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Recent Decision

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RECENT DECISION

CONSTITUTIONAL LAW — SEARCH AND SEIZURE OF FOREIGN VESSELS ON THE HIGH SEAS PERMISSIBLE IF THE VESSEL IS SUBJECT TO THE OPERATION OF UNITED STATES LAW, AND EVIDENCE ACQUIRED IN VIOLATION OF INTERNATIONAL LAW DOES NOT REQUIRE EXCLUSION

I. FACTS AND HOLDING

Defendant[1] was convicted of conspiracy to import marijuana into the United States.[2] Defendant had boarded the Panamanian vessel *PHGH,* which was docked off the coast of Colombia, while the ship was being loaded with marijuana.[3] After the Drug Enforcement Administration observed the loading activity, the Coast Guard Cutter *Acushnet* began surveillance of the *PHGH.*[4] When the *PHGH* was forced to stop because of mechanical difficulties, crew members attempted to signal the *Acushnet.*[5] After receiving Panamanian authorization,[6] an armed party from the

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1. Defendant was Frank Gunnar Williams, a United States citizen.

2. 21 U.S.C. § 963 (1976). This section prohibits conspiracy to import controlled substances barred by 21 U.S.C. § 952 (1976), including marijuana.

3. The *PHGH* was a 270-foot cargo vessel of Panamanian registry. The ship was supposedly en route from Venezuela to Peru with a load of sulphur. United States v. Williams, 617 F.2d 1063, 1070 (5th Cir. 1980) (en banc).

4. A routine Drug Enforcement Administration flight to detect possible drug trafficking spotted the *PHGH* anchored off the coast of Colombia. The ship was a rendezvous point for several smaller vessels. The pilot reported his observations to the Drug Enforcement Administration Intelligence Center. When the *Acushnet* sighted the *PHGH* several days later, the Coast Guard Commander consulted a master list and identified it as the same vessel which had been observed earlier. *Id.*

5. The *Acushnet* approached the *PHGH,* which had hoisted a distress flag after generator problems rendered the vessel immobile. Several crew members, who had acquiesced in the drug transportation only at gunpoint, took advantage of the ship's difficulties and signalled the *Acushnet* by waving clothes, toilet paper and flashlights. One bold crewman dove overboard and swam to the *Acushnet,* where he informed the Coast Guard that there was "dirty business" going on aboard the *PHGH. Id.*

6. The Panamanian Vice-Minister of Foreign Affairs issued the authorization

Acushnet boarded the *PHGH* in international waters.[7] Failing to locate the ship's registration number in the engine room, the boarding party entered the cargo hold and discovered the contraband.[8] The Coast Guard then confiscated the vessel and arrested the defendant, who was later convicted.[9] Defendant's conviction was affirmed by a panel of the Fifth Circuit Court of Appeals.[10] The panel held that the search and seizure on reasonable suspicion of criminal activity did not abridge the fourth amendment.[11] The Fifth Circuit granted a rehearing en banc to clarify the panel's fourth amendment analysis and to harmonize conflicting Fifth Circuit precedent.[12] Defendant's conviction was *affirmed. Held:* The fourth amendment standard for search and seizure at sea differs from that on land; search and seizure on reasonable suspicion that a vessel is subject to the operation of United States law satisfies the fourth amendment, although reasonable suspicion may not be the minimum standard. *United States v. Williams,* 589 F.2d 210 (5th Cir. 1979), *aff'd on rehearing,* 617 F.2d 1063 (5th Cir. 1980) (en banc).

II. LEGAL BACKGROUND

The fourth amendment to the United States Constitution guarantees security from an unreasonable search and seizure: a search conducted without a judicially approved search warrant.[13] Subject

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to the Coast Guard through the State Department. *Id.*

7. At the time of the seizure, the *PHGH* was stalled approximately 100 miles east of the Yucatan Peninsula. *Id.*

8. The search was made pursuant to 14 U.S.C. § 89(a) (1976). This statute authorizes the Coast Guard to stop and board vessels to check registration numbers and safety precautions in order to prevent violations of United States law. *See* text accompanying note 19 *infra.* Upon entering the cargo hold, a Coast Guardsman noticed paper packages containing a total of 21,680 pounds of marijuana. 617 F.2d 1063, 1071.

