (2) generate a significant subjective intrusion (causing concern or fright) on the part of lawful travelers;[142] and (3) are unnecessary since the characteristics of smuggling tend to give rise to a reasonable suspicion.[143]

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139. *Id.* at 2580.

140. *See id.*

141. *Id.* See *supra* note 136 for the number of boaters likely to be affected.

142. *Villamonte-Marquez*, 103 S. Ct. at 2580. *See also* United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976).

The majority's failure to address the Court's previous concern with unlimited discretion in the hands of officers in the field formed the basis for most of Justice Brennan's dissent dealing with the fourth amendment issue. *See Villamonte-Marquez*, 103 S. Ct. at 2585-89 (Brennan, J., dissenting). Arguing in the dissent in *Prouse*, Justice Rehnquist summarily addressed the majority's concern with leaving excessive discretion in the hands of officers by stating that "[a]lthough a system of discretionary stops could conceivably be abused, the record before us contains no showing that such abuse is probable or even likely." Delaware v. Prouse, 440 U.S. at 667 (Rehnquist, J., dissenting). The potential for abuse is a relevant factor under both United States v. Martinez-Fuerte, 428 U.S. at 559, and United States v. Biswell, 406 U.S. 311, 317 (1972).

143. *Villamonte-Marquez*, 103 S. Ct. at 2580. *Compare* note 48 *supra* (characteristics which might constitute articulable suspicion in vehicle cases) *with* United States v. Ceballos, 706 F.2d 1198, 1200 (11th Cir. 1983) (bow low in water, all rigging removed, fuel tank unusually large for fishing trawler), United States v. Kubiak, 704 F.2d 1545, 1546 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 163 (1983) (riding low in water, apparent flight from Coast Guard, registration numbers from Delaware but Florida port of call), United States v. Michelena-Orovio, 702 F.2d 496, 498, *reh'g*, 719 F.2d 738 (5th Cir. 1983) (lights reversed to give appearance of going in opposite direction; after sighting Coast Guard, vessel changed course radically), United States v. Dillon, 701 F.2d 6, 7 (1st Cir. 1983) (boat sluggish and low in water), United States v. Allen, 690 F.2d 409, 410 (4th Cir. 1982) (sailing erratically and without navigation lights), United States v. Green, 671 F.2d 46, 48 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982) (riding sluggishly, low in water, heavy in bow, inconsistent responses to questions), United States v. Streifel, 665 F.2d 414, 416 (2d Cir. 1981) (lying dead in water for no apparent reason, evasive and uncertain answers to questions), United States v. Kleinschmidt, 596 F.2d 133, 135-36 (5th Cir.), *cert. denied*, 444 U.S. 927 (1979) (vessel approached coast late at night and had not been seen leaving port earlier; it was a type capable of foreign travel; vessel was wallowing as if

The rationale in support of a reasonable suspicion requirement is equally applicable to vessels on inland waters as to automobiles near the border.[144] Previously, the circuit courts had required that customs officials make a showing of a reasonable suspicion of wrongdoing[145] or comply with administrative guidelines for vessel stops.[146] The circuit court cases suggest that the maritime setting gives rise to a great variety of grounds to suspect smuggling.[147] Therefore, the legitimate needs of law enforcement[148] do not require the broad interference with legitimate traffic that the majority's holding authorizes.

Nevertheless, the Court concluded that the physical and psychological intrusion, which was held decisive on land,[149] had little bearing at sea.[150] It held, in effect, that since it is not possible to mitigate with roadblocks the intrusive and awesome nature of roving patrols on water, customs officers must be given unrestricted authority to stop vessels on inland waters.[151] In doing so, the Court decided that the concerns underlying the fourth amendment protections should be written out of the reasonableness equation in the maritime context.[152] The strength of

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heavily loaded; water line high, suggesting it had been altered; cabin dark, windshield covered by canvas; name was on a list of suspect boats provided by local police; occupants of ship refused to respond to questioning when customs approached), *and* United States v. Odneal, 565 F.2d 598, 600-01 (9th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978) (customs stop upheld when boat poorly rigged, no name on stern and moving slowly).

