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Criminal Law: “Prepare For Boarding:” Coast Guard Authority On The High Seas. United States V. Williams

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Criminal Law: “Prepare For Boarding:” Coast Guard Authority On The High Seas. United States V. Williams

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Abstract

The Fifth Circuit Court of Appeals recently attempted to “harmonize the discordant precedent that has evolved” in the circuit with regard to high seas searches and seizures conducted by the United States Coast Guard.

KEYWORDS: Coast Guard, Boarding, Williams

Criminal Law: "Prepare For Boarding:" Coast Guard Authority On The High Seas. United States v. Williams.

*"Like the seas where the vessel was boarded, the problem is deep and shark-infested. Unlike them, the answer is not clearly charted. We voyage toward a conclusion"**

The Fifth Circuit Court of Appeals recently attempted to "harmonize the discordant precedent that has evolved"¹ in the circuit with regard to high seas searches and seizures conducted by the United States Coast Guard. The resulting *en banc* decision has reinforced the plenary authority of the Coast Guard to stop vessels on the high seas which are suspected of smuggling, or attempting to smuggle, contraband into the United States.² Judge Alvin B. Rubin, who concurred in the result in

* United States v. Cadena, 585 F.2d 1252, 1255 (5th Cir. 1978) (Rubin, J.).

1. United States v. Williams, 617 F.2d 1063 (5th Cir. 1980) (en banc).

2. The United States Coast Guard has the authority to stop and board a vessel of any nationality in international waters when a reasonable suspicion of a violation of United States laws exists. 14 U.S.C. § 89(a) (1976); 19 U.S.C. § 1581 (1976). The applicable provisions of the statutes are as follows:

§ 89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United

Williams, criticized the majority for misusing the case “to expound a mini-treatise on the subject of offshore law enforcement.”³ An additional concurrence notes that *Williams*’ conviction could have been upheld on basic principles of international law due to Panamanian consent, the country in which the seized ship was registered.⁴

This comment will discuss the analyses employed by the *en banc* panel in light of the precedent in the Fifth Circuit which led to *Williams*. The discussion is divided into four areas: the jurisdictional authority of the Coast Guard, the seizure and subsequent search of the vessel, the effect of Panama’s consent to the boarding, and finally, the international legal ramifications of the decision.

States by, such vessel, liable to forfeiture or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine and penalty, such vessel or such merchandise, or both, shall be seized.

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

- (1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and
- (2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States. Aug. 4, 1949, c. 393, § 1, 63 Stat. 502; Aug. 3, 1950, c. 536, § 1, 64 Stat. 406.

§ 1581. Boarding vessels

Customs officers

(a) 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, 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, 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.

3. 617 F.2d at 1094 (concurring opinion).

4. *Id.* at 1092.

FACTS

On January 30, 1978, the Panamanian merchant vessel "M/V PHGH" was sighted in international waters by the United States Coast Guard Cutter "ACUSHNET."⁵ Commander A.C. Peck, Captain of the ACUSHNET, identified the PHGH as one of a number of vessels suspected of being involved in drug trafficking. As the ACUSHNET approached the PHGH, the latter vessel hoisted a distress signal flag. The Coast Guard then requested by radio that the PHGH state its origin, destination, cargo and reason for flying the distress flag.⁶ The

5. The PHGH was spotted five days earlier by John Stevenson, a Drug Enforcement Administration (DEA) pilot, who was flying a mission to look for drug trafficking vessels. The PHGH was anchored about one and a half miles off the coast of Colombia, with several smaller craft rendezvousing with her. Stevenson identified the vessel as the PHGH and reported the observation to DEA Intelligence in El Paso, Texas.

Testimony at Williams' bench trial revealed that the PHGH had taken on a cargo of sulphur in Venezuela, at which time the ship's owner, Emanuel Karavias, was aboard. The ship's captain informed crew members of plans to pick up cargo off the coast of Colombia and deliver it somewhere in the Gulf of Mexico. The vessel proceeded to the coast of Colombia and anchored offshore, at which time several smaller vessels came alongside the PHGH. As the loading of cargo onto the PHGH began, defendant Williams came on board the vessel. Karavias had previously departed the vessel in Aruba.