9. United States v. Williams, No. 78-28 (S.D. Ala. May 22, 1978).

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

11. *Id.* at 214.

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

13. 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.

to limited exceptions, judicial approval is dependent on a demonstration in front of a neutral magistrate that probable cause exists before a search warrant is issued.[14] This probable cause requirement protects an individual's reasonable expectation of privacy, an expectation that the United States Supreme Court has protected from "invasions . . . of the sanctity of a man's home and the privacies of life."[15] One[16] "carefully drawn"[17] exception to this guarantee is that administrative inspections authorized by a statute may be reasonable, absent a search warrant.[18] The Coast

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14. The Supreme Court stated in Katz v. United States that searches conducted without observance of the warrant process are per se unreasonable. 389 U.S. 347, 357 (1967). *See* Robbins v. California, _ U.S. _, 101 S. Ct. 2841 (1981) (opaque containers in automobile discovered incident to arrest could not be opened without a search warrant); Mincey v. Arizona, 437 U.S. 385, 395 (1978) (homicide committed in home insufficient to justify warrantless search of dwelling); Chimel v. California, 395 U.S. 752 (1969) (warrantless search of home incident to arrest held unconstitutional).

15. Boyd v. United States, 116 U.S. 616, 630 (1886). *See* United States v. Chadwick, 433 U.S. 1, 3 (1977) (placing personal effects inside locked footlocker manifests an expectation of privacy; warrantless search of locker in absence of exigent circumstances unreasonable). *See generally* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

16. There are two other exceptions to the general rule. First, a private area may be searched upon probable cause without a search warrant if the delay in procuring a warrant might result in loss of the evidence. Such a search is permissible if required by "exigent circumstances," and often has been upheld with respect to automobiles. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); *cf.* Warden v. Hayden, 387 U.S. 294, 298 (1967) (search of the house permissible without a warrant due to exigencies of hot pursuit).

Second, a search conducted at a border or its "functional equivalent" is reasonable under the fourth amendment because of the special interest in securing United States borders. United States v. Ramsey, 431 U.S. 606, 619 (1977) (customs officials allowed to open envelopes entering the United States from Thailand because of the "longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' ").

17. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (citing Jones v. United States, 357 U.S. 493, 499 (1958)).

18. This exception is construed narrowly and invoked under statutes involving closely regulated industries "long subject to close supervision and inspection." Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (sole penalty against liquor licensee refusing to allow statutorily authorized inspection was statutory monetary sanction; forcible entry penalty was disallowed); *cf.* Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (Occupational Safety and Health Act provision allowing warrantless inspections held unconstitutional); Camara v. Municipal Court, 387 U.S. 523 (1973) (warrants required for health and safety

Guard has the authority to pursue warrantless administrative searches:

> 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, . . . 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 . . . .[19]

The inevitable conflict between this broad delegation of authority and the basic freedom granted by the fourth amendment has generated inconsistent application of the relevant fourth amendment standards[20] by the Fifth Circuit, which is the court confronted

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inspections of dwellings, although the warrants could issue on something less than probable cause).

19. 14 U.S.C. § 89(a) (1976). This broad power is conferred on the Coast Guard because shipping has long been closely regulated by the United States Government. Once a vessel has been properly stopped and boarded for an administrative inspection, *see* text accompaning notes 22-26 *infra,* no reasonable expectation of privacy exists regarding any area of the ship in plain view during the inspection. Before any private area may be searched, however, a warrant must be obtained or conditions invoking a separate exception to the general fourth amendment guarantee of privacy must exist. *See* United States v. Whitmire, 595 F.2d 1303 (5th Cir. 1979), *rehearing denied,* 601 F.2d 586 (5th Cir. 1979), *cert. denied,* 448 U.S. 906 (1980); United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (en banc), *rev'd in part, aff'd in part,* 612 F.2d 887 (5th Cir. 1980), *cert. denied,* 446 U.S. 956 (1980).