144. *See supra* notes 38-69 & 141-143 and accompanying text.

145. *See, e.g.*, Blair v. United States, 665 F.2d 500, 505 (4th Cir. 1981) (where no border crossing, stop on inland waters requires reasonable suspicion); *see also* United States v. D'Antignac, 628 F.2d 428 (5th Cir. 1980) (same); United States v. Zurosky, 614 F.2d 779 (1st Cir. 1979), *cert. denied*, 446 U.S. 967 (1980) (same); United States v. Odneal, 565 F.2d 598 (9th Cir. 1977) (same).

146. *See, e.g.*, United States v. Watson, 678 F.2d 765, 769 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 451 (1982) (administrative plan authorized Coast Guard to inspect all vessels less than 200 feet in length found in specific corridors at established points in Pacific); United States v. Harper, 617 F.2d 35, 37 (4th Cir. 1970), *cert. denied*, 449 U.S. 887 (1980) (Coast Guard policy entailed stopping all United States vessels less than 250 feet travelling Caribbean sea lanes).

147. *See* cases cited *supra* note 143.

148. *Villamonte-Marquez*, 103 S. Ct. at 2581. *See supra* note 111.

149. *See, e.g.*, Delaware v. Prouse, 440 U.S. at 657; United States v. Martinez-Fuerte, 428 U.S. at 558.

150. *See Villamonte-Marquez*, 103 S. Ct. at 2580.

151. *Id.* at 2579-80.

152. *See id; accord id.* at 2585-89 (Brennan, J., dissenting). *See also supra* text accompanying notes 97-113.

the Court's conclusion depends on the soundness of its use of the vessel-vehicle distinction.

In balancing the intrusion caused by boarding a vessel on inland waters to check documents with the public interest furthered by such document checks,[153] the Court abandoned the vessel-vehicle distinction. After using the distinction to demonstrate why fixed checkpoints are impractical on water,[154] the Court failed to pursue the distinction in analyzing the extent of the intrusion.[155]

The vehicle cases are inappropriate for measuring the extent of the intrusion to determine what is reasonable under the fourth amendment when law enforcement officials board vessels. The significant factual differences between vessels and vehicles[156] help to explain why the physical intrusion attendant to a stop by customs officials is greater on inland waters than on the highway. In the maritime context, a document check involves officers coming on board, since it cannot be performed by their simply coming alongside.[157] Boarding a vessel entails difficult and sometimes dangerous maneuvering of the respective craft,[158] which in turn can cause considerable inconvenience due to the time and effort expended.

The Court places great weight on the logistical problems that distinguish policing the land border from the sea border. *See id.* at 2580. These problems at sea are offset to some extent by the much greater numbers of vehicles on land than vessels at sea. In 1982, there were 107,393 vessels which carried 2,549,112 people through customs. U.S. CUSTOMS SERVICE, *supra* note 3, at 35-36. In contrast, there were 90,662,805 vehicles which carried 266,448,281 people in "ground vehicles and on foot" through customs. *See id.*

153. *See Villamonte-Marquez*, 103 S. Ct. at 2580-81. *See supra* note 99.

154. *Villamonte-Marquez*, 103 S. Ct. at 2580.

155. *See id.* at 2581.

156. *See id.* at 2579-80. *See also infra* note 167 and accompanying text.

157. The government argued, for example, that the documents can not be handed over because boats rock back and forth and hit each other. *See* Oral Arguments, *supra* note 7, at 21. *See* Brief for United States at 27-35, *Villamonte-Marquez*, 103 S. Ct. 2573 (1983) (government argued that handing documents is impractical because boats rock back and forth and hit one another, and it is insufficient because need to check main beam number remains). But see Justice Brennan's claim that "the Court does not explain why that need [to check compliance with registration laws] requires the police to board a vessel, rather than to come alongside or to request that someone from the vessel to come on board the police vessel." *Villamonte-Marquez*, 103 S. Ct. at 2590 (Brennan, J., dissenting).