6. This procedure followed by the Coast Guard was best described in *United States v. May May*, 470 F. Supp. 384, 388-89 (S.D. Tex. 1979), in the district court's findings of fact in support of denials of motions to suppress and motions to dismiss for lack of jurisdiction. These facts were developed during a final pre-trial hearing from evidence and testimony elicited from five Coast Guard officers. The relevant findings are as follows:

When a Coast Guard vessel is on patrol and encounters another vessel, it is standard operating procedure for the patrol vessel to attempt to determine the nationality of the encountered ship. Indeed, it is a common practice in the military to identify all surface traffic in the patrol area by name, home port and nationality. If the vessel is not properly identified, the Coast Guard vessel will check with the country of the flag being flown by the ship being investigated to determine if the ship is in fact registered to that country. If the ship is flying the proper flag and there is no indication or reasonable suspicion of illegal activity, then the ship is passed on. If, however, there is evidence of illegal activity, especially of illegal drug activity, the information is passed along by the patrol vessel through the chain of command to the country of the ship being investigated, and a request is made for permission to take action as agent of that country. If the ship is not flying the correct flag, the Coast Guard will continue an investigation to identify

PHGH replied that she was enroute from Aruba to Mobile, Alabama, carrying sulphur, and that no assistance was needed for what was explained as a generator problem.

The ACUSHNET maintained visual surveillance of the PHGH, and at approximately five o'clock on the morning of February 1, 1978, the crewmen of the PHGH appeared on deck waving clothes, flashlights and giving hand signals.⁷ Later that day, a crewman on

the ship, which investigation will consist of boarding the ship to check its documentation. Under applicable international law, vessels on the high seas demonstrate their nationality by the flag they fly and the documents issued by the country whose flag is being flown. In addition, all vessels have a beam number permanently affixed to or marked into the main beam of the vessel. This beam number is similar to an automobile's vehicle identification number, and is usually kept by the flag country of the vessel. The beam number is also noted on the vessel's documents; if no documents are available, other sources, such as Lloyds of London, can be contacted in an attempt to identify the country to which the vessel is registered. Under Coast Guard policy, the boarding personnel generally should first check the pilothouse and the captain's cabin for the ship's documents; both of these places are usually located above the decks. In those situations where a ship suspected of being involved in illegal activity is flying the proper flag, it has been the Coast Guard's experience that the country whose flag is being flown will usually grant permission to the Coast Guard to board and investigate the vessel. Panama, for example, has always granted its permission, while Colombia is the only nation which has denied permission to board.

The Coast Guard maintains and periodically updates a list of vessels suspected to be involved in illegal activities. This list is provided to Coast Guard vessels on patrol.

. . . [I]t is a fact that the names of vessels involved in transporting narcotics are routinely and frequently changed. It is also a fact that vessels can legitimately carry the flags of various countries, flying them as a courtesy when they enter the ports or territorial waters of those nations. However, such flags are usually flown from yardarms, not from the main mast.

The following factors are looked to by Coast Guard patrol vessels in determining whether an encountered vessel should be considered suspicious: improper markings; no permanently attached name or home port; failure to fly a flag; failure to identify itself; the condition of the vessel; and unusual activities aboard the vessel.

7. This activity, which continued for some six hours, was apparently for the purpose of attracting the attention of the Coast Guard and averting the possibility that the ACUSHNET would move on without further investigation. This point was argued by the United States as elevating reasonable suspicion to the level of probable cause. Supplemental Brief for Appellee on Rehearing En Banc at 13, *United States v. Williams*,

board the PHGH dove overboard and swam to the ACUSHNET, reporting there was "dirty business" on board the PHGH. The merchant vessel was anchored in the water at this time. The ACUSHNET relayed all this information to its headquarters in Miami.⁸

On February 2, 1978, Commander Peck received permission from Panama to board the PHGH, search the ship, and, if contraband were discovered, to take the ship and all those on board into United States custody for criminal prosecution.⁹ An armed Coast Guard party was dispatched to the PHGH, whereupon one guardsman, checking for the vessel's official registration number, discovered 21,680 pounds of marijuana in the ship's cargo hold. The PHGH was seized, her crew placed under arrest, and then towed into Mobile, Alabama.¹⁰

Williams was convicted in the United States District Court for the Southern District of Alabama of conspiring to import marijuana into the United States, pursuant to 21 U.S.C. § 963.¹¹ A panel of the Fifth

617 F.2d 1063 (1980).

8. Since the time of the original sighting of the PHGH, the Coast Guard was in continual radio contact with its Seventh District Headquarters in Miami. It was through this channel that the Coast Guard contacted the Panamanian Embassy, requesting permission to board the PHGH.