20. *See* text accompanying notes 22-26 *infra.* These inconsistencies, which are not unexpected when twenty-four judges sit on the same bench, may have contributed to the recent division of the Fifth Circuit into two new circuits: a new Fifth Circuit and an Eleventh Circuit. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 852 (1980). Earlier decisions were problematic because the Fifth Circuit Court of Appeals blurred the various exceptions to the search warrant requirement in order to uphold Coast Guard action under § 89(a). *See, e.g.,* United States v. Whitmire, 595 F.2d 1303, 1315 n.36 (5th Cir. 1979), *rehearing denied,* 601 F.2d 586 (5th Cir. 1979), *cert. denied* 448 U.S. 906 (1980), in which the court stated:

> In exploring a possible distinction between inspections and searches, we should be mindful that, in the maritime context, the policies behind several traditionally discrete exceptions to the warrant requirement—the border search doctrine, the administrative inspection exception for certain regulated industries, and the automobile-exigent circumstances doctrine—uniquely converge.

595 F.2d at 1315 n.36. The variety of standards which has been articulated by the court for a legitimate stop of a vessel at sea has led to uncertainty among

with the majority of the search and seizure at sea appeals.[21] In *United States v. Odom*[22] the Fifth Circuit held that absent suspicious circumstances the Coast Guard could stop and board a United States flag vessel in international waters to check the ship's documents and inspect for safety violations. Documentary and safety inspections of United States flag vessels in the absence of suspicion were upheld as constitutional in *United States v. One (1) 43 Foot Sailing Vessel "Wind's Will"*.[23] Another Fifth Circuit case, *United States v. Cadena*,[24] extended *Odom* to inspections of foreign vessels and held that no suspicion was required prior to Coast Guard exercise of its section 89(a) authority to search foreign vessels on the high seas. The expansion of section 89(a) authority permitting the Coast Guard to stop and board vessels has been restricted, however, in more recent Fifth Circuit decisions. In a case involving a customs statute analogous to section 89(a), *United States v. Kleinschmidt*,[25] the Fifth Cir-

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law enforcement officials as to what, if any, degree of suspicion is necessary before they may act under section 89(a). *See* United States v. Williams, 617 F.2d at 1069.

21. Most such search and seizure appeals arise in the Fifth Circuit, which includes Florida, because of the many overseas drug smuggling efforts in that area. In the Mexican or Canadian border areas, smuggling attempts are often made over land or by air. When sea-based cases do arise, other circuits usually apply long-standing fourth amendment principles to ascertain the validity of action by law enforcement officials. *See, e.g.*, United States v. Allen, No. 79-1059 (9th Cir. Nov. 5, 1980).

22. 526 F.2d 339 (5th Cir. 1976). *Odom* involved a routine boarding in the Yucatan Straits for a "safety inspection." The inspection ripened into a full-fledged search when burlap bags containing marijuana were found in the hold of the vessel. *Id.* at 340-41. *See also* United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (en banc), *rev'd in part, aff'd in part*, 612 F.2d 887 (5th Cir. 1980), *cert. denied*, 446 U.S. 956 (1980).

23. 538 F.2d 694 (5th Cir. 1976) (per curiam).

24. 585 F.2d 1252 (5th Cir. 1978), *rehearing denied*, 588 F.2d 100 (5th Cir. 1979) (per curiam). In *Cadena*, the Coast Guard boarded a foreign vessel (it was not clear from the facts whether the ship was of Canadian or Colombian registry) pursuant to a preplanned "sting" operation.

25. 596 F.2d 133 (5th Cir. 1979), *rehearing denied*, 599 F.2d 1054 (5th Cir. 1979), *cert. denied*, 444 U.S. 927 (1980). *Kleinschmidt* involved 19 U.S.C. § 1581(a) (1976), which provides:

> Any officer of the customs may at any time go on board of any vessel . . . within the customs waters . . . and examine the manifest and other documents and papers and examine, inspect, and search the vessel . . . and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel . . . .

cuit held that reasonable suspicion was a prerequisite to investigatory stops of United States vessels by customs officials. Similarly, the panel opinion in the instant case required reasonable suspicion of criminal activity prior to Coast Guard seizure of a foreign vessel on the high seas.[26] The more narrow holdings in *Kleinschmidt* and in the instant case are reinforced by decisions maintaining similar principles involving land-based administrative inspections.[27]

Coast Guard action against foreign vessels on the high seas may not violate the general principle of free navigation. This guarantee, first articulated by Hugo Grotius,[28] has been incorporated into subsequent international common law through traditional custom of the seas[29] and international treaties.[30] The United States Supreme Court also has recognized free navigation.[31] The concept of free navigation, along with several exceptions, was eventually codified by the Convention on the High Seas (CHS).[32] The Fifth Circuit has ignored the lead of the Supreme Court, however, and has not respected the limited exceptions to the principle of free navigation. In *Cadena,* the Fifth Circuit avoided recognizing directly that none of the exceptions to the principle of free navigation applied by holding that the flag state was not entitled to rely on the CHS because the nation was not a signatory to the treaty.[33] The *Cadena* court failed to consider that the

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26. United States v. Williams, 589 F.2d at 214.