158. *See supra* note 157.

Customs officers visit not only public areas of the vessel, but also possibly the hold.[159] Once aboard, customs officers may look through open hatches and portholes, and may inspect the hold for the vessel's identification number. The officials, therefore, have a considerably *plainer*[160] view of the vessel, its contents, and its occupants than when the vessels are merely tethered together. This situation is only remotely analogous to an officer's standing alongside a vehicle for the purpose of inspecting a driver's license and car registration. Moreover, factors traditionally associated with the need for fourth amendment protection — the unexpectedness of the stop and the realization that the stop may occur again at some unknown time and place[161] — seem to apply equally to random vehicle and random vessel stops.

The distinction is highlighted by the fact that cars travel along the highway in close proximity to each other. Furthermore, when automobiles are stopped, such as at stop lights, automobile occupants are easily observed.[162] By contrast, the Coast Guard boating rules are designed to prevent close encounters.[163] The rules set forth guidelines regarding warning signals and rights of way which give those on boats a reasonable expectation that other boats will maintain a certain distance.[164]

Vessels and vehicles seem distinguishable not only in that vehicles must follow established avenues, as the majority pointed out,[165] but also in that one arguably has a greater "reasonable expectation of privacy" on a pleasure boat than in a vehicle.[166] This is so because boats often have living quarters, toi-

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159. Documented vessels must have identification numbers "deeply carved or otherwise permanently marked on main beam." 46 U.S.C. § 45 (1976).

160. The elements of the plain view doctrine include inadvertant discovery by an officer who is legitimately present at the time of the seizure. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 468-69 (1971).

161. *See* United States v. Martinez-Fuerte, 428 U.S. at 559.

162. *See* Texas v. Brown, 103 S. Ct. 1535, 1542 (1983) (held not a search for an officer to bend down and look into lawfully stopped vehicle with a flashlight, because he only saw what "inquisitive passersby" could see).

163. *See, e.g.*, NAVIGATION RULES, *supra* note 2, Rule 12, at 27.

164. *Id.* Rules 8-18, at 19-35.

165. *Villamonte-Marquez*, 103 S. Ct. at 2580.

166. *See id.* at 2588-89 (Brennan, J., dissenting). "A boat unlike a car, quite often serves as an actual dwelling for its owners . . . . [T]he occupant would quite reasonably suppose that he was entitled to remain undisturbed by arbitrary government authority."

lets, and dining facilities.[167] The psychological intrusion of a boarding would be substantially increased if one were using the sleeping, toilet, or dining facilities at the time of a customs stop. These uses, at least in the case of pleasure craft, suggest that a vessel is more appropriately compared to a dwelling than to a vehicle.[168] People aboard vessels, therefore, should be afforded *at least* the same degree of protection from arbitrary official interference provided passengers of automobiles, if not *more*.

B. *Regulatory Analysis*

The majority employed a regulatory analysis to demonstrate both the extent of the governmental interest protected by customs and the resulting reduced legitimate expectation of privacy of boaters.[169] This is a balancing analysis similar to that used in *United States v. Biswell*[170] for regulatory inspections of commercial premises. Under this approach, the majority found that a boater's reasonable expectation of privacy is negligible because of the pervasiveness of the regulations and licensing requirements affecting boating.[171] Moreover, the Court illustrated the importance of the federal interest by noting regulations that affect not only pleasure boats, but all maritime commerce.[172]

For purposes of balancing under the administrative check exception to the probable cause requirement, however, it is inaccurate to analogize regulation of a particular industry[173] with regulation of everything that constitutes maritime activity.[174] The result is that the balance is more heavily weighted in favor of the governmental interest than is warranted by an analysis

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Id. (Brennan, J., dissenting). *See also* 3 W. LAFAVE, *supra* note 20, § 10.5, at 135 (Supp. 1983).