9. 617 F.2d at 1070. Authority to stop and board the vessel is derived from two sources: first, under 14 U.S.C. § 89 (1976); which reads in part "if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty, such vessel or such merchandise, or both, shall be seized." Second, generally established principles of international law provide that "[ships] . . . shall be subject to [the flag state's] exclusive jurisdiction on the high seas." Convention on the High Seas, September 30, 1962, Art. 6, 13 U.S.T. 2312, T.I.A.S. No. 5200.

10. Upon arrival in Mobile, Alabama, a DEA agent ascertained that documents on board the vessel indicated that the PHGH was bound for Mobile, although the legitimate cargo was destined for Peru. 617 F.2d at 1071. Regarding litigation concerning the legitimate cargo, see *Rayon y Celanese v. United States*, 79 Am. Mar. Cases 2682 (S.D. Ala. 1979).

11. "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 963 (1976). The offense referred to under § 963 is contained in § 952 as follows:

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to im-

Circuit Court of Appeals affirmed the conviction,¹² and Williams then petitioned the court for a rehearing *en banc*.¹³ This *en banc* proceeding gave rise to the thirty-seven page opinion affirming the district court's holding, which, in author Judge Tjoflat's words, was meant to clear up the "muddled case law" of the Fifth Circuit in this area.¹⁴

THE COURT'S ANALYSIS

The *en banc* majority employed a wide-ranging analysis encompassing all the issues relevant to the disposition of the case. It affirmed the panel's decision,¹⁵ but disagreed with its analysis of the fourth amendment issue.¹⁶ The panel had held that "before the government may order a foreign vessel to stop, . . . reasonable suspicion that criminal activity (is) afloat must be shown."¹⁷ The panel then found that this standard had been met.¹⁸

The *en banc* court disagreed, preferring not to rely on cases involving land-locked searches and seizures as had the panel. Consequently, it set out upon the hazardous waters of prior Fifth Circuit decisions¹⁹ in order to clear up the "muddled state of (its) precedent"²⁰ in the area of nautical search and seizure.

port into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter.

21 U.S.C. § 952 (1976).

12. *United States v. Williams*, 589 F.2d 210 (5th Cir. 1979).

13. Of the 26 judges sitting on the Fifth Circuit Court of Appeals, 23 took part in the *en banc* decision. 617 F.2d at 1069.

14. 617 F.2d at 1072.

15. 589 F.2d at 210.

16. 617 F.2d at 1071.

17. 589 F.2d at 214.

18. *Id.*

19. *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S. Ct. 61 (1979); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (*en banc*); *United States v. Erwin*, 602 F.2d 1183 (5th Cir. 1979) (*per curiam*); *United States v. One (1) 43 Foot Sailing Vessel*, 405 F. Supp. 879 (S.D. Fla. 1975), *aff'd*, 538 F.2d 694 (5th Cir. 1976) (*per curiam*); *United States v. Odom*, 526 F.2d 339 (5th Cir. 1976).

20. 617 F.2d at 1071.

Before discussing the prior Fifth Circuit precedent in this area the court discussed the application of the United States Supreme Court's "Ramsey"²¹ analysis." The two-part analysis employed in *Ramsey* "implies that a warrantless seizure or search in the complete absence of authority — a lawless governmental intrusion — is unconstitutional per se."²² Once statutory authority exists for the search or seizure, the second issue pertains to the reasonableness of the search or seizure as guided by the fourth amendment.²³ In this light, the court divided its discussion into three parts: statutory authority; a fourth amendment analysis; and the effect of Panama's consent to the seizure and search.²⁴

A. Statutory Authority Of The Coast Guard

The United States Coast Guard is charged with enforcing, or assisting in the enforcement of, "all Federal laws on and under the high seas and waters subject to the jurisdiction of the United States."²⁵ Two federal statutes empower the Coast Guard to stop, search and seize a vessel which is subject to the jurisdiction of the United States.²⁶ 14 U.S.C. § 89(a) is the only authority for search and seizures beyond the territorial sea²⁷ of the United States. Foreign vessels on the high seas

21. *United States v. Ramsey*, 431 U.S. 606 (1977).

22. 617 F.2d at 1074.

23. *Id.* U.S. CONST. amend. IV:

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.

24. 617 F.2d at 1075.

25. 14 U.S.C. § 2 (Supp. 1980). *See also* U.S. CONST., art. I, § 8, cl. 10: Congress shall have the power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations . . ."

