

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 81-1350  
**TITLE** UNITED STATES, Petitioner  
v.  
JOSE REYNALDO VILLAMONTE-MARQUEZ, ET AL.  
**PLACE** Washington, D. C.  
**DATE** February 23, 1983  
**PAGES** 1 thru 64



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4                      Petitioner                      :

5 v. : No. 81-1350

6 JOSE REYNALDO VILLAMONTE- :

7 MARQUEZ, ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Wednesday, February 23, 1983

11                   The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 1:00 o'clock p.m.

14 APPEARANCES:

15 SAMUEL A. ALITO, JR., ESQ., Office of the Solicitor

16 General, Department of Justice, Washington, D.C.;

17 on behalf of the Petitioner.

18 RICHARD P. IEYOUNG, ESQ., Lake Charles, Louisiana; on

19      behalf of the Respondent

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 next in the United States against Villamonte-Marquez.

4                    Mr. Alito, you may proceed whenever you are  
5 ready.

6                    ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.,  
7                                    ON BEHALF OF THE PETITIONER

8                    MR. ALITO: Mr. Chief Justice, and may it  
9 please the Court, since before the adoption of the  
10 Fourth Amendment, Customs officers have been authorized  
11 by federal statute to conduct suspicionless boardings of  
12 vessels for the purpose of checking their documents.  
13 The issue in this case is whether such boardings in  
14 inland waters constitute unreasonable searches or  
15 seizures.

16                    The facts of this case may be briefly  
17 summarized. At about 11:30 in the morning, in March,  
18 1980, a patrolling Customs officer spotted a 40-foot  
19 sailboat equipped with a diesel engine, anchored about  
20 18 miles inland, in the Calcasieu River Ship Channel,  
21 which is a waterway connecting the Gulf of Mexico to the  
22 Customs port of entry at Lake Charles, Louisiana.

23                    The officer and those on board his boat had  
24 never before seen a sailboat in that waterway, which is  
25 traveled by large commercial vessels. On the stern of



1 the sailboat was the name of the vessel, the Henry  
2 Morgan II, and its hailing port, "Basilea," which it  
3 turns out is the Latin translation for Basel,  
4 Switzerland. Although the officer did not recognize the  
5 name "Basilea," he correctly believed that it denoted a  
6 foreign port.

7           At this time, a large freighter was heading up  
8 the ship channel, and it created a huge wake that caused  
9 the sailboat to rock so violently back and forth that it  
10 appeared it was about to capsize. In fact, at one point  
11 the sailboat's mast actually touched the water, and its  
12 keel emerged from the water.

13           The Customs officer called out to Respondent  
14 Hamparian, who was the only person visible on deck, and  
15 asked if he was all right, but Hamparian merely shrugged  
16 his shoulders, which suggested to the officer that he  
17 was unable to speak English. The officer then decided  
18 to board the vessel for the purpose of checking the  
19 documents.

20           He did so, and while examining the documents,  
21 he detected the odor of burning marijuana. He also saw  
22 through an open hatch burlap-wrapped bales of what he  
23 believed was marijuana. The Respondents were then  
24 arrested. The boat was searched. Fifty-eight hundred  
25 pounds of marijuana, with a street value of about \$7

1 million, was seized.

2            Respondents were convicted of drug offenses,  
3 but their convictions were reversed by the Court of  
4 Appeals on the ground that there was no reasonable  
5 suspicion of criminal activity, and therefore the  
6 officer was prohibited from boarding the vessel in  
7 inland waters for the purpose of checking the documents.

8            With these facts in mind, it bears emphasis  
9 that the only authority at issue in this case is the  
10 authority to board the vessel and check the documents,  
11 and not the authority to search any other portion of the  
12 craft. It also bears emphasis that the Henry Morgan II  
13 was not a small American boat on an inland lake. It was  
14 a seagoing foreign vessel on a ship channel connecting  
15 the open sea with the Customs port of entry, and it was  
16 located just a relatively short distance from the open  
17 sea.

18            Our position, of course, is that suspicionless  
19 boardings and inspections, whether on inland or Customs  
20 waters, are reasonable, and therefore do not violate the  
21 Fourth Amendment. It is strong evidence of their  
22 reasonableness that they were authorized by the First  
23 Congress, which of course proposed the Bill of Rights to  
24 the States, and they have been continuously authorized  
25 by statute ever since.

1                   Why is this so? First, because there is  
2 simply no other adequate alternative way of enforcing  
3 the documentation laws, and the documentation laws serve  
4 many vital functions. They are the primary method of  
5 identifying vessels. They serve to regulate the entry  
6 and departure of persons and goods traveling by water.  
7 They are used in collecting import and tonnage duties,  
8 in conserving natural resources, and promoting safe  
9 shipping and boating.

10                   QUESTION: Mr. Alito, you have been addressing  
11 the merits from the beginning. What about mootness?

12                   MR. ALITO: Your Honor, this case is certainly  
13 not moot. Both sides retain legally cognizable  
14 interests in the outcome of this case. If the decision  
15 below is reversed, and Respondent's convictions are  
16 reinstated, the government will be able to seek their  
17 extradition. They may be arrested and imprisoned if  
18 they are ever found in the United States, and at a  
19 minimum, reversal of the decision below will provide  
20 grounds for their exclusion --

21                   QUESTION: Wasn't it the government that got  
22 the dismissal of the indictment?

23                   MR. ALITO: The government had the indictment  
24 dismissed merely for the purpose of complying with the  
25 Court of Appeals mandate, but I think this Court's

1 decisions establish that ministerial acts of that sort,  
2 which --

3 QUESTION: Instead of a dismissal, couldn't  
4 you have sought a stay of mandate?

5 MR. ALITO: We could have, Your Honor, and  
6 that might have been a preferable procedure, but it is  
7 merely a technical matter.

8 QUESTION: Didn't you waive reinstatement by  
9 the course you took, dismissing instead of getting a  
10 stay?

11 MR. ALITO: I don't think so, Your Honor. I  
12 believe that a reversal of the decision below would  
13 permit the reinstatement of the indictment and the  
14 convictions, and therefore --

15 QUESTION: Would you have to reinstate the  
16 indictment?

17 MR. ALITO: I think you just reinstate the  
18 convictions.

19 QUESTION: And then the sentence, yes.

20 MR. ALITO: And the sentence. And then if  
21 they are ever again found --

22 QUESTION: That is what your brief says.

23 MR. ALITO: That's correct, and I think that's  
24 what would happen. The dismissal of the indictment was  
25 purely a technical matter, and it would certainly --



1           QUESTION: Are you aware of any cases in which  
2 a conviction had been reinstated without the indictment  
3 -- I mean, a conviction had been reinstated without an  
4 indictment being in the case, in the record?

5           MR. ALITO: Justice Stevens, I must confess, I  
6 don't know what happens as a technical matter to the  
7 indictment when the conviction is reinstated, but I  
8 think that when --

9           QUESTION: I have never heard of it. I have  
10 thought about this quite a bit, and I can't think of an  
11 analogy. I am not sure it is moot. I think maybe you  
12 are right about mootness. But I don't understand how  
13 you can have a conviction in a case where there is no  
14 underlying pleading. I mean, you couldn't enter a  
15 judgment in a case if nobody ever filed a complaint.  
16 How can you have a conviction without an indictment?

17          MR. ALITO: Well, I see no reason why the  
18 indictment cannot be reinstated. Certainly if an  
19 indictment is improperly dismissed, it may be reinstated  
20 when that decision is reversed.

21          QUESTION: Has it ever been done, to your  
22 knowledge, under this set of facts? I am just puzzled  
23 by this problem.

24          MR. ALITO: I don't know whether it has been  
25 done on this state of facts.

1           QUESTION: You can't cite us any case in which  
2 it has been done?

3           MR. ALITO: I'm afraid I can't.

4           QUESTION: Well, he was indicted, and he was  
5 convicted while the indictment was outstanding.

6           MR. ALITO: Certainly, he was.

7           QUESTION: Nobody disputes there was an  
8 indictment at one time.

9           QUESTION: And that -- And the only  
10 requirement for indictment is under -- that he be  
11 indicted before he is tried, isn't it?

12          MR. ALITO: I believe that is correct.

13          QUESTION: Well, I still don't understand.  
14 Why did the government seek a dismissal of the  
15 indictment.

16          MR. ALITO: I believe it was done -- it was --

17          QUESTION: Why not a stay of the mandate?

18          MR. ALITO: I won't dispute the fact that  
19 that's probably the preferable alternative, but I don't  
20 think that --

21          QUESTION: Well, why was it -- why was  
22 dismissal sought?

23          MR. ALITO: As a fact, I don't know, Justice  
24 Brennan. I think it was done to comply with the Court  
25 of Appeals mandate, at a time before the final decision

1 to seek review in this Court was made.