167. *See, e.g.*, United States v. Cadena, 588 F.2d 100 (5th Cir. 1979). "The ship is the sailor's home. There is hardly the expectation of privacy in the curtained limousine or the stereo-equipped van that every mariner or yachtman expects aboard his vessel." *Id.* at 101.

168. *Accord id.; see supra* note 167.

169. *See Villamonte-Marquez*, 103 S. Ct. at 2580-81.

170. 406 U.S. 311, 314-17.

171. *Villamonte-Marquez*, 103 S. Ct. at 2580-81.

172. *Id.*

173. *See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972) (firearms industry); Colonade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor industry).

174. *Villamonte-Marquez*, 103 S. Ct. at 2580-81.

confined to the facts of *Villamonte-Marquez*. For instance, the complexity and extent of the documentation that is required of a forty-foot sailboat, such as the *Henry Morgan II*, is limited in comparison to the documentation required of all commercial vessels.[175] Since, under the Court's analysis, the extent of the governmental interest is measured by the extensiveness of the regulations and the documentation requirements,[176] the governmental interest in stopping pleasure boaters should be measured solely by the extent of the regulations affecting such boaters.

The Court rebutted the respondents' related contention, that while the public interest in stopping commercial vessels might be great, this interest does not extend to pleasure boats, by noting that *Villamonte-Marquez* illustrates that these distinctions are often blurred.[177] The Court observed that the *Henry Morgan II* ostensibly was a pleasure boat, but in fact was engaged in a very profitable smuggling trade.[178] Under such an analysis, however, if drug operations are found to be frequently conducted from apartments, then apartments may be equated with business premises, thus reducing the reasonable expectation of privacy of all apartment dwellers.[179]

As the government pointed out, analysis in vessel-stop cases is clouded by the fact that smuggling and documentation law violations are virtually co-extensive.[180] Furthermore, prevention of smuggling is perhaps the principal governmental interest protected by customs.[181] There seems to be a great potential for

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175. While pleasure boats are eligible for documentation, they are not required to be documented unless they weigh over five tons. *See* 46 U.S.C. §§ 65(b), 65(l) (Supp. IV 1980). *Cf. Villamonte-Marquez*, 103 S. Ct. at 2581 (documentation laws serve the public interest by regulating certain *trades*).

176. *See Villamonte-Marquez*, 103 S. Ct. at 2580-81.

177. *Id.* at 2581 n.6. *See also* Carmichael, *supra* note 2, at 100 ("[S]mugglers' vessels now operate within a vast, indistinguishable sea of recreational boaters.").

178. *Villamonte-Marquez*, 103 S. Ct. at 2581 n.6.

179. *Cf.* Lewis v. United States, 385 U.S. 206 (1966). "[W]hen . . . the home is converted into a commercial center to which outsiders are *invited* for purposes of transacting unlawful business, that business is entitled to no greater [fourth amendment] sanctity than if it were carried on in a store . . . ." *Id.* at 211 (emphasis added).

180. *See* Brief for United States at 11 n.6, *Villamonte-Marquez*, 103 S. Ct. 2573 (1983).

181. In 1973, Customs investigated 40,256 cases. Narcotics smuggling was the largest single category, accounting for 20,421 of the cases. The second largest category was "undervaluation, etc." which accounted for 3752 cases. U.S. CUSTOMS SERVICE, U.S. DEP'T OF

customs officers who suspect drug smuggling to use the pretext of a document check to avail themselves of the plain view doctrine.[182] The plain meaning of 19 U.S.C. § 1581(a)[183] does not require such a pretext, but fourth amendment reasonableness requires some governmental interest to justify the intrusion.[184]

TREASURY, A PROGRESS REPORT 29 (1974). In 1982, the Customs Service made 59,054 seizures for violations of laws enforced by customs, which included 23,463 seizures of prohibited non-narcotic articles and 27,132 seizures of general merchandise. CUSTOMS U.S.A., *supra* note 3, at 36. In addition, the Customs Service made 19,536 seizures of narcotics and dangerous drugs. *Id.* at inside back cover.