26. 14 U.S.C. § 89; 19 U.S.C. § 1581 (1976).

27. There are basically three divisions of the waters of the seas: internal waters, territorial seas, and high seas. The latter encompasses an area known as the contiguous zone. The three-mile limit of the territorial sea is "that body of the seas which is included with a definite maritime belt immediately adjacent to a state's coastline." Carmichael, *At Sea With the Fourth Amendment*, 32 U. MIAMI L. REV. 51, 56 (1977). Seaward of this three-mile limit is the high seas. However, for implementation of certain United States laws, there is a contiguous zone which extends nine miles from the three-mile boundary, or, in other words, to a boundary between three and twelve miles

have gradually drifted into the grasp of section 89 (a) through expansive holdings in a long line of recent Fifth Circuit cases.²⁸

In *United States v. Warren*,²⁹ Judge Tjoflat also wrote for the *en banc* majority. *Warren* held that section 89(a) affords the Coast Guard a plenary power to "apprehend and board any vessel of the American flag . . . beyond the twelve-mile limit."³⁰ Exercise of this plenary power need not be founded on any particularized suspicion. Thus, in *Warren*, the Coast Guard's stopping of an American vessel at a point approximately seven hundred miles from the United States³¹ was upheld even though Coast Guardsmen and Drug Enforcement Administration agents boarded to "conduct a safety and documentation inspection and to look for obvious customs and narcotics violations."³² The majority rested its holding on the unusual facts surrounding the voyage itself and the actions of the crewmen on board.³³

In *United States v. Cadena*,³⁴ Judge Alvin B. Rubin (who concurs

from the coast.

28. See generally cases cited note 19 *supra*.

29. 578 F.2d 1058 (5th Cir. 1978) (*en banc*), *rehearing denied*, 586 F.2d 608 (1978) (*en banc*), *rehearing granted*, 589 F.2d 254 (1979) (*en banc*), 612 F.2d 887 (1980) (*en banc*), *cert. denied*, ___ U.S. ___, 100 S. Ct. 2928 (1980).

30. *Id.* at 1064-65.

31. *Id.* at 1061.

32. *Id.* at 1065.

33. In the early evening of August 19, 1974, the Coast Guard cutter STEADFAST sighted the American shrimping vessel STORMY SEAS as she sailed southward between Haiti and Cuba, some 700 miles from the United States coast. The STEADFAST hailed the STORMY SEAS and told her to prepare for boarding. A party of three Coast Guard officers, an agent of the DEA and a Customs Service Agent proceeded to board and found nothing on the ship's papers indicating travel to a foreign port. During subsequent questioning and a cursory search, it was discovered that on board there were three pistols and a small amount of marijuana, which aroused the suspicion of the Coast Guard officers. Further questioning led the defendants to producing envelopes containing \$7,000 in cash. The defendants were then advised of their *Miranda* rights and that they may have violated United States currency laws. Subsequently, the officers found envelopes and a briefcase containing a total of \$41,500 in cash and 46,800 Colombian pesos. The defendants were again given *Miranda* warnings and arrested.

34. 585 F.2d 1252 (5th Cir. 1978), *rehearing denied*, 588 F.2d 100 (1979). This case involved a Coast Guard boarding of a vessel of unknown nationality on the high seas. The Coast Guard cutter hailed the freighter, which was sailing approximately 200 miles off the Florida coast. The freighter ignored the Coast Guard and continued to sail away. Only after machine gun fire and a cannon volley did the freighter stop and per-

in the result in *Williams*) wrote for a Fifth Circuit panel. The court in *Cadena* held "the Coast Guard is empowered to search and seize any vessel on the high seas that is subject to the jurisdiction or operation of any law of the United States."³⁵ Additionally, section 89(a) is not limited on its face to domestic vessels or domestic waters.³⁶ In *Cadena*, the panel struggled with the notion of jurisdiction over the crime as opposed to jurisdiction over the vessel.³⁷ Indeed, no United States statute expressly asserts "jurisdiction" over a foreign vessel on the high seas.³⁸ In this restrictive light, the panel in *Cadena* was able to narrow the analysis down to the fact that ". . . authority of the Coast Guard to act upon the high seas must depend upon whether a vessel sailing there is 'subject to . . . the operation of any law of the United States.'"³⁹ The court then found that Congress intended the domestic conspiracy statute⁴⁰ to apply extraterritorially, and therefore held that a conspiracy to violate a federal narcotics statute is an offense which is subject to the jurisdiction of the United States.⁴¹