2 QUESTION: Did the Court of Appeals mandate  
3 address itself to the indictment or merely set aside the  
4 judgments?

5 MR. ALITO: I believe it reversed and remanded  
6 with instructions to take proceedings consistent with  
7 the decision, and since the principal evidence at trial  
8 was the evidence that had been suppressed, I believe  
9 that --

10 QUESTION: Is it your position that if you  
11 were complying with the mandate of the Court of Appeals,  
12 you can't be charged with any waiver?

13 MR. ALITO: I think that's correct.  
14 Otherwise, we would have to seek a stay in every case,  
15 and if the stay was denied, every stay case in which it  
16 was denied would have to go up to this Court, and if the  
17 stay was not granted, the case would become moot.

18 QUESTION: When the mandate went back down, it  
19 went back down to the District Court, right?

20 MR. ALITO: Yes, it did.

21 QUESTION: Well, who dismissed the indictment?

22 MR. ALITO: The District Court dismissed the  
23 indictment.

24 QUESTION: On whose motion?

25 MR. ALITO: I don't know on whose motion. I

1 know that we did not object to it.

2 QUESTION: I had the impression it was on the  
3 government's motion.

4 QUESTION: Me, too.

5 QUESTION: Am I wrong?

6 QUESTION: The government can't dismiss the  
7 indictment, can it?

8 MR. ALITO: No, it certainly can't. It can  
9 only move or not object to a defense motion.

10 QUESTION: Well, do we know what the record  
11 is, or not?

12 MR. ALITO: Well, we know what the record is.  
13 I don't know --

14 QUESTION: Certainly there is nothing in the  
15 judgment of the Court of Appeals that in so many words  
16 said that the indictment should be dismissed.

17 MR. ALITO: That is certainly correct, but  
18 when -- in a case of this sort, when the convictions are  
19 founded upon the discovery of contraband, the  
20 suppression of that contraband necessarily means that  
21 there will no longer have been --

22 QUESTION: Was there some transcript made at  
23 that time of what happened in court?

24 MR. ALITO: I assume there was, Justice  
25 White. I have not reviewed it. And looking here at the



1 docket sheets, it is not clear which party moved for  
2 dismissal of the indictment.

3 Respondent's argument on mootness is not based  
4 on dismissal of the indictment. It is based on the fact  
5 that the -- that Respondents had been deported, and it  
6 is for that reason --

7 QUESTION: Let me put it another way. I  
8 suppose you feel that the indictment is merged in the  
9 judgment in any event.

10 QUESTION: That's what your brief says.

11 MR. ALITO: I believe the dismissal --

12 QUESTION: I think that's a good way of  
13 describing it.

14 MR. ALITO: I don't think I can say more than  
15 that the dismissal of the indictment was merely a  
16 technical matter, done to comply with the Court of  
17 Appeals mandate.

18 QUESTION: All the Court of Appeals mandate  
19 required was that you set aside the conviction and  
20 suppress the evidence, which normally would lead to a  
21 new trial. I don't see why there was any requirement of  
22 dismissing the indictment.

23 MR. ALITO: There was not a requirement of  
24 dismissing the indictment in a legal sense.

25 QUESTION: You could have complied with the

1 mandate of the Court of Appeals without dismissing the  
2 indictment.

3 MR. ALITO: It would have meant an outstanding  
4 indictment --

5 QUESTION: Right.

6 MR. ALITO: -- which would have called for a  
7 trial within a certain amount of time under the Speedy  
8 Trial Act, and if there could be no retrial, which in  
9 fact there could not be, unless the decision suppressing  
10 the evidence was reversed --

11 QUESTION: Or stayed.

12 MR. ALITO: -- or stayed, then compliance with  
13 the Court of Appeals mandate as a practical matter would  
14 have necessitated dismissal of the indictment.

15 QUESTION: No, it would have necessitated a  
16 motion for a stay.

17 MR. ALITO: Well, that's right, Justice  
18 Stevens, but our position is that making such a stay  
19 motion is not necessary to preserve a live controversy.

20 QUESTION: Well, but you don't have any  
21 authority for that proposition.

22 MR. ALITO: Well, we don't have authority for  
23 that proposition because it was not Respondent's  
24 contention at any point that dismissal of the indictment  
25 was what mooted this case. Their argument was that

1 deportation is what mooted the case.

2 QUESTION: Well, you hope to make some  
3 authority for that.

4 MR. ALITO: Well, at the minimum, we hope to  
5 make authority for that, Justice White.

6 QUESTION: It wouldn't necessarily follow that  
7 there would be a new trial, if the only evidence the  
8 government had was the evidence that was suppressed.  
9 The government routinely dismisses indictments, or just  
10 doesn't pursue an outstanding indictment.

11 MR. ALITO: That is certainly correct, Mr.  
12 Chief Justice. As a practical matter, suppression of  
13 the evidence meant dismissal of the indictment. If the  
14 Court is interested --

15 QUESTION: Well, they don't dismiss the  
16 indictment. They just don't prosecute it.

17 MR. ALITO: Well, I believe at a certain point  
18 there is a motion to dismiss the indictment.

19 QUESTION: Well, I thought you told Justice  
20 Stevens that you couldn't name a single case where the  
21 indictment was dismissed.

22 MR. ALITO: I can't name one offhand. We  
23 would be happy to brief the issue.

24 QUESTION: How can you say it if you can't  
25 name one?

1 MR. ALITO: Well, what I am saying is that  
2 when critical evidence is suppressed and a case is  
3 remanded to the District Court, the indictment is  
4 dismissed because a new trial is impractical, and that  
5 was what happened here, and I am sure that is what the  
6 Court of Appeals understood was going to happen when  
7 they decided this case.

8 QUESTION: And that was consistent with the --  
9 if not ordered, it was certainly consistent with the  
10 mandate of the Court of Appeals?

11 QUESTION: Well, supposing you had a civil  
12 case where plaintiff got a judgment in a negligence  
13 case, and the appellate court set it aside and sent it  
14 back for a new trial, and the plaintiff went in and  
15 moved to dismiss his complaint. Could you reinstate the  
16 judgment after the complaint was dismissed?

17 MR. ALITO: I believe there are cases that  
18 would permit reinstatement of the complaint after --  
19 after that.

20 QUESTION: After the prevailing party moved to  
21 dismiss his own complaint?

22 MR. ALITO: I believe if that was done truly  
23 to comply with the mandate of an appellate court  
24 reversing --

25 QUESTION: But it wasn't necessary to comply



1 with the mandate. It clearly wasn't necessary. If it  
2 sent it back for a new trial, you don't have to go in  
3 and dismiss the complaint.

4 MR. ALITO: Well, if the practical effect of  
5 the appellate ruling is to make any further proceedings  
6 in the trial court impossible, I think --

7 QUESTION: Counsel, let's get on with the  
8 merits of the case now.

9 MR. ALITO: Thank you.

10 As I was saying, there are two reasons why  
11 suspicionless boardings and document inspections are  
12 necessary. First --

13 QUESTION: Excuse me, Mr. Alito. May I ask  
14 you, in that respect, did the government argue in the  
15 Fifth Circuit that no reasonable suspicion was required  
16 or only that the officers in fact had reasonable  
17 suspicion? Which was it?

18 MR. ALITO: We certainly raised the question  
19 of whether reasonable suspicion was required.

20 QUESTION: Well, what did you argue? Did you  
21 argue one or both?

22 MR. ALITO: We argued -- in our petition for  
23 rehearing, we argued both points.

24 QUESTION: By that, the original argument?

25 MR. ALITO: Initially before the trial we

1 merely argued that reasonable suspicion was present, but  
2 we did that for two good reasons. First, the District  
3 Court had found that there was reasonable suspicion. We  
4 believed he was correct. We still believe he was  
5 correct.

6           Second, and more important, there were prior  
7 binding Fifth Circuit cases holding that reasonable  
8 suspicion was needed for boarding in inland waters, and  
9 therefore we saw no need to urge affirmance of the  
10 District Court decision on the ground that prior  
11 decisions binding on the panel ought to be reversed, but  
12 after the panel rendered its decision, then we raised  
13 the issue of whether reasonable suspicion was needed in  
14 our petition for rehearing.

15           There are no other adequate means of enforcing  
16 the documentation laws besides suspicionless boardings.  
17 In addition, because of the long history of pervasive  
18 federal regulation of most aspects of maritime activity,  
19 persons aboard vessels within the jurisdiction of the  
20 United States have a greatly reduced expectation of  
21 privacy, especially with respect to the vessel's  
22 documents.