182. *Villamonte-Marquez* exemplifies this document check and contraband-in-plain-view scenario. *See Villamonte-Marquez*, 103 S. Ct. at 2576-77. Arguments that an administrative stop was a pretext to carry out a criminal investigation have been uniformly rejected. *See, e.g.*, United States v. Watson, 678 F.2d 765, 769-71 (9th Cir.), *cert. denied*, 103 S. Ct. 451 (1982); United States v. Hayes, 653 F.2d 8, 12 (1st Cir. 1981); United States v. Demanett, 629 F.2d 862, 869 (3d Cir. 1980), *cert. denied*, 450 U.S. 910 (1981). Rejection of the pretext argument has been justified by the impossibility of determining what an officer's principal motivation is, and the illogical result of sanctioning examinations of unsuspect vessels, but forbidding them in the case of suspected smugglers. *See Villamonte-Marquez*, 103 S. Ct. at 2577 n.3.

This pretext argument was one of the respondents' main contentions. *See* Brief for Respondent at 1-14, *Villamonte-Marquez*, 103 S. Ct. 2573 (1983).

See also Drug Smuggling (San Juan, P.R.): Hearings Before the Subcomm. on Coast Guard & Navigation of the House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 13 (1975) (statement of Albert Bazemore, Regional Comm'r of Customs):

> By the placement of a Customs Patrol Officer on a board a Coast Guard vessel, thus utilizing the Coast Guard authority to hail American flag vessels . . . for the purpose of performing safety and documentation checks . . . the first wave of the attack is launched. . . . The Coast Guard authorities provide the entrée and the Customs officer provides the expertise and experience in concealment techniques, drug identification and interdiction. . . . Marijuana, by virtue of its bulk, requires a great deal of space and does not easily afford concealment.

183. 19 U.S.C. § 1581(a) (1982). *See supra* note 3.

184. *See Villamonte-Marquez*, 103 S. Ct. at 2579. *See also* Delaware v. Prouse, 440 U.S. at 654. In *Villamonte-Marquez*, the government argued that even if the fourth amendment does not allow customs officers to board all vessels on inland waters without a suspicion of wrongdoing or a border crossing, random stops should at least be allowed on waters connecting a Customs port of entry with the sea. *See* Brief for United States at 49 n.27. The Court's holding was even broader than this, allowing random stops on *any* water providing access to the sea. *Villamonte-Marquez*, 103 S. Ct. at 2575, 2582. The need to stop vessels and check documents in such areas is greater because of the connection such areas have with the border and the increased likelihood that the vessels stopped have crossed the border. Thus, the argument seems to rest upon a "likelihood of a border crossing" assumption, and it is difficult to see why some evidence of a border crossing is not a threshold requirement before allowing such stops.

C. *Statutory Analysis and Historical Pedigree*

The majority maintained that the consistency between section 1581(a) and the fourth amendment is supported by the fact that the same Congress which enacted the original version of section 1581(a) also proposed the fourth amendment.[185] The dissent, arguing for a reasonable suspicion standard, asserted that section 31 of the Act of August 4, 1790 authorized boarding in any part of the United States only when vessels were *bound* for the United States.[186] Thus, in the dissent's view, the Act allowed stops in inland waters only if there was a known or suspected border connection which would trigger customs interests.[187] The dissent's construction of section 31 is reasonable in that it covers situations, such as that in *Villamonte-Marquez* in which there is a known or suspected border connection, but boarding by customs does not occur until the vessel is in inland waters.[188] This interpretation is supported by the explicit concern throughout the Act that merchant ships would unladen their goods without first checking in at the customs port of entry.[189]

In addition, the statutory scheme was aimed at collecting from merchants all possible dutiable revenue for a fledgling country by penalizing those who tried to avoid paying duties and others who tried to benefit by buying duty-free goods.[190] From

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185. *Villamonte-Marquez*, 103 S. Ct. at 2579 (quoting Boyd v. United States, 116 U.S. 616, 623 (1886)).