27. *See* note 18 *supra.* Criminal suspicion and arrest are among the exceptional circumstances justifying a warrantless search.

28. *See* R. MAGOFFIN, GROTIUS ON THE FREEDOM OF THE SEAS 38 (1916).

29. H. SMITH, THE LAW AND CUSTOM OF THE SEA 60-61 (3d ed. 1959); C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 10 (6th ed. 1967).

30. *See* text accompanying note 32 *infra.*

31. *See, e.g.,* The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826). Justice Story stated there that "the ocean . . . is the common highway of all . . . and no one can vindicate to himself a superior or exclusive prerogative there." *Id.* at 41. *See also* The Flying Fish, 6 U.S. (2 Cranch) 170 (1804).

32. The exceptions, derived from both international custom and convention, are that a vessel on the high seas may be stopped and boarded for the following reasons: (1) a state's exercise of its exclusive jurisdiction over ships flying the nation's flag; (2) reasonable suspicion that the vessel is engaged in piracy or slave trade; (3) self-defense; (4) hot pursuit; (5) acts of interference authorized by a treaty with the flag state. Convention on the High Seas, *opened for signature* April 29, 1958, arts. 2, 6, 13-21, 23-25, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962).

33. 585 F.2d at 1260-61.

treaty merely codified previously existing international common law rights.[34] In dictum the court stated that even if the Coast Guard violated international law, exclusion of evidence so obtained was not necessarily required, because other remedies, such as damages or dismissal of indictments at the request of the flag state, were available.[35] This dictum contradicts the Supreme Court's holding in *The Charming Betsy*[36] that an act of Congress should never be construed "to violate the law of nations, if any other possible construction remains."[37] In *United States v. Postal*,[38] the Fifth Circuit was confronted with a seizure case in which the flag state, the Grand Cayman Islands, was a signatory to the CHS. Thus, the seizure constituted a clear breach of both international custom and convention. The court circumvented the question by holding that the CHS did not control domestic law because the treaty was not self-executing.[39] The decision in *Postal* highlights the conflict between United States and international law, as well as the conflicts within domestic authority. These conflicts, however, evidence the commitment of the Fifth Circuit to confront the significant drug enforcement problem by upholding police action against United States-bound vessels carrying narcotics. The en banc court reheard the instant case to clarify conflicting prior authority, to establish the fourth amendment standard for search and seizure under section 89(a), and to offer an analysis of the exceptions to the doctrine of freedom of the seas.[40]

III. The Instant Opinion

In the instant rehearing, Judge Tjoflat's majority opinion disagreed with the panel's initial application of land-based search

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34. *See* text accompanying notes 29-30 *supra*.

35. 585 F.2d at 1261.

36. 6 U.S. (2 Cranch) 64 (1804).

37. *Id.* at 118.

38. 589 F.2d 862 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979).

39. *Id.* at 876. A self-executing treaty is one which has the force of domestic law, either because the treaty so states or because of the circumstances surrounding its adoption. *Id.* After analyzing the CHS, other treaties to which the United States was a signatory, and cases liberally construing jurisdiction at sea, the court concluded that the CHS was not self-executing. *Id.* at 884. *See also* Cook v. United States, 288 U.S. 102 (1933); Ford v. United States, 273 U.S. 593 (1927).