23           Let me first --

24           QUESTION: Does this case fit within the  
25 border exception?

1           MR. ALITO: It does not fit within the classic  
2 border exception, but we believe it is necessary to  
3 effectively police the sea border. The sea border is  
4 nothing but an imaginary line three miles from the  
5 coast. Now, if a suspicionless boarding and document  
6 check is allowed only when there is reasonable suspicion  
7 to believe that a vessel has crossed the border, that is  
8 an impossible standard. Unless the Customs officer  
9 actually observes the vessel crossing the border, he  
10 will usually have no way of detecting whether a border  
11 crossing has taken place.

12           QUESTION: You think that the foreign  
13 registration of the vessel would not be sufficient, I  
14 mean, the obvious markings from the outside of the  
15 vessel showing it's a foreign vessel?

16           MR. ALITO: Well, we believe that any foreign  
17 -- persons on any foreign vessel within United States  
18 waters have no legitimate expectation of privacy, at  
19 least with respect to their documents.

20           QUESTION: Would that fit within a traditional  
21 border search exception as cause to believe that the  
22 vessel had had foreign contacts?

23           MR. ALITO: Your Honor, I hesitate to  
24 analogize this too closely to border searches on land,  
25 because the sea is simply not like the land.

1           QUESTION: Well, how about border searches of  
2 airplanes? You can make a border search of an airplane  
3 at an airfield in Chicago, can't you?

4           MR. ALITO: Well, that's correct, and with an  
5 airplane you can usually detect on radar whether it has  
6 in fact crossed the border, and with scheduled airlines,  
7 you know in advance where they are coming from. There  
8 is no way of gathering analogous information concerning  
9 a vessel. And that is one of the reasons why  
10 suspicionless boardings and inspections are necessary.

11           When a vessel enters U.S. waters, there is  
12 really no way of knowing where it is coming from, what  
13 it is carrying, and whether it has complied with any of  
14 the --

15           QUESTION: Mr. Alito, what particular document  
16 or documents did this particular sailing vessel need,  
17 even though it was from -- even if you believed it was  
18 from a foreign country?

19           MR. ALITO: Well, if it was a foreign vessel,  
20 of course, it would have foreign -- it would have  
21 foreign documents. Now, this was a vessel --

22           QUESTION: What documents?

23           MR. ALITO: Each country has its own  
24 documentation system. This was a French-registered  
25 vessel bearing Swiss markings. I don't know what --



1           QUESTION: All right. What documents -- Did  
2 that vessel need any document required by United States  
3 law?

4           MR. ALITO: As soon as it entered Customs  
5 waters, it was required to report its arrival promptly  
6 to Customs, and if it was to go any further, it would  
7 need a cruising license, or else it would have to make  
8 entry again --

9           QUESTION: Well, of course, it hadn't entered  
10 the United States yet.

11          MR. ALITO: It had entered Customs waters  
12 and --

13          QUESTION: I am just asking you again, at the  
14 point where the vessel was boarded, what document were  
15 you looking for?

16          MR. ALITO: We were looking for its basic  
17 foreign registry documents, where was it registered,  
18 what sort of vessel was it.

19          QUESTION: And that is permitted under the  
20 federal statute?

21          MR. ALITO: That's correct. The federal  
22 statute authorizes an inspection of any documents.

23          QUESTION: And are documents like that sort of  
24 mobile, or are they attached to a vessel somewhere, or  
25 are they -- can you hand them around, or what?

1           MR. ALITO: I think this may vary from country  
2 to country. For federally documented vessels, they are  
3 pieces of paper that are usually kept in the bridge. On  
4 a numbered American boat, there is a small certificate  
5 of number which is sometimes --

6           QUESTION: What if this gentleman had said,  
7 yes, he understands English, and you want some  
8 documents, I shall hand you the document, and don't  
9 board my boat?

10          MR. ALITO: Well, I think it is often if not  
11 usually impractical to do that without boarding the  
12 boat.

13          QUESTION: Why is that?

14          MR. ALITO: Because boats rock back and forth  
15 and hit each other.

16          QUESTION: Well, how about the captain  
17 boarding your boat?

18          MR. ALITO: Well, he may do that, perhaps.

19          QUESTION: Despite the rocking back and forth?

20          MR. ALITO: He may do that perhaps, but part  
21 of --

22          QUESTION: What if he said to you, I will  
23 board your boat and bring my documents?

24          MR. ALITO: Well, I don't know what their  
25 response would be in a specific case, but part of --

1           QUESTION: I know, but what would be your  
2 response for the United States if he said that and he  
3 said, stay off my boat, but I'll bring you my document?

4           MR. ALITO: Well, I think that it would be  
5 reasonable first to inspect the documents, and then  
6 after doing so --

7           QUESTION: Right, and if they complied, you  
8 wouldn't board his boat, would you?

9           MR. ALITO: Well, part of a documentation  
10 inspection is examining the main beam number, which  
11 necessitates a visit to a portion of the hold.

12          QUESTION: Now, is that for a foreign vessel  
13 at 18 miles from the coast? Is that required, that you  
14 look at the beam number?

15          MR. ALITO: It is required to make a  
16 satisfactory identification of the vessel. I believe it  
17 is part of the standard procedure in checking the  
18 documentation of a foreign vessel. Otherwise, there is  
19 no reliable way of knowing what sort of vessel this is.

20          QUESTION: So there is a statute or some  
21 regulation that says, please look at the beam numbers?

22          MR. ALITO: There is a statute, 19 USC  
23 1581(A), that authorizes Customs officers to board any  
24 vessel in any part of the United States to check its  
25 documents and to examine the vessel. That would entail

1 the authority to examine the documents and check the  
2 main beam number.

3 QUESTION: Where did you get that latter  
4 authority, to check the beam number? You don't need --

5 MR. ALITO: It authorizes --

6 QUESTION: It is done in a regulation?

7 MR. ALITO: It is in a statute, and in the  
8 regulations, but it is --

9 QUESTION: To examine the beam number?

10 MR. ALITO: It says, to search the vessel.

11 QUESTION: To examine -- search the vessel for  
12 a beam number, or what?

13 MR. ALITO: It says, it conveys the broad  
14 power to --

15 QUESTION: Where is the statute?

16 MR. ALITO: The statute is reproduced in the  
17 appendix to our brief.

18 QUESTION: What page?

19 MR. ALITO: Page 1-A.

20 QUESTION: Let me pursue this, not on a little  
21 sailing vessel down there, but a British or a Swedish or  
22 a Norwegian or a Dutch vessel comes into the New York  
23 harbor. Before they can open a hatch or discharge a  
24 passenger or do anything, our people board it and look  
25 at the papers, do they not, and they are permitted by

1 statute to do it, and they can inspect the ship from  
2 stem to stern and top to bottom. Is that not so?

3 MR. ALITO: That is absolutely correct. That  
4 is true with any foreign vessel entering a port.

5 QUESTION: It doesn't make any difference  
6 whether it is a 40-foot sailboat or a 300-foot cruise  
7 vessel?

8 MR. ALITO: No, I would suppose that someone  
9 attempting to set the record for the smallest vessel to  
10 make a trans-Atlantic crossing would be subject to those  
11 entry requirements.

12 QUESTION: And this includes the health  
13 officers, and the Customs officers, and a whole range of  
14 people, does it not?

15 MR. ALITO: That is correct, and that is why a  
16 vessel like the Henry Morgan II cannot have any  
17 legitimate expectation of privacy in U.S. waters. On a  
18 vessel like that, Customs is expressly authorized by  
19 statute to put someone on board and leave him there as  
20 long as the vessel is in U.S. waters.

21 Now, as I was saying, inspection of the  
22 vessel's documents is vitally important in performing  
23 all of these important national functions, and this is  
24 so because there is simply no other way of effectively  
25 enforcing the documentation laws. The markings on



1 vessels, as we have attempted to show in the brief, are  
2 simply not satisfactory. They can be easily falsified.  
3 They are not very revealing, especially in the case of a  
4 foreign vessel, and even in the case of an American  
5 vessel, they do not disclose very much.

6 Respondents have suggested a number of  
7 alternatives, but I want to stress that none of these  
8 would be satisfactory. Certainly hailing a vessel, as  
9 they suggest, is no substitute for looking at the  
10 documents, because it requires the Customs officers to  
11 take the word of the persons on board.

12 Checking the documents only in the case where  
13 there is reasonable suspicion of a border crossing, as I  
14 have tried to show, is also not acceptable, nor is it  
15 satisfactory to check with the documentation office by  
16 radio, for a number of reasons, including the fact that  
17 the information available from that office is severely  
18 limited.