186. *Villamonte-Marquez*, 103 S. Ct. at 2586 n.7 (Brennan, J., dissenting).

187. *See id.* (Brennan, J., dissenting).

188. *See, e.g.*, United States v. Helms, 703 F.2d 759, 762-63 (4th Cir. 1983) (ship sighted on customs waters, boarded on inland waters).

189. *See* Act of Aug. 4, 1790, ch. 35, § 13, 1 Stat. 145, 157 (any ship laden with goods and bound to the United States within districts of United States or within four leagues of coast which unladens before coming to the proper place shall pay $1000 and forfeit goods).

190. *See id.* § 4, 1 Stat. at 153 ($500 fine for master who neglects to deposit manifest with surveyor or collector); *id.* § 10, 1 Stat. at 156 (for failure to include goods in manifest, master forfeits amount equal to goods); *id.* § 12, 1 Stat. at 157 ($500 fine for failure upon arrival within four leagues to produce manifest, state what destination is, or give false destination); *id.* § 13, 1 Stat. at 157 ($1000 fine for unauthorized unlading of goods); *id.* § 14, 1 Stat. at 158 (goods unladen from one boat to another, except in case of distress, makes master liable for treble value of the goods for master and treble value for each person aiding, and ship or vessel shall be forfeited or lost); *id.* § 15, 1 Stat. at 158 (any vessel from a foreign place which leaves without reporting to the collector, may be fined $400 and forced to return, unless going to a more interior district); *id.* § 16, 1 Stat. at 158-59 ($1000 fine for failing to deliver manifest to collector or fraudulently declaring

this it seems that the concern was to regulate ships from foreign places and therefore some border connection was assumed necessary to trigger the statute's application.[191] Furthermore, there is reason to suspect that this assumption existed, namely that a border crossing was a necessary prerequisite for a suspicionless stop in inland waters, because "in 1789 most sea-going vessels were either merchant ships or warships."[192] Significantly changed circumstances in the twentieth century — a large number of sea-going pleasure craft[193] and a substantial body of intervening fourth amendment case law[194] — diminish the relevance of this eighteenth century ancestor to section 1581(a). They also indicate that this precursor of section 1581(a) does not support the Court's abandonment of the border nexus requirement based on historical pedigree and the ostensible intentions of those who proposed the fourth amendment.

VI. Conclusion

In *United States v. Villamonte-Marquez*,[195] the Supreme Court held that it was reasonable under the fourth amendment for customs officials to randomly stop vessels and conduct document checks on inland waters that provide ready access to the open sea. The Court concluded that the intrusive effect of stops for both those in vehicles and on vessels is "modest" when in fact the effect is quite different.[196] The intrusion is arguably greater for those on pleasure boats on inland waters.[197] Instead of abandoning fourth amendment protections altogether due to the special problems in policing the sea border, the Court should have opted for an administrative solution. Both a reasonable suspicion standard and administrative guidelines based upon the experience of customs are alternatives which would effectively address the needs of law enforcement and would be consistent

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that no part of lading has been unladen since departure from foreign place).

191. *Accord Villamonte-Marquez*, 103 S. Ct. at 2586 n.7 (Brennan, J., dissenting).

192. United States v. Williams, 617 F.2d 1063, 1080 (5th Cir. 1980). *See also* Brief for Respondent at 19 n.8.

193. *See supra* note 136.

194. *See supra* Part II.

195. 103 S. Ct. 2573, 2582 (1983).

196. *Id.* at 2581-82. *See supra* notes 139-167 and accompanying text.

197. *Id.*

with existing notions of reasonableness under the fourth amendment. Finally, in balancing interests such as those implicated in *Villamonte-Marquez*, the Court has cautioned in the past that "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual . . . [and] [i]t is precisely the predictability of these pressures that counsels a resolute loyalty to Constitutional safeguards."[198]

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198. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (rejecting the government's administrative inspection cases because commercial enterprises stand on a unique footing, and rejecting their automobile search cases because there was no probable cause for the search).