40. United States v. Williams, 617 F.2d at 1069.

and seizure standards to searches and seizures at sea.[41] To ascertain the proper standard against which to judge the Coast Guard action, the majority followed the analytical framework established by the Supreme Court in *United States v. Ramsey*:[42] the court first identified the authorization for the action and next considered the constitutionality of the action.[43] Judge Tjoflat found that 14 U.S.C. section 89(a) authorized the seizure of the *PHGH*.[44] Examining the authorization of that seizure, the court interpreted section 89(a) to require reasonable suspicion that the *PHGH* was subject to United States law before the Coast Guard could properly stop and board the vessel.[45] Citing *Postal*, the court found that the *PHGH* was subject to the operation of United States law for the purposes of section 89(a) because those aboard the vessel were engaged in conspiracy to violate federal narcotics statutes.[46] Since *Ramsey* neither requires that the authorization be derived from the statute in question nor precludes the court from deriving authorization from international law, the court stated in dictum that Panama's consent alone would have provided sufficient authorization for the seizure.[47] The constitutional question whether the statutorily authorized seizure nevertheless violated the fourth amendment formed the second focal point for the majority's analysis.[48] Judge Tjoflat rejected the panel's conclusion that suspicion of criminal activity was required before the Coast Guard might constitutionally stop and board a foreign vessel on the high seas.[49] While admitting that a "minimum standard"

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41. *Id.* at 1079.

42. 431 U.S. 606, 619 (1977).

43. 617 F.2d at 1074. The instant court stated that, although *Ramsey* was not automatically applicable because it involved a search on land, the *Ramsey* two-part analysis would allow the court to factor out the inapplicable aspects of land-based fourth amendment analysis. *Id.* at n.10.

44. The *PHGH* was "seized" since the stopping and boarding of the vessel restrained the ship's freedom to proceed. *Id.* at 1071 n.1.

45. *Id.* at 1076.

46. *Id.*

47. *Id.* at 1077. The court suggested that Panama's consent met at least the first (authorization) step of the *Ramsey* analysis pursuant to executive authority over the Coast Guard. *Id.* Defendant had not challenged this contention.

48. *Id.* The court cited *Cadena* for the proposition that the fourth amendment's protections were not limited to United States vessels or citizens. *Id.* at 1078 n.17; *see* United States v. Cadena, 585 F.2d at 1262. *Contra* 617 F.2d at 1092 n.7 (Roney, J., specially concurring).

49. *Id.* at 1078. Judge Tjoflat recited a litany of horrors that would flow from

could not be formulated in the abstract, the majority explained that the constitutionality of a seizure could be determined only through application of the weighing process used in land-based cases:[50] balancing the governmental interests protected by section 89(a) against the defendant's privacy interests adversely affected by the seizure of the *PHGH*.[51] The court noted that enforcement of narcotics laws was of vital importance to the United States and that the seizure of the *PHGH* was a limited and foreseeable intrusion.[52] Thus, seizure of a foreign vessel on the high seas pursuant to section 89(a) is not an unreasonable violation of fourth amendment rights.[53] After examining the initial boarding of the *PHGH*, the court next applied the two-part *Ramsey* analysis to the search of the hold that followed the initial seizure.[54] The court concluded that during an inspection authorized under section 89(a) there could be no reasonable expectation of privacy in any area of the ship's hold which would be in plain view.[55] Finally, Judge Tjoflat

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application of the panel's "criminal activity" standard. *Id.* He stated that such a requirement would invalidate all customs searches except those based on criminal suspicion, a clearly undesirable result. *Id.* Indeed, current customs statutes allow Customs officers to stop and board vessels in territorial waters in the absence of suspicion. *See* note 25 *supra*. Judge Tjoflat also cited the cases upholding § 89(a) seizures of United States flag vessels on the high seas absent any modicum of suspicion. *Id.* at 1082; *see* text accompanying note 22 *supra*. Additionally, under international law vessels in international waters may be stopped and boarded for several reasons other than suspicion of criminal activity. *See* note 32 *supra*.

50. 617 F.2d at 1083.

51. *Id.* The court balanced the governmental interest protected against the private interest affected in order to determine whether the Coast Guard action was constitutional. *Id.* This same type of balancing process is used in cases involving searches and seizures on land. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (public interest balanced against individual's right to personal security free from arbitrary interference by law officers in order to determine reasonableness of seizure).

52. *Id.* The court stated that the seizure was "limited and foreseeable" because a vessel in territorial waters was always subject to customs stops under 19 U.S.C. § 1581(a) (1976), and a vessel on the high seas was subject to stops based on the CHS. *Id.; see* note 32 *supra*.

53. *Id.* at 1084.

54. *Id.* at 1085. The court found that § 89(a) provided statutory authorization for the search of the *PHGH*. *Id.* The court next considered the constitutionality of the action by ascertaining whether a reasonable expectation of privacy had been violated. *Id.* at 1086.