19 QUESTION: Your argument then certainly isn't  
20 limited to vessels who you see on the stern may come  
21 from a foreign port. It is just any vessel anchored 18  
22 miles from --

23 MR. ALITO: Well, that's correct, but what is  
24 at issue --

25 QUESTION: Isn't that right?

1 MR. ALITO: -- what is at issue here is the  
2 search -- is the boarding and document check in this  
3 particular case, which involved such a large sea-going  
4 foreign vessel. It wouldn't be necessary to address  
5 other applications, but certainly --

6 QUESTION: Are you suggesting, Mr. Alito, that  
7 your asserted power to board without reasonable  
8 suspicion would not apply in the case of boats not  
9 capable of going to sea, for example, like river barges  
10 and such?

11 MR. ALITO: I am not asserting that that  
12 authority would not apply in those instances, because  
13 Customs has enforcement responsibilities --

14 QUESTION: Even if it is a barge incapable of  
15 going to sea?

16 MR. ALITO: I think that --

17 QUESTION: You say they could board those  
18 under this statute?

19 MR. ALITO: Yes, they could. Customs has the  
20 responsibility for --

21 QUESTION: And would it make any difference,  
22 for example, if it is on waters that don't empty into  
23 the seas, a lake or something like that? They can still  
24 do all this?

25 MR. ALITO: It would -- I believe the

1 authority would extend to any navigable waters of the  
2 United States, because Customs has the -- has  
3 enforcement authority that goes beyond policing the  
4 entry of goods coming from abroad, although that is  
5 perhaps their most highly visible responsibility. They  
6 also have the duty to enforce all the shipping and  
7 navigation laws, and this would justify boarding many  
8 miles further inland than the one in this case.

9 But I want to stress that, of course, it is  
10 only the situation here that is at issue.

11 Let me now explain very briefly why  
12 suspicionless boardings and inspections of vessels  
13 entail a much lesser intrusion upon protected privacy  
14 interests than land inspections to which they are  
15 sometimes compared.

16 First of all, when a documentation check is  
17 made, a vessel is detained only briefly, if at all. The  
18 inspecting -- the boarding officer does not search the  
19 whole vessel. He only searches the documents and makes a  
20 visit to the hold to look at the main beam number if  
21 that is appropriate based on the type of vessel. He  
22 doesn't search the cargo or the cabins or the passenger  
23 compartments.

24 QUESTION: Is the underlying basis for this  
25 authority the authority of the United States to govern

1 entry into this country from beyond our borders of  
2 foreign goods and vessels?

3 MR. ALITO: That is one of -- That is one of  
4 the bases for this authority, but --

5 QUESTION: Is that the primary thrust?

6 MR. ALITO: It is the primary, but not the  
7 exclusive basis. As I was saying --

8 QUESTION: It is just hard for me to  
9 understand how it should extend, for instance, to a full  
10 right to board and search a small pleasure boat on an  
11 inland lake.

12 MR. ALITO: Well, we are specifically not  
13 making that argument, but I think it is also important  
14 to recognize that any rule that would draw a distinction  
15 between commercial and non-commercial vessels would be  
16 extremely unworkable.

17 QUESTION: How about a rule that is limited to  
18 the open seas or adjacent waterways and Customs --

19 MR. ALITO: That isn't what is involved in  
20 this case. And that --

21 QUESTION: Yes, but you are arguing for a much  
22 broader rule, if I understood you correctly.

23 QUESTION: You certainly did in answer to my  
24 question.

25 MR. ALITO: We are arguing for a much broader

1 rule, but in this case all that is involved is a vessel  
2 located, as I said, a relatively short distance from the  
3 coast. We think that the necessity for suspicionless  
4 boardings and document checks is most important in that  
5 area, but the statute authorizes boardings and  
6 inspections in other areas, and I am not prepared to say  
7 that to the extent it goes further than what was  
8 necessary here, the statute is unconstitutional.

9 QUESTION: In any event, we haven't got a lake  
10 case here today, have we?

11 MR. ALITO: That's right. We have a 40-foot  
12 foreign vessel, I want to stress, located not very far  
13 from the coast, and although it is masquerading as a  
14 pleasure vessel, in fact, it is engaged in a very  
15 lucrative, although illegal, trade. It is carrying a \$7  
16 million cargo. This is not a pleasure vessel, and a  
17 rule that tried to draw a distinction between pleasure  
18 vessels and commercial vessels would be subject to just  
19 this sort of abuse.

20 People engaged in violations of the  
21 documentation laws would use the sort of vessels that  
22 are commonly employed for recreational purposes, and  
23 would document them for recreational use.

24 The invasion of privacy involved in stopping a  
25 vessel and conducting a document check is significantly



1 different from what is involved in conducting a  
2 discretionary vehicle stop on land. First, and probably  
3 most important, vessels simply do not play the same  
4 central role in the lives of the average person as a  
5 passenger car does. I suspect that most of the people  
6 in Court today used a passenger car this morning, and  
7 they will use one tonight. I doubt that many people  
8 here used a vessel or will use one later in the day.

9           Land vessels have not historically been  
10 subject to the same close regulation as -- excuse me.  
11 Land vehicles have not been subject to the same close  
12 supervision as vessels. In fact, the early statutes from  
13 which Customs authority derives specifically required  
14 probable cause or reasonable suspicion for searches on  
15 land.

16           In sum, the important interests served by the  
17 documentation laws in our judgment far outweigh their  
18 minimal intrusion upon privacy interests, and for that  
19 reason Customs' long-standing authority to conduct  
20 suspicionless boardings and inspections should be  
21 sustained.

22           Thank you.

23           CHIEF JUSTICE BURGER: Mr. Ieyoub.

24           ORAL ARGUMENT OF RICHARD P. IEYOUNG, ESQ.,

25           ON BEHALF OF THE RESPONDENT

1           MR. IEYOUNG: Mr. Chief Justice, and may it  
2 please the Court, Your Honors, the boarding of the Henry  
3 Morgan II was pursuant to 19 USC 1581. This statute  
4 grants government agents broader powers of search and  
5 seizure than any statute which has previously come  
6 before the Court for constitutional consideration. It  
7 is even broader than the statute that was before the  
8 Court in Brignoni-Ponce, because in that particular  
9 situation there was at least a geographic limitation on  
10 the powers of border controls to conduct roving and  
11 random patrols and stops of vehicles near the border  
12 with Mexico.

13           There are absolutely no limitations within the  
14 statute on the powers of Customs agents to seize or  
15 search vessels and vehicles. The agents may stop,  
16 board, and search any vessel, any time, any place in the  
17 United States. Therefore, the time, place, manner, and  
18 scope of the boarding and search of the vessel is left  
19 to the unbridled discretion of the agent in the field,  
20 which this Court has always considered as an evil in  
21 this type of case.

22           The holding of the Fifth Circuit Court of  
23 Appeal was that the reasonableness standard of the  
24 Fourth Amendment required that Customs agents possess a  
25 reasonable suspicion of a law violation before boarding

1 a vessel in inland waters pursuant to 19 USC 1581.  
2 There was a limitation on these broad powers that were  
3 placed -- that Customs agents enjoyed placed on it by  
4 the Fifth Circuit.

5 I think very definitely that the true nature  
6 of this particular patrol is important in this case.  
7 First of all, insofar as the facts are concerned, this  
8 patrol was instigated and executed because of  
9 information which a Customs agent had received on the  
10 prior day, on March 5th, 1980, that there were two  
11 vessels in the Hackberry, Louisiana, area laden with  
12 marijuana.

13 Pursuant to that information, this patrol was  
14 formed, which included not only U.S. Customs agents, but  
15 included Louisiana State Police narcotics agents. In  
16 fact, this was not a mere administrative search for  
17 documents. This was clearly an investigatory, a  
18 criminal investigatory search that was made in order to  
19 obtain evidence to substantiate a criminal prosecution.

20 QUESTION: If the government is right, and I  
21 realize you argue they are not, that suspicionless  
22 boardings are permissible under the statute and don't  
23 violate the Constitution, what difference does it make  
24 what motive the investigators had?

25 MR. IEYOUNG: Your Honor, I think it is very

1 significant, because if the search was primarily one to  
2 obtain criminal evidence to support a criminal  
3 prosecution, the competing interests of the government  
4 and the individual are changed.

5 QUESTION: Well, do you have any finding from  
6 either the District Court or the Court of Appeals that  
7 the search was primarily to obtain incriminating  
8 evidence?

9 MR. IEYOUB: Only -- only the facts that were  
10 adduced at the trial, Your Honor, indicates that. As I  
11 stated, the patrol was formed basically --

12 QUESTION: But, I mean, I asked you, did  
13 either of the lower courts make a finding such as you  
14 are now saying apparently should have been made?