*United States v. Postal*⁴² also involved Coast Guard seizure of a foreign vessel on the high seas.⁴³ The panel in *Postal* relied on *Warren*

mit boarding by the Coast Guard. The boarding party found plastic and burlap sacks in the holds containing 54 tons of marijuana. Appellants were indicted and convicted on charges of conspiring to import and conspiring to distribute marijuana in violation of 21 U.S.C. §§ 963 and 846, respectively. Appellants challenged the conviction on the legality of the search and seizure, but the Fifth Circuit Court of Appeals affirmed the conviction, finding the attempted flight an exigent circumstance, which, coupled with probable cause, justified the warrantless search.

35. *Id.* at 1256, 1257 (footnote omitted).

36. *Id.* at 1257.

37. *Id.* at 1257-58.

38. *Id.* at 1259. See generally Carmichael, *supra* note 27. See also 18 U.S.C. § 7 (1976) (Special Maritime and Territorial Jurisdiction of the U.S.); and 19 U.S.C. § 1701 (1976) (Customs Enforcement Areas Declarable by the President).

39. 585 F.2d at 1259.

40. 21 U.S.C. § 963 (1976). See also *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975).

41. 585 F.2d at 1259.

42. 589 F.2d 862 (5th Cir. 1979).

43. Judge Tjoflat, writing for the Fifth Circuit accurately described the facts as "bizarre." The Coast Guard cutter CAPE YORK first sighted the defendant's vessel, LA ROSA, a 51-foot sailboat, approximately 8.5 miles off the Florida Keys. Because the LA ROSA displayed neither flag nor home port on the stern, the CAPE YORK approached to

and *Cadena* to hold that the Coast Guard had the proper authority for boarding a foreign vessel on the high seas. *Postal* can be distinguished in that it involved a breach of the High Seas Convention⁴⁴ which resulted from a search and seizure on the high seas. The panel held that the applicable provision of the High Seas Convention was not self-executing.⁴⁵ When the United States ratified the treaty, it was not incorporated into the domestic law of the United States.⁴⁶ Through such an analysis, the court was able to hold that a “mere violation” of international law would not supply a defense to the court’s jurisdiction.⁴⁷

The Coast Guard continues to be afforded a plenary power through section 89(a) in its continuing battle against illicit drug trafficking on the high seas.⁴⁸ Recent cases in the Fifth Circuit have reaffirmed this statutory authority of the Coast Guard.⁴⁹

determine the vessel’s nationality, origin and destination. Two of the defendants displayed a flag of the Grand Cayman Islands, while defendant *Postal* responded that the crew was Australian. After contacting Coast Guard operations in Miami, the CAPE YORK decided to board the LA ROSA. Defendant *Postal* resisted the boarding, but finally agreed to allow one officer to board. Soon after the officer boarded, defendant *Postal* asked, “Can you be bought?” *Id.* at 866. The officer assured *Postal* that he could not, and, after a quick search, the officer left the boat. A second boarding took place approximately two and one-half hours later, during which time the LA ROSA had dramatically changed course. Upon boarding the second time, the defendants were read their *Miranda* warnings, and, after a brief conversation, defendant *Postal* asked, “Oh, does that mean you want to see the pot?” *Id.* at 867. One of the Coast Guard officers then found numerous bales of what appeared to be marijuana. The defendants were then arrested. One of the defendants then offered a Coast Guardsman a drink, proclaiming, “We’re celebrating, first time we’ve been busted.” *Id.* at 868.

44. Convention on the High Seas, September 30, 1962, Art. 6, 13 U.S.T. 2312, T.I.A.S. No. 5200.

45. Treaties may be considered self-executing so as to take effect without legislative implementation when their terms clearly convey such an intention and provide sufficient detailed standards for executive/administrative application. *Foster v. Neilsen*, 27 U.S. (2 Pet.) 253 (1829).

46. *Cf. The Paquete Habana*, 175 U.S. 677 (1900) (incorporation of customary rules of international law.)

47. 589 F.2d at 884.

48. *See generally High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725, 735 (1980).

49. *See United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980); and *United States v. D’Antigniac*, No. 79-5007 (5th Cir. filed Aug. 15, 1980).