55. *Id.* at 1087. Nine of the twelve judges who joined the majority opinion felt that no such expectation of privacy was possible, but joined this part of the

discussed the provisions of international law and the effect of Panama's consent on the propriety of the seizure and concomitant search; he held that the Panamanian Government's consent to the search operated as a waiver of any rights Panama might have had under international law.[56] In dictum the court stated that even if the Coast Guard action had violated the international legal principle of free navigation, under *Postal* and *Cadena* presentation of that evidence would not necessarily be precluded.[57]

Only twelve of the twenty-three judges rehearing the instant case joined Judge Tjoflat's opinion.[58] In a concurring opinion,[59] Judge Rubin questioned whether the defendant had standing[60] and added that muddled precedent did not justify the majority's creation of judicial legislation. Judge Rubin felt that there had been no violation of the fourth amendment because the Coast Guard action was authorized by section 89(a), and that Panama's consent foreclosed any questions of international law.[61] Judge Roney also filed an opinion[62] in which he specially concurred in the result but disagreed with the majority's analysis.[63] Although Panama's consent had foreclosed arguments that international law had been violated, Judge Roney explained that international law authorized the seizure[64] and that the limits on the instant action must be derived from international law, rather than the fourth

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opinion in order to achieve a majority. *Id.* at 1087 n.25.

56. *Id.* at 1090.

57. *Id.; see* United States v. Postal, 589 F.2d at 884; United States v. Cadena, 585 F.2d at 1261. The instant court relied on these cases for the conclusion that other remedies, such as damages or dismissal of indictments at the request of the flag state, were available. Thus, exclusion of the evidence was not required. 617 F.2d at 1090. *See also* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 611 (2d ed. 1976).

58. The majority opinion was joined by Chief Judge Coleman and Judges Brown, Ainsworth, Gee, Tjoflat, Vance, Garza, Henderson, Reavley, Politz, Hatchett and Sam D. Johnson. 617 F.2d at 1063-64, 1069.

59. Judge Rubin's opinion was joined by Judges Kravtich, Randall, and Frank M. Johnson, Jr. *Id.* at 1093.

60. *Id.* Judge Rubin felt that it was doubtful that the defendant had standing to contest the search of the *PHGH* because he had no reasonable expectation of privacy in the hold of the vessel. *Id.*

61. *Id.* at n.1.

62. *Id.* at 1090. Judge Roney's opinion was joined by Judges Godbold, Hill, Fay, Tate and Thomas A. Clark. *Id.*

63. *Id.*

64. 617 F.2d at 1091 n.6. Judge Roney stated generally that exceptions to the principle of free accessibility do exist. *Id.*

amendment.[65]

IV. COMMENT

The Fifth Circuit Court of Appeals has taken the instant opportunity to write an essay on the law of search and seizure on the high seas. Applying *Ramsey,* the majority found authority for the Coast Guard action, either under section 89(a) or through the consent of the Panamanian Government.[66] Although both conclusions are open to dispute,[67] the major question arises from the court's analysis of the constitutionality of the Coast Guard action. While a firm resolution of the confusion engendered by previous conflicting Fifth Circuit decisions is certainly desirable,[68] the instant court's resolution fails to provide necessary analytical clarity. Judge Tjoflat concluded that the fourth amendment should be applied less rigorously when the action in question occurs at sea rather than on land,[69] and he delineated the search and seizure standard to be used for actions occurring at sea.[70] This attempt is analytically inconsistent. On one hand the court applied *Ramsey's* two-part analysis utilizing a balancing test derived from land-based search and seizure law; on the other hand,

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65. *Id.* at 1091. Judge Roney concluded that the fourth amendment did not apply to foreign vessels on the high seas. *Id.* He further criticized the majority's application of the fourth amendment because the cases cited did not support the majority's analysis. *Id.* at 1092. Judge Roney felt, however, that defendant's status as a United States citizen entitled him to fourth amendment protection. He did not find any violation of defendant's rights in the instant case. *Id.* at 1093.