15 MR. IEYOUB: No. I don't think that either of  
16 the lower courts did that, Your Honor.

17 QUESTION: Were they asked, requested to? Do  
18 you know?

19 MR. IEYOUB: I don't think they were requested  
20 to do so, Your Honor, but the testimony that was taken  
21 at trial clearly reflected that --

22 QUESTION: If you have to win based on having  
23 us accept a fact like that, you may be in trouble. Your  
24 real case is that whatever the reason, this boarding was  
25 improper. Whether it was an administrative or any other

1 kind of a boarding, it was improper.

2 MR. IEYOUB: That's correct, Your Honor.

3 QUESTION: Isn't that what you really have to  
4 say?

5 MR. IEYOUB: That is really what I am  
6 emphasizing here. Well, in that respect, I wanted to  
7 bring out, however, the true nature of it, because this  
8 Court on many other occasions --

9 QUESTION: Well, how do we know? How do we  
10 know whether it is the true nature of it? We don't have  
11 any findings about that.

12 MR. IEYOUB: I think the objective facts of  
13 this particular case indicate that it was a criminal  
14 search. First of all, the presence of the Louisiana  
15 narcotics agents in the patrol, his presence can only be  
16 explained by the very fact that it was a criminal search  
17 seeking to obtain evidence for a criminal prosecution.  
18 There is no other explanation for his presence there  
19 except that fact.

20 And as I stated before, they were looking for  
21 marijuana. That was the reason why the patrol was ever  
22 formed, and why the boarding was executed.

23 QUESTION: Do you suggest that the state  
24 police of the border states haven't any right to  
25 cooperate with federal Customs people and the FBI and



1 whatnot in keeping drugs out of the country?

2 MR. IEYOUB: They certainly, Your Honor, do  
3 not have the right to board under 19 USC 1581. There is  
4 a federal statute which was cited by the government, I  
5 think 19 USC 507. However, this particular statute, the  
6 very nature of it indicates that Congress intended that  
7 any assistance given by a person to Customs agents in  
8 that particular respect was for the furtherance of a  
9 criminal search, or a search in criminal cases.

10 So, at least under the federal regulations or  
11 federal statutes, state narcotics agents do not have the  
12 right to board a vessel.

13 QUESTION: Did the narcotics agent testify?

14 MR. IEYOUB: Yes, he did, Your Honor.

15 QUESTION: Did you ask him that question?

16 MR. IEYOUB: I did not specifically ask him  
17 that question.

18 QUESTION: Well, if you did, you could have  
19 found out, couldn't you?

20 MR. IEYOUB: Yes, I could have, Your Honor.

21 QUESTION: So you didn't ask, and you ask us  
22 to draw a conclusion.

23 MR. IEYOUB: Well, Your Honor, he --

24 QUESTION: Which you could have brought out of  
25 the witness.

1 MR. IEYOUB: Correct. His testimony did  
2 indicate, however, that they were looking for  
3 marijuana. His testimony did indicate that. But --

4 QUESTION: Indicate is enough?

5 MR. IEYOUB: I am sorry, Your Honor?

6 QUESTION: Indicate is enough?

7 MR. IEYOUB: I think in this case if you take  
8 all of the facts as they are presented, and as the  
9 testimony indicated, that it should lead to a  
10 conclusion, Your Honors, that it was in fact a criminal  
11 investigatory search.

12 QUESTION: Do you say that when these officers  
13 stood on the deck of this craft, they were there  
14 illegally?

15 MR. IEYOUB: Absolutely, Your Honor.

16 QUESTION: And when they detected the odor of  
17 burning marijuana, they could not legally do anything  
18 about it?

19 MR. IEYOUB: Well, that --

20 QUESTION: Or could they take the vessel in  
21 tow, and take them to a United States magistrate and get  
22 a warrant?

23 MR. IEYOUB: I think they could have done  
24 that, Your Honor. The question, I think, in this case  
25 was whether or not the boarding was legal, and not

1 whether or not -- although I did contest that the search  
2 that took place after the boarding was illegal. The  
3 Fifth Circuit did not decide that particular question.  
4 The Fifth Circuit only held that the boarding itself was  
5 unreasonable under the Fourth Amendment.

6 QUESTION: Because of the lack of some kind of  
7 reasonable suspicion.

8 MR. IEYOUB: That's correct. That's correct,  
9 Your Honor. The situation -- even if we assume that the  
10 government, as the government contends, that the  
11 boarding in this case was purely an administrative  
12 documentation check, only in very unique and limited  
13 circumstances may even an administrative inspection or  
14 search of private premises be accomplished with an  
15 administrative warrant -- without an administrative  
16 warrant or without a valid substitute therefore. I  
17 think the government tried to argue that this particular  
18 inspection fell under the Colonnade-Biswell exception.

19 But this particular exception was a very  
20 narrow exception to the general rule, which requires a  
21 warrant for administrative inspections of residential  
22 and commercial premises. The exception allowed  
23 warrantless regulatory searches of a pervasively  
24 regulated business to further an urgent federal  
25 interest, by statute.

1           However, the statute is very limiting in these  
2 particular types of cases. The statute limits the time,  
3 scope, and place of these types of searches, and unless  
4 you have a valid statute which carefully and narrowly  
5 limits these particular inspections, then you need  
6 either an administrative warrant or some substitution  
7 for an administrative warrant, which we suggest in this  
8 case would be a reasonable suspicion of a law  
9 violation.

10           QUESTION: Are there different factors that  
11 play, though, when you are dealing with vessels on open  
12 waters which just don't lend themselves to staying put  
13 long enough to go get your administrative warrant?

14           MR. IEYOUB: Your Honor, I think insofar as  
15 that is concerned, that vessels, with respect to your  
16 particular answer, vessels are not that much different  
17 in mobility certainly than automobiles are.

18           QUESTION: Well, but, of course, with vessels  
19 we don't have roads. They go anyplace that there is  
20 open water, and it makes it -- you can't put up a  
21 roadblock, like you could for automobiles, to check  
22 registrations and licenses.

23           MR. IEYOUB: Well, in --

24           QUESTION: So how do you deal with that?

25           MR. IEYOUB: Well, in United States versus

1 Demanett, which was a lower court case, they were faced  
2 with that particular proposition. In fact, the same  
3 proposition has been cited by the government here. And  
4 that particular court held, there has to be some way  
5 other than complete unbridled discretion in the hands of  
6 the agent in the field.

7       They did not rule out some type of border or  
8 some type of check point search. They did not rule that  
9 out. And certainly in the Calcasieu Ship Channel, which  
10 is not a very wide body of water at all, there certainly  
11 could have been that type of thing in the Calcasieu Ship  
12 Channel, where this particular vessel was sited. There  
13 could have been a check point type situation.

14       Besides that, insofar as the documentation  
15 checks go, and insofar as the documentation laws and  
16 other regulatory objectives of this particular statute  
17 go, the minimal or the minimum -- it certainly would not  
18 benefit that much, random, suspicionless, warrantless  
19 boardings of vessels would not necessarily benefit the  
20 documentation laws to such an extent that it would  
21 outweigh the tremendous possibility of abuse and threat  
22 to the privacy of the individual that this statute  
23 allows.

24       I think in Biswell, the Court stated that if  
25 the statute offers a great possibility of abuse, and



1 there is a tremendous threat to the privacy of the  
2 individual, then you cannot fall within the  
3 Colonnade-Biswell exception.

4 QUESTION: How would a check point be less of  
5 an intrusion on privacy? And you have just conceded  
6 that a check point could have been set up along this  
7 waterway.

8 MR. IEYOUB: Yes, Your Honor. I am using the  
9 rationale that the Court used in --

10 QUESTION: How would there be less intrusion  
11 of the privacy if the Customs boat had pulled alongside  
12 and said, 200 yards north there is a check point, pull  
13 your craft in for inspection?

14 MR. IEYOUB: Well, first of all, the check  
15 point can be seen by all the vessels. There is less of  
16 a subjective intrusion. There is less fear that might  
17 be engendered when you see a check point where other  
18 vessels are being stopped. There is a regular pattern  
19 that is followed in stopping all of the vessels that may  
20 be coming into a particular point.

21 And in that respect, it follows the  
22 Martinez-Fuerte rationale, that permanent check points  
23 are not as much an intrusion into the privacy of the  
24 individual as a roving patrol that makes random  
25 suspicionless searches. And that is the difference

1 between the check point and any of -- the random  
2 searches.

3 QUESTION: But for the check point, they could  
4 have the stop and the search without suspicion?

5 MR. IEYOUB: I think so. Yes, Your Honor. I  
6 think if you had a regular, a set check point, that that  
7 might be all right under the Martinez-Fuerte rationale.

8 QUESTION: A check point in the canal?

9 MR. IEYOUB: Yes, Your Honor. At least they  
10 could have in this --

11 QUESTION: Have you ever seen one?

12 MR. IEYOUB: No, I have never seen one, Your  
13 Honor. That is an alternative that would be available.  
14 But certainly there has to be some alternative other  
15 than subjecting every person that is in inland waters  
16 lawfully, either for recreational purposes or vacational  
17 purposes, to random, suspicionless, dragnet-type  
18 searches.