B. Constitutional Requirements Of Search And Seizure On The High Seas

The majority in *Williams* relies on the holding of *United States v. Cadena* and accepts the premise that the protection of the fourth amendment extends to foreign vessels on the high seas.⁵⁰ Prior to the first panel decision in *Williams*,⁵¹ the Fifth Circuit had not attempted to define the minimum requirements of the fourth amendment in a section 89(a) context. The first panel held that "before the government may order a foreign vessel to stop, . . . reasonable suspicion that criminal activity (is) afloat must be shown."⁵² The *en banc* majority disagreed with the panel in its use of such "extremely broad" language with regard to a fourth amendment standard applied to a nautical search and seizure.⁵³ The adoption of such a standard implied to the *en banc* majority that the panel was of the opinion that "Section 1581 and other sources of authority . . . providing for the seizure of vessels without suspicion of criminal activity are unconstitutional."⁵⁴ In light of such a contrary holding to past Fifth Circuit precedent,⁵⁵ the panel found it necessary to discuss the constitutional limitations on the initial seizure of the PHGH.⁵⁶

1. THE SEIZURE⁵⁷

"There is by act of God, nature, the Congress, and the activities of

50. 589 F.2d at 214. "The applicability of the fourth amendment is not limited to domestic vessels or to our citizens; once we subject foreign vessels or aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment." 585 F.2d at 1262.

51. 589 F.2d at 210.

52. *Id.* at 214.

53. 617 F.2d at 1078.

54. *Id.* at 1079. The majority panel has been criticized for its references to section 1581, which clearly does not apply to vessels on the high seas. 617 F.2d 1063, 1094 (concurring opinion).

55. *See generally* cases cited note 19 *supra*.

56. 617 F.2d at 1079.

57. "The Coast Guard plainly "seized" the PHGH within the meaning of the fourth amendment when they stopped and boarded the vessel. Even the mere stopping of a vessel, without a boarding, is a fourth amendment "seizure" since the governmental action restrains the vessel's freedom to proceed." *Id.* at 1071 n.1. Seizure through-

man a great difference between the landlocked vehicle and the nautical vessel”⁵⁸ The decisions of the Fifth Circuit should be included in the above quote for their seemingly Reverian “one if by land; two if by sea” application of the fourth amendment.⁵⁹

Ever since this nation’s first customs statute in 1789,⁶⁰ the “revenue cutters” (which have evolved statutorily into the modern day United States Coast Guard Cutters) have been empowered to seize American vessels on the high seas.⁶¹ This 1789 custom statute’s provision for the search and seizure of vessels has been suggested by the Supreme Court as being “plenary” and “reasonable.”⁶² In this light, the *Williams* panel reiterates the *Ramsey* court’s belief that “the first Congress thought that the fourth amendment permitted the stopping and searching of vessels in the absence of any suspicion of criminal activity.”⁶³

The Fifth Circuit reconfirmed the notion that “the fourth amendment does not necessarily require any sort of suspicion of criminal activity before a vessel may be stopped at sea”⁶⁴ In *Williams*, the court holds that “the Coast Guard’s seizure of the PHGH easily satisfied the fourth amendment’s requirement of ‘reasonableness.’”⁶⁵ The panel arrived at a “reasonableness” standard for the seizure of vessels at sea through analogy to similar standards of international law.

A doctrine of international maritime law — the right of approach⁶⁶ — allows for visitation on the high seas. This visitation is a

out refer(s) to the stopping or the “stopping . . . and boarding of nautical vessels rather than to the expropriation of contraband or evidentiary material.” *Id.*

58. *United States v. Ingham*, 502 F.2d 1287 (5th Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

59. 617 F.2d at 1095.

60. Section 24 of the Act [of July 31, 1789] granted Customs officials “full power and authority” to enter and search “any ship or vessel, in which they have reason to suspect any goods, wares or merchandise subject to duty shall be concealed” *Id.* at 1079 citing *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977). Act of July 31, 1789, ch. 5, 1 Stat. 29.

61. 617 F.2d at 1079. *See also* *Maul v. United States*, 274 U.S. 501 (1927).

62. *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977).

63. 617 F.2d at 1079. *See* note 23 *supra* for the text of the fourth amendment.

64. 617 F.2d at 1082.

65. *Id.* at 1084.