Judge Anderson also filed a short concurring opinion approving of the result, but he stated that the majority had been overly expansive. *Id.* at 1099-1100. He limited his analysis to a finding that § 89(a) authorized the seizure and that probable cause and exigent circumstances justified the search. *Id.*

66. *See* text accompanying notes 47 and 56 *supra.*

67. It has been suggested that the broad grant of authority given the Coast Guard under § 89(a) unconstitutionally abridges the fourth amendment search warrant requirement. *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Camara v. Municipal Court, 387 U.S. 523 (1973). Further, the court's acceptance of Panama's informal permission as satisfying the treaty exception to the freedom of the seas doctrine might be questioned by those who would require a formal, written treaty between the states involved. *See* 617 F.2d at 1090.

68. *See* note 20 *supra.*

69. *See* text accompanying notes 41 & 52 *supra.*

70. *See* text accompanying note 50 *supra.* The majority has rejected reasonable suspicion, substituted a nebulous balancing test, and allowed the government to meet the new test merely because law enforcement at sea is difficult.

the court substituted a more lenient test for the constitutionality of searches and seizures at sea.[71] Even if the majority is correct in applying *Ramsey* to the instant search and seizure, the inevitable balancing of interests should comport with established constitutional standards and should not be altered simply because law enforcement at sea is difficult. Although the majority's effort to articulate a fourth amendment criterion specific to search and seizure at sea is understandable in light of the difficulties of drug enforcement activities, it is unnecessary. This decision might have been based on narrower grounds. The separate opinions joined by eleven of the twenty-three judges, concurring in the result but dissenting from the majority's analysis,[72] indicate that the court easily could have upheld the instant action under well-established "land-based" principles. The administrative inspection or probable cause and exigent circumstances exceptions to the search warrant requirement would legitimate the Coast Guard's action.[73] The treaty exception to the principle of free navigation, whether evidenced by formal or informal consent, would provide international legal justification for searches of foreign vessels on the high seas.[74] Thus, the instant action could have been upheld under established principles of both domestic and international law. Nevertheless, the majority has broadly concluded that the instant search and seizure were permissible since the *PHGH* was subject to the operation of United States law.[75] The court's holding will provide law enforcement officials with authority to stop and board United States flag vessels at any time.[76] Foreign vessels will be subject to search and seizure in United States territorial wa-

71. *See* text accompanying notes 49-53 *supra.*

72. *See* text accompanying notes 58-65 *supra.*

73. Section 89(a) gave statutory authority for the instant search and seizure. *See* text accompanying note 19 *supra.* The observations by the Drug Enforcement Administration pilot and the actions of the *PHGH* crew members provided probable cause that United States law was being violated. The ship's mobility (it was possible that the generator problem could have been corrected) provided exigent circumstances. 617 F.2d at 1077.

74. *See* note 32 *supra.*

75. 617 F.2d at 1075.

76. American flag vessels in United States territorial waters are subject to customs inspections under 19 U.S.C. § 1581(a) (1976). *See* note 24 *supra.* On the high seas, United States flag vessels are always subject to administrative inspections under § 89(a), because a vessel is at all times subject to the jurisdiction of the flag state. *See* note 35 *supra.*

ters,[77] and also in international waters if there is reasonable suspicion that a vessel is involved in conspiracy to violate United States law.[78] Additionally, dicta in the instant opinion indicates that the CHS "treaty" exception to free navigation may be invoked by informal consent from the flag state.[79] Additional significant dicta suggests that a violation of international law will not be determinative in considering whether evidence must be excluded.[80] Although the instant opinion grants liberal power to law enforcement officials, it provides little coherent guidance for judges on the recurring question of Coast Guard authority vis-a-vis drug smugglers. The court rejected "reasonable suspicion" as a standard by which to measure Coast Guard action,[81] but it offered no viable alternative. Since the court applied a balancing test rather than a minimum standard, future Fifth Circuit holdings using the instant decision as precedent will be ad hoc rulings on the validity of Coast Guard action, determined according to the court's general sense of whether the relevant governmental interest outweighs violations of private rights. These individualized judgments will create a patchwork of conflicting decisions, because different courts have varying thresholds for invalidating governmental action. Since the Supreme Court has refused to grant certiorari to provide more guidance in this area, ad hoc decision-making continues to present especially confusing standards.

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77. Section 1581(a) extends to both foreign and domestic vessels. *See* note 24 *supra.*

78. 617 F.2d at 1077.

79. *Id.* at 1090.

80. *Id.*

81. *Id.* at 1078.