19 QUESTION: Well, now, this isn't really the  
20 inland water situation, though, here, is it? It is the  
21 extension of the open sea, and in Customs waters, as I  
22 understand it.

23 MR. IEYOUB: Well, Your Honor, this --

24 QUESTION: Isn't that right?

25 MR. IEYOUB: Well, yes, that's correct, but --

1           QUESTION: And you would also agree that there  
2 is no real right of privacy, is there, for anyone  
3 entering our borders from abroad?

4           MR. IEYOUB: Insofar as the border search is  
5 concerned, Your Honor, there is no right to privacy, and  
6 that has been historically true, and the decisions of  
7 this Court have so held for many years, but this was not  
8 a border search, and insofar as this particular body of  
9 water was concerned, it covers an area of 35 statute  
10 miles from Lake Charles, Louisiana, to the coast of  
11 Louisiana. This vessel was 18 miles inland, and there  
12 are many pleasure vessels that ply that particular  
13 waterway. There definitely is, but --

14          QUESTION: And as someone pointed out, Chicago  
15 or Minneapolis-St. Paul are thousands of miles away from  
16 the Mexican border, but a plane from Acapulco has got to  
17 stop and be boarded and inspected completely when it  
18 makes its first landing in the United States.

19          MR. IEYOUB: Well, I think, Your Honor, in  
20 that particular case, though, you have a set point of  
21 Customs or border inspections. I think in this  
22 particular case the border rationale would be  
23 applicable. In that case, if they flew from a foreign  
24 country and landed at a particular point in the United  
25 States, where there were regular inspections and regular

1 searches, I think the border search rationale would  
2 apply, as it did in Ramsey. In Ramsey --

3 QUESTION: What if a plane was sited by  
4 Customs officials on the Arizona-Mexican border as  
5 coming in from Mexico, and they were able to trace it by  
6 radar, say, to simply a small landing field in northern  
7 Arizona, northern New Mexico. Do you think those  
8 Customs officials, if they were able to wire their  
9 compatriots wherever it landed, would have to have some  
10 sort of a warrant or reasonable suspicion before  
11 inspecting that plane?

12 MR. IEYOUB: Well, in that particular case,  
13 Your Honor, it would, first of all, seem very unusual  
14 for a very small plane to be flying in from Mexico and  
15 flying at a very --

16 QUESTION: Let's accept my factual hypothesis,  
17 if you will.

18 QUESTION: And it isn't unusual.

19 QUESTION: It isn't unusual at all.

20 MR. IEYOUB: Well, it may not be unusual,  
21 however, I think, but those particular facts might give  
22 rise to a reasonable suspicion of a law violation, and --

23 QUESTION: Well, I don't know why that would  
24 be, but supposing the government didn't argue any law  
25 violation, they just said, we can make a suspicionless

1 inspection in the nature of a border search here, even  
2 though you are 400 miles from the border.

3 MR. IEYOUB: Well, I think in a particular  
4 situation where there is a plane, and a plane is  
5 different than, I think, a vessel in this particular  
6 case. If a plane flies in from Mexico into the United  
7 States, and even if it is 400 miles from the border, I  
8 think the border rationale, the border search rationale  
9 could apply.

10 QUESTION: So if Customs officials had seen  
11 your client's boat crossing the three-mile limit or 12  
12 miles, whatever it is in Louisiana, they could have  
13 stopped it there?

14 MR. IEYOUB: Yes, I think so, Your Honor,  
15 because the Fifth Circuit has held that way. In fact, I  
16 think it was in United States versus Whittaker in the  
17 Fifth Circuit, the Customs agent sited the vessel off  
18 the coast, and kept it under surveillance, and during  
19 the course of the surveillance there were certain  
20 articulable facts which were generated because of the  
21 nature of the boat, the type of the spray that it was  
22 throwing, the sluggish nature of its movement.

23 They followed her inland and then boarded her,  
24 and the Fifth Circuit said, that's fine. You can do  
25 that, because you saw the border crossing. The Fifth



1 Circuit in this case just held that there was absolutely  
2 no evidence to establish a border crossing here.

3 QUESTION: Even though in fact it turned out  
4 that the boat had crossed the border.

5 MR. IEYOUB: That's correct. There was  
6 absolutely no facts. When the boat was initially sited,  
7 Your Honor, it was anchored. It was anchored 18 miles  
8 inland in the Calcasieu Ship Channel. The sails were  
9 furled. There were no persons on board. There was  
10 absolutely no activity whatsoever.

11 QUESTION: Is that what shows as Lake  
12 Calcasieu on the roadmap?

13 MR. IEYOUB: I am sorry, Your Honor?

14 QUESTION: Is what you call the Calcasieu Ship  
15 Channel what shows as Lake Calcasieu on the roadmap, or  
16 is that further up? It is --

17 MR. IEYOUB: It is very close by, Your Honor.  
18 It is not the Calcasieu Ship Channel, but it is very  
19 close by, and Officer Wilkins, incidentally, testified  
20 that there are hundreds of pleasure vessels in Calcasieu  
21 Lake which would have access to the Calcasieu Ship  
22 Channel.

23 QUESTION: I suppose they are two -- The ship  
24 channel and the lake are two separate things?

25 MR. IEYOUB: That's correct, Your Honor.

1 QUESTION: What papers in fact were found on  
2 this craft when they boarded? What kind of papers?

3 MR. IEYOUB: I think it was just a  
4 registration, Your Honor, I think, that -- showing where  
5 the vessel was purchased, where the vessel was made and  
6 where the vessel was purchased. There is something, I  
7 think, that is very interesting here. One of the  
8 officers testified at trial that the decision was made  
9 before they even started the patrol that every vessel in  
10 the Calcasieu Ship Channel was going to be boarded.  
11 They didn't care whether or not --

12 QUESTION: Well, how does that help you?

13 (General laughter.)

14 MR. IEYOUB: Your Honor, it helps me, I think,  
15 Your Honor, in showing that there is a tremendous amount  
16 of possibility of abuse.

17 QUESTION: It is just like a roadblock.

18 MR. IEYOUB: Well, no, Your Honor --

19 QUESTION: We're not going to pick and  
20 choose. We're going to -- everybody in sight is going  
21 to have a document check.

22 MR. IEYOUB: Well, in a random --

23 QUESTION: I thought you said that would be  
24 all right.

25 MR. IEYOUB: A random search, Your Honor, is

1 what it was. A random patrol.

2 QUESTION: Random? It isn't random at all if  
3 you're going to stop every vessel you see in that lake.  
4 Nothing random about that.

5 MR. IEYOUB: Well --

6 QUESTION: It's like setting up a roadblock  
7 and saying, everybody who goes through this roadblock is  
8 going to have to show his registration certificate.

9 MR. IEYOUB: Well, but there is not the  
10 regularity that a roadblock would have. People would  
11 not be able to see that other vessels were being stopped  
12 necessarily. They were roaming the entire area of the  
13 Calcasieu Ship Channel, 35 miles.

14 QUESTION: Stopping everybody in sight?

15 MR. IEYOUB: Well, that was their purpose.  
16 The record doesn't reflect whether or not they actually  
17 did. But they did site this particular vessel. But the  
18 broadness of this particular statute is very important,  
19 because the Court has always held that whenever there is  
20 unbridled discretion in the hands of the officer in the  
21 field, then you have a problem here, and this particular  
22 statute does not make any provision whatsoever  
23 concerning the procedures that are to be used when these  
24 boardings take place.

25 Now, the government has said, well, this

1 boarding only deals with the weather decks or the places  
2 that you can see. The statute doesn't say that. The  
3 statute simply says that you can board and examine the  
4 documents and the manifest. You can board and inspect  
5 and search the vessel.

6 QUESTION: But what you are challenging is the  
7 application of the statute to your particular case,  
8 isn't it? I mean, you can't call up a bunch of  
9 hypotheses that might occur under the statute that  
10 didn't happen in this case to urge a court to conclude  
11 that what happened in this case was wrong.