66. *Id.* at 1076, construing the Convention on the High Seas, September 30,

verification right which is granted to warships⁶⁷ when there is reasonable ground for suspecting that a ship is engaged in piracy, engaged in the slave trade, or of the same nationality as the warship.⁶⁸ In *United States v. Cortes*,⁶⁹ a Fifth Circuit panel found a boarding by the Coast Guard reasonable for fourth amendment purposes. This right of approach was found constitutionally reasonable because

Under a well-established rule of international law, known as the Right of Approach, the cutter had the authority to sail up to the unidentified vessel to ascertain her nationality [The Coast Guard] had justifiable suspicion that the [seized vessel] was attempting to conceal its identity and activities. Under these circumstances, the boarding of the vessel to search for registration papers or other identification was not unreasonable for Fourth Amendment purposes.⁷⁰

Thus, the *en banc Williams* court viewed section 89(a)'s provision permitting seizure of a foreign vessel in international waters as "at least as reasonable as the provision for seizures of vessels set out in . . . article 22 [of the High Seas Convention]."⁷¹ This analogy is reinforced in the court's opinion by reference to other treaties entered into by the United States⁷² which have permitted restricted intrusions into vessels on the high seas.

The majority has therefore relied on standards espoused at international law to attach the reasonableness standard to seizures at sea. In this light, what has been considered reasonable on land does not automatically control what is reasonable on the high seas.⁷³

1962, Art. 22(2), 13 U.S.T. 2312, T.I.A.S. No. 5200.

67. A Coast Guard cutter is a warship under international law. *See Carmichael, supra* note 27, at 52 n.6.

68. 617 F.2d at 1076.

69. 588 F.2d 106 (5th Cir. 1979). In this case, the Coast Guard had justifiable suspicion that the vessel was attempting to conceal its identity and activities. The Coast Guard used the "right of approach" doctrine as authority for boarding.

70. 617 F.2d at 1082.

71. *Id.* at 1084.

72. *See, e.g.*, Convention for the Prevention of Smuggling of Intoxicating Liquors, January 23, 1924, United States-Great Britain, art. II(1), 43 Stat. 1761, cited with approval in *Williams*, 617 F.2d at 1083-84.

73. 617 F.2d at 1084.

2. THE SEARCH

In its discussion of the Coast Guards's statutory authority, the majority found that "Section 89(a) provided for searches of vessels in the complete absence of suspicion that contraband or evidence of criminal conduct will be found in the particular place to be searched."⁷⁴ The search of the PHGH, based upon all the facts in the case, was clearly authorized. The next issue became whether any fourth amendment rights of Williams may have been violated by the authorized search.

Once again, analogy to the international requirements of a search under Article 22 of the High Seas Convention was employed. "[If] any suspicion remains after the vessel's documents have been examined,"⁷⁵ the permissible procedure is to send a boarding party to examine the vessel's main beam identification number.⁷⁶ While in the process of locating this number, the Fifth Circuit holds that "no one, not even a person with a proprietary interest in the vessel and in the cargo, could conceivably have any legitimate expectation of privacy with regard to any objects that would be in the plain view (or smell) of a person conducting such an identification check."⁷⁷

In *United States v. Freeman*,⁷⁸ the panel recognized that "the national frontiers of oceans are much more difficult to police than the territorial boundaries of the land."⁷⁹ Through dicta from *Church v. Hubbard*,⁸⁰ the notion of a less restrictive standard governing searches on the high seas arose. Chief Justice Marshall noted that a nation has the right to prohibit certain commerce. Thus, "any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries . . ."⁸¹

The court did not find probable cause or the warrant requirement

74. *Id.* at 1085.

75. *Id.* at 1086.

76. *Id.* See discussion in note 6 *supra*.

77. 617 F.2d at 1086.

78. 579 F.2d 942 (5th Cir. 1978).

79. *Id.* at 946.

80. 6 U.S. (2 Cranch) 187 (1804).

81. *Id.* at 235.

characteristic of land-locked searches to be applicable on the high seas. This conclusion was based upon the court's observations that: (1) the frontiers of the oceans are more difficult to police than the territorial boundaries of the land; (2) any expectation of privacy on the seas is limited by extensive federal and international regulation of shipping and boating; (3) drug smuggling is a massive problem; (4) practical problems exist if the Coast Guard were required to obtain warrants in order to conduct a search on the high seas; and (5) the Congress that enacted the first customs statute and proposed the fourth amendment for ratification did not intend the fourth amendment requirement to be applicable on the seas.⁸²

In this light,⁸³ the *Williams* court concludes that "reasonable suspicion is the appropriate fourth amendment standard by which to judge section 89(a) searches of the 'private' areas . . . of the holds of vessels in international waters"⁸⁴ In order to search public or plain view areas of a vessel upon a section 89(a) boarding, however, the appropriate standard is the reasonableness of the stop.⁸⁵ There is no requirement of suspicion that any particular evidence of contraband will be found.