12 MR. IEYOUB: No, Your Honor, I am challenging  
13 it as it was --

14 QUESTION: You would have to show to win that  
15 the boarding was unconstitutional.

16 MR. IEYOUB: It was unreasonable under the  
17 Constitution, Your Honor.

18 QUESTION: You have to show that, don't you?

19 MR. IEYOUB: I'm sorry, Your Honor?

20 QUESTION: You have to show that the boarding  
21 was unconstitutional.

22 MR. IEYOUB: That's correct. The basis --  
23 What was the basis of the particular -- what was the  
24 constitutional basis of the search? The government is  
25 saying that --

1 QUESTION: Of the search? Of the boarding.

2 MR. IEYOUB: Of the boarding. I'm sorry, Your  
3 Honor. Of the boarding. That's correct. They're  
4 saying, well, this was an administrative documentation  
5 check. But the rule is that unless it falls under a  
6 very narrow exception, a search of private property must  
7 be conducted either with an administrative warrant or a  
8 substitution, or --

9 QUESTION: Congress has said that that doesn't  
10 -- that -- here is what we think is reasonable under the  
11 Fourth Amendment. You should be able to board any  
12 vessel for a documentation search.

13 MR. IEYOUB: Well, but Congress cannot  
14 authorize the violation of the Constitution.

15 QUESTION: I agree with that, but at least --

16 QUESTION: They didn't board to search. They  
17 did not board to search. They didn't search until they  
18 saw in plain view the contraband, did they?

19 MR. IEYOUB: Well --

20 QUESTION: Is that what the record shows?

21 MR. IEYOUB: The record shows that they  
22 boarded -- I contend that they boarded in order to  
23 conduct a search.

24 QUESTION: I'm talking about -- not you. I'm  
25 talking about the record.



1           MR. IEYOUB: Well, the record would show that,  
2 too, Your Honor, but they did board, and then supposedly  
3 they saw -- they smelled marijuana, looked toward the  
4 hold, and there were some burlap sacks.

5           QUESTION: Have you anything to dispute that  
6 they did that?

7           MR. IEYOUB: No, I don't have anything to --

8           QUESTION: Well, why do you say supposed?

9           MR. IEYOUB: I'm sorry, I didn't hear Your  
10 Honor.

11          QUESTION: Why do you say supposed?

12          MR. IEYOUB: No, that is what -- that's what  
13 the testimony, that's what the testimony reflected.

14          QUESTION: That's what they did.

15          MR. IEYOUB: Yes, Your Honor.

16          QUESTION: So they didn't board to search.  
17 They searched after they saw.

18          MR. IEYOUB: That's correct.

19          QUESTION: And what is wrong with that?

20          MR. IEYOUB: Well, the boarding itself. The  
21 boarding itself.

22          QUESTION: Well, if they'd passed by the boat  
23 and had smelled it, could they have boarded it then?

24          MR. IEYOUB: Very possibly they could have  
25 boarded, yes.

1 QUESTION: Well, couldn't they very possibly  
2 have done it here?

3 MR. IEYOUB: Well, the record absolutely  
4 doesn't reflect that they smelled it before they boarded  
5 the vessel, Your Honor.

6 QUESTION: You know, I am with you on one  
7 point. I don't understand these crooks that always  
8 leave everything out in plain view.

9 (General laughter.)

10 QUESTION: But the record shows it was in  
11 plain view. That's what the record shows.

12 MR. IEYOUB: The record does show that --

13 QUESTION: And I don't see how you can get  
14 away from that. They had a right to look for the papers  
15 of that boat. They had that right.

16 MR. IEYOUB: That's correct.

17 QUESTION: And while they were looking for the  
18 papers of the boat, they saw marijuana on every place  
19 except nailed to the mast.

20 MR. IEYOUB: I am saying, Your Honor --

21 (General laughter.)

22 MR. IEYOUB: I am saying, Your Honor, they  
23 didn't have the right to board the vessel in the first  
24 place. They didn't have the right to board the vessel --

25 QUESTION: To look to see whether it was

1     papered or not?

2             MR. IEYOUB: Even an administrative search.

3             QUESTION: Do you have a right to stop a car  
4     to see if it is registered?

5             MR. IEYOUB: Not at random. Not roving  
6     patrols, of border patrols. In Brignoni-Ponce the Court  
7     made that very clear. Because you are subjecting  
8     numerous people who are lawfully on the highways to  
9     interruption of their freedom of passage, and that's  
10    what happens when you have this random border patrol.

11            QUESTION: Or right to travel.

12            MR. IEYOUB: Or right to travel. Absolutely,  
13    Your Honor. Right to travel. Right to be free from  
14    arbitrary governmental interference in your passage.

15            QUESTION: This man -- there's only one man on  
16    the boat. He couldn't speak English. He had the right  
17    to travel?

18            MR. IEYOUB: Well, that's correct. He's  
19    covered under the Fourth Amendment.

20            QUESTION: Where did he come from?

21            MR. IEYOUB: I think he came from Colombia.

22            QUESTION: You don't even know.

23            MR. IEYOUB: Colombia, Your Honor. Colombia.  
24    He did come from Colombia. But just because the  
25    government says, well, we have a right to inspect

1 documentation, doesn't mean that that is going to be  
2 constitutional. It doesn't mean that they have carte  
3 blanche just to stop either any vessel or either -- or  
4 vehicle just to check the documentation.

5 QUESTION: Could he stop by, take his  
6 bullhorn, and say, have you got papers?

7 MR. IEYOUB: Well, if it entailed --

8 QUESTION: Could he say that?

9 MR. IEYOUB: It depends on whether it was a  
10 stop.

11 QUESTION: Is that interfering with him?

12 MR. IEYOUB: It is interfering. It depends --

13 QUESTION: Could he?

14 MR. IEYOUB: Not unless he had a reasonable  
15 suspicion initially to make the stop. The issue is, can  
16 the stop be made?

17 QUESTION: Well, here he had already stopped.

18 MR. IEYOUB: He had already stopped.

19 QUESTION: Is that right?

20 MR. IEYOUB: Yes, he was anchored.

21 QUESTION: Well, could he have asked him, do  
22 you have papers?

23 MR. IEYOUB: I think that would be a minimal  
24 intrusion.

25 QUESTION: Over the bullhorn, could he do

1 that?

2 MR. IEYOUB: I think that would definitely be  
3 a minimal intrusion.

4 QUESTION: Thank you for agreeing to one  
5 point.

6 MR. IEYOUB: Yes. Yes, Your Honor. What I  
7 think that the government is trying to do in this  
8 particular case is convert 19 USC 1581 into a writ of  
9 assistance that gives Customs agents total power to do  
10 anything they want insofar as vessel checks are  
11 concerned without any Fourth Amendment or constitutional  
12 constraints, and that's what they're trying to do in  
13 this particular case.

14 And the possibility that this will lead to  
15 abuse is very real. They don't have the right to  
16 conduct random, suspicionless, warrantless stops,  
17 whether it be for a documentation check, or for a safety  
18 check, or what have you. The Fourth Amendment does  
19 apply here. The standard of reasonableness applies.

20 And I think this Court has recognized in  
21 numerous cases, in Brignoni-Ponce, in Almeida-Sanchez,  
22 and other cases, that the random -- this discretion, the  
23 unbridled, unconstrained discretion in the hands of the  
24 officer in the field is what is very important insofar  
25 as the application of the reasonableness standard to the



1 Fourth --

2 QUESTION: Do you think this is the same rule  
3 whether it was three miles from the -- two miles from  
4 the coast, three miles from the coast, 18 miles from the  
5 coast, or 100 miles?

6 QUESTION: A million?

7 MR. IEYOUB: Well, I think insofar as three  
8 miles from the coast is concerned, Your Honor, that  
9 there could have possibly been a border type -- a border  
10 search rationale applied.

11 QUESTION: Why? Why? Why?

12 MR. IEYOUB: Well, I think if it is that close  
13 to --

14 QUESTION: Well, it is close. It is close.

15 MR. IEYOUB: I think it can be a matter of  
16 degree. If you are right at the coast, if you are one  
17 mile --

18 QUESTION: You mean, you have already crossed  
19 the border.

20 MR. IEYOUB: That's correct.

21 QUESTION: Any time you cross the border, you  
22 can search? You can not only board, you can search the  
23 entire vessel?

24 MR. IEYOUB: Not any time you cross the  
25 border, Your Honor, no. If there --

1 QUESTION: Why not? Why not? Within three  
2 miles, say.

3 MR. IEYOUB: Well, I'm just -- I'm just saying  
4 that there's a possibility the Court of Appeal might  
5 have found that this -- if it had been three miles, or  
6 closer to the border, there may have been a border  
7 search rationale applied, because --

8 QUESTION: Let's suppose it wasn't Customs.  
9 The state, the state says, any time you cross our  
10 border, you have to be searched.

11 MR. IEYOUB: No, that would be unreasonable,  
12 Your Honor. That would be unreasonable under the Fourth  
13 Amendment.

14 QUESTION: Do you think it is unreasonable for  
15 a state to put up an inspection station at its border  
16 and search for citrus that may cause plant disease in  
17 that state?

18 MR. IEYOUB: No, Your Honor. Not a permanent  
19 check point or an inspection station. No, I do not  
20 think that would be unreasonable.

21 QUESTION: I know, but a vessel, it can unload  
22 anywhere along the beach, and here is a -- here is the  
23 state's border, three miles out in the ocean, or nine  
24 miles, some places in the Gulf, and the vessel has  
25 crossed the border of the state. You don't know where

1 it's going to tie up.

2 MR. IEYOUB: Well, Your Honor --

3 QUESTION: It may go into some -- it may just  
4 unload. It just may anchor 50 yards off the coast and  
5 unload.

6 MR. IEYOUB: That's correct.

7 QUESTION: Don't you think the state could  
8 stop that and insist on a search to see if it is  
9 carrying something that is contrary to state law?

10 MR. IEYOUB: Well, I think -- Your Honor, I  
11 think that might be unreasonable under the Fourth  
12 Amendment. Certainly, they --

13 QUESTION: Assume it isn't. Assume for the  
14 minute it isn't. What is the border of the United  
15 States?

16 MR. IEYOUB: I would say the border of the  
17 United States, the coast of the United States, is three  
18 miles -- there's a --

19 QUESTION: What's the border? What is the  
20 outer boundaries of the United States?

21 MR. IEYOUB: I think it's three miles off the  
22 coast, Your Honor, if I'm not mistaken.

23 QUESTION: Of the United States?

24 MR. IEYOUB: I think so.

25 QUESTION: And what --

1 MR. IEYOUB: It's Customs waters. I think  
2 that's referred to Customs waters, if I'm not mistaken.

3 QUESTION: Well, that's -- you mean the  
4 Customs waters is three miles?

5 MR. IEYOUB: If I -- I think so. I'm not sure  
6 about that point, Your Honor. It may be 12 miles off  
7 the coast.

8 QUESTION: A few minutes ago you said it's all  
9 right to stop and search for bugs and things.

10 MR. IEYOUB: At a permanent type check point,  
11 Your Honor.

12 QUESTION: Well, suppose while they are  
13 looking for it they find marijuana.

14 MR. IEYOUB: I'm sorry, Your Honor. I didn't  
15 hear you.

16 QUESTION: Suppose they find marijuana.

17 MR. IEYOUB: If they find --

18 QUESTION: While they were searching the  
19 lettuce.

20 MR. IEYOUB: If they find marijuana, then the  
21 person is subject to being arrested and prosecuted.

22 QUESTION: What's the difference between that  
23 case and this one?

24 MR. IEYOUB: This is a roving patrol, random  
25 type search that leaves --

1 QUESTION: That's the only difference?

2 MR. IEYOUB: Well, the only difference, too,  
3 Your Honor, is that it is -- it was made pursuant --

4 QUESTION: The only difference, too?

5 MR. IEYOUB: No, Your Honor. There is also a  
6 difference in that it was made pursuant to a federal  
7 statute which grants broad powers of search and seizure  
8 which are unreasonable under the Fourth Amendment. This  
9 was a random search by a roving patrol, and I think this  
10 Court in prior decisions has held that this is  
11 unreasonable under the Fourth Amendment.

12 Thank you.

13 CHIEF JUSTICE BURGER: Do you have anything  
14 further, Mr. Alito?

15 ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.,

16 ON BEHALF OF THE PETITIONER

17 MR. ALITO: Two very brief points, Mr. Chief  
18 Justice.

19 First, if the Court wishes, we will submit a  
20 supplemental brief on the issue of whether dismissal of  
21 the indictment mooted this case. Second, I want to  
22 emphasize --

23 QUESTION: Well, on that, will you please put  
24 in a copy of your order which the U.S. Attorney filed,  
25 the motion to dismiss the indictment?



1 MR. ALITO: Yes, Your Honor, we will look into  
2 that.

3 QUESTION: It is right here in the record.

4 MR. ALITO: Well, Your Honor, as I said, that  
5 was done not because they had no further interest in  
6 pursuing this case.

7 QUESTION: Well, it doesn't say -- it just  
8 says he's the one. If it hadn't been for him, it  
9 wouldn't have been done.

10 MR. ALITO: It was done because he wanted to  
11 comply with the mandate of the Court of Appeals. The  
12 only other -- Thank you.

13 CHIEF JUSTICE BURGER: Do you have anything --  
14 Your time is not up.

15 MR. ALITO: I am sorry.

16 The only other point I would like to add, Mr.  
17 Chief Justice, was that the crux of this case is that  
18 until a documentation inspection is conducted, it is not  
19 possible to know what sort of vessel Customs is dealing  
20 with, and that is why it's necessary, and that is  
21 illustrated graphically by this particular case.

22 Here, if the Henry Morgan II had been a  
23 documented boat from Basilea, Louisiana, or Mississippi,  
24 or Alaska, it would have had exactly the same markings,  
25 and here, a Customs patrol in a Louisiana ship channel

1 came across a boat that bore the outward markings of a  
2 landlocked country 5,000 miles away. The hailing port  
3 was written in Latin, and although the vessel bore Swiss  
4 markings, it was actually of French registry.

5 Because situations like this come up all the  
6 time, it is necessary to conduct a documentation check  
7 to determine whether any further procedures, including a  
8 full-scale border search, is appropriate.

9 QUESTION: Well, in your submission, it sounds  
10 like, your most recent one, anyway, is that on the facts  
11 of this case, this boarding was all right, but that you  
12 aren't pushing for any kind of a rule that you can  
13 search any -- you can board any vessel that you find  
14 anchored 18 miles off the coast.

15 MR. ALITO: No, I believe it is necessary to  
16 do that, because until you inspect the documents, you  
17 cannot --

18 QUESTION: So you are saying any vessel you  
19 find anchored or under way 18 miles off the coast or any  
20 distance off the coast, for that matter, you can stop  
21 and make a document check?

22 MR. ALITO: We believe the statute is  
23 constitutional, and that is what it provides. I think  
24 this case is --

25 QUESTION: Well, you are not arguing about the

1 search, I don't suppose.

2 MR. ALITO: Pardon me?

3 QUESTION: Are you arguing that the search  
4 provision, part of the -- is constitutional?

5 MR. ALITO: That is not the issue here. All  
6 that was conducted here was a document check.

7 QUESTION: But I take your argument to be, as  
8 applied here, it meets constitutional standards.

9 MR. ALITO: That's correct. A document check  
10 was conducted here, and those are reasonable because  
11 they are necessary for enforcing many important national  
12 laws.

13 Thank you.

14 QUESTION: Is the statute limited to Customs  
15 waters?

16 MR. ALITO: No, it is in any part of the  
17 United States or in Customs waters.

18 QUESTION: I was thinking about the request or  
19 suggestion as to whether or not a search could be made  
20 100 miles off the coast.

21 MR. ALITO: A search could be made 100 miles  
22 off the coast by the Coast Guard pursuant to a different  
23 statute which authorizes boardings on the high seas of  
24 any vessel subject to U.S. jurisdiction for the  
25 purpose --

1 QUESTION: There are some cases pending on  
2 that, isn't that correct, down in Florida?

3 MR. ALITO: There are many cases pending on  
4 that issue, and that authority has generally been upheld  
5 by Courts of Appeals based upon reasoning analogous to  
6 the arguments we have advanced in this case.

7 QUESTION: Do you have in mind how many times  
8 we have denied certiorari on boardings off the Florida  
9 coast and --

10 QUESTION: Both ways.

11 MR. ALITO: Quite a few. There have been a  
12 number of them.

13 QUESTION: Both ways. Both ways.

14 MR. ALITO: That authority has been sustained  
15 by at least three or four circuits, and cert has been  
16 denied on numerous occasions.

17 QUESTION: May I ask one question? I know it  
18 has been asked. I am a little -- not entirely clear on  
19 your answer. Justice Brennan, I believe, asked you, in  
20 the Court of Appeals, did you argue that reasonable  
21 suspicion was not necessary?

22 MR. ALITO: We did in our petition for  
23 rehearing.

24 QUESTION: In your petition for rehearing.

25 MR. ALITO: We did not do it initially because

1 of settled Fifth Circuit authority, and because we had  
2 won on alternative grounds in the District Court.

3 QUESTION: Right.

4 MR. ALITO: But we raised it in the petition  
5 for rehearing.

6 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
7 The case is submitted.

8 (Whereupon, at 1:59 o'clock p.m., the case in  
9 the above-entitled matter was submitted.)

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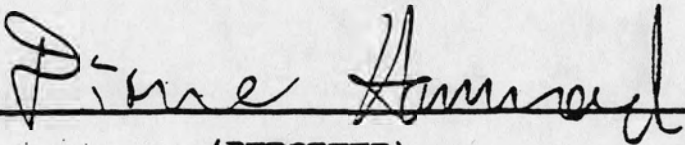
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