C. *The Effect Of Panama's Consent*

The court noted that the major ramification of a nation's violation of international law is political.⁸⁶ In this light, if an aggrieved nation wishes to assert its rights under a treaty it may ask the government to dismiss the charges.⁸⁷

82. 617 F.2d at 1087-88.

83. It is apparent that public policy concern has been an overriding consideration throughout the court's opinion. This is reflected in opening dicta stating that "the ambiguity and inconsistency of the case law in this circuit has substantially impeded the counter-smuggling activities of the Coast Guard and the Customs Service." *Id.* at 1072.

84. *Id.* at 1088 (emphasis supplied).

85. *Id.* at 1089. This type of "search," authorized by section 89(a), is limited to administrative searches.

86. *Id.* at 1089, citing *Church v. Hubbard*, 6 U.S. at 239.

87. As Chief Justice Marshall intimated in 1804, the major ramification of a nation's violation of international law is political: "If [a nation's actions in enforcing its laws] are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to

The majority concluded that the consent of Panama to the boarding, search and seizure of the PHGH constituted a waiver by Panama to assert its rights on behalf of its nationals. This is clearly correct under the analyses of *Postal* and *Cadena*.⁸⁸ It is clear that although "the sea is the common highway of all, and that no nation or ship has a universal right to stop and search other vessels on the high seas,"⁸⁹ *Williams* has effectively held that a nation may stop and board ships on the high seas that it has cause to believe may be engaged in preparation for the commission of a crime within that nation's jurisdiction. Such an exercise of jurisdiction is founded upon international law which gives a nation the right to assert jurisdiction over crimes which have an effect inside its territory regardless of where that crime occurs.⁹⁰

CONCLUSION

It is quite evident there is a major problem of increased drug smuggling into the area which comprises the Fifth Circuit.⁹¹ Additionally, there has been great public outcry for the government to put a strangle hold on this trafficking. The *Williams* court has echoed the need for the continued success of the counter-smuggling activities of the Coast Guard and Customs Service. However, this great public need does not negate the constitutional safeguards which characteristically attend our nation's law enforcement activities. Perhaps the Fifth Circuit, through *Williams*, is applying an overreaching and unlimited in-

secure their laws from violation, they will be submitted to." 6 U.S. at 234.

88. *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978), *rehearing denied*, 588 F.2d 100 (1979); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S. Ct. 61 (1979).

89. *Rayon y Celanese v. United States*, 79 Am. Mar. Cases 2682, 2685 (S.D. Ala. 1979), citing *The Marianna Flora*, 24 U.S. (1 Wheat) 1 (1826).

90. *See Straszheim v. Daily*, 221 U.S. 280, 285 (1911) (Holmes, J.).

91. The states comprising the Fifth Circuit have a coastline of 2,211 miles, or approximately seven percent of the coastline of the North American continent. As a result of the geographical susceptibility, the United States Coast Guard seized 2.15 million pounds of marijuana in 1978, which is estimated to be only 10-15% of the total flow into the United States. May May, 470 F. Supp. at 384. U. S. DEP'T COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1979, at 207, Table 341.

terpretation of the statute.

Section 89(a) appears, in its present application by the United States Coast Guard, to be in direct conflict with the High Seas Convention.⁹² Exercise of jurisdiction over a vessel on the high seas is a right expressly reserved in the nation under whose laws that vessel is registered.⁹³ Indeed such an unrestricted exercise of statutory authority may inevitably force the United States into a significant international incident.

The current session of Congress has reiterated its concern over increased drug smuggling into the United States.⁹⁴ With laws such as section 89(a) and the newest proposals by Congress, the United States appears to be exercising its jurisdiction over a frontier traditionally viewed as neutral and open to all the nations of the world.

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92. Convention on the High Seas, September 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200.

93. *Id.* arts. 5 & 6.

94. H.R. 2538, 96th Cong., 1st Sess. (1979), Pub. L. No. 96-350, 3 Nat'l L.J. 3, 25 (October 20, 1980) (to be codified at 21 U.S.C. § 955 (a)). The language found in the new law applicable to smuggling contraband into the United States is as follows: "(d) It is unlawful for any person to possess, manufacture, or distribute, a controlled substance —

(1) intending that it be unlawfully imported into the United States; or
(2) knowing that it will be unlawfully imported into the United States."

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