Enforcement

CHAPTER 5

The FCMA establishes a legal regime enforceable throughout an oceanic area nearly as large as the land mass of the continental United States. Because of the practical difficulty of patrolling such a vast area and the legal issues raised by the Act's administrative, civil, and criminal sanctions, enforcement is a major fishery management problem. This chapter analyzes the enforcement provisions of the Act in three parts. First, it describes the overall enforcement scheme of the FCMA. Next, it focuses on several particularly significant provisions. Finally, it analyzes the possibility of conflict between the Act's warrantless search provision and the Fourth Amendment of the United States Constitution.
I. The Overall Scheme

The enforcement provisions of the FCMA can be found in Title 16 of the U.S. Code, sections 1857 through 1861. The first of these sections (1857) spells out the basic prohibitions of the Act. The next three sections (1858-1860) establish penalties for violations. Section 1858 establishes a system of civil penalties (fines). Section 1859 classifies certain serious violations as criminal offenses. Section 1860 provides for civil forfeitures of a violator's vessel, gear, and catch. Finally, section 1861 places general enforcement responsibility on the United States Coast Guard and the Secretary of Commerce, describes the power of enforcement officers (including their authority to board, search, seize, and arrest), and allows the use of discretionary citations that are, in effect, simply warnings.

It may be helpful to arrange the various sanctions into an enforcement hierarchy. Minor or technical violations of the FCMA will likely result in mere citation. More serious violations will result in fines or forfeiture of gear, catch, and even of the vessel. Finally, acts such as forcible interference with enforcement officers are criminal offenses and are punishable by fines, imprisonment, or both.

The civil and criminal penalties in sections 1858-1861 are applicable to foreign and domestic fishermen. Additionally, the FCMA provides for two types of indirect sanctions that are applicable only to violations by foreign vessels or nations. First, section 1824(b)(12) grants the Secretary of Commerce the power to revoke, suspend, or restrict a foreign vessel's permit for failure to comply with prohibitions of section 1857, or for nonpayment of civil or criminal fines. Second, section 1821(c)(4)(C) requires foreign nations with whom we have Governing International Fisheries Agreements (GIFAs) to "take appropriate steps" under their own laws to ensure that their nationals comply with all regulations promulgated pursuant to the FCMA.

It is worth reiterating that while there exist unique sanctions that apply only to foreign fishermen, the FCMA's basic enforcement scheme applies to foreign and domestic vessels. In fact, United States vessels have been charged with 2,132 of the 3,689 violations asserted under the Act through March 1984.

A. What is Illegal Under the Act?

Section 1857 makes it unlawful for any person to violate provisions of the FCMA, any regulation or permit issued pursuant to the Act, or any part of an applicable GIFA. More specifically, section 1857(1) lists several categories of prohibited conduct that apply to "any person," both foreign and domestic. Additionally, section 1857(2) makes it illegal for any foreign vessel to fish within the 200-mile conservation zone without a valid permit.
Section 1857(1) specifies prohibited acts that can be grouped into three categories. The first category makes it illegal to fish after the revocation or suspension of a permit issued under the Act. This prohibition obviously applies to foreign fishermen and it may apply to domestic fishermen as well. Section 1853(b)(1) authorizes any management plan to require permits of United States vessels fishing or seeking to fish within the conservation zone. If a Fishery Management Plan (FMP) contains such a provision, domestic fishermen are subject to civil penalties for fishing with a revoked or suspended permit. It should be noted that section 1857(1) also applies to "support" vessels and activities. For example, the broad definitions of "fishing" and "fishing vessel" in sections 1802(10) and (11) would make it illegal for a person whose permit has been revoked or suspended to use a vessel to supply another fishing vessel with fuel or provisions or to transfer fish from a vessel to shore facilities.

A second and related prohibited act is detailed in section 1857(1)(G). This provision makes it illegal to "ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this Act" or its implementing regulations, permits, or GIPPs. Although this prohibition reiterates the proscription of "support" activities mentioned above, its scope is much broader. In particular, section 1857(1)(G) is not restricted to activities done in conjunction with a fishing vessel. As a result, a person far inland who transports, purchases, or even possesses "illegal" fish has violated the statute. Section 1857 imposes strict liability: violations do not require elements of willfulness, intent, or even knowledge. Amendments that would have inserted the phrase "knowingly and willingly" to this section were defeated in Congress. The violator's mental element, however, does become relevant in determining the level of civil penalties and in forfeiture settlements. More attention is given to the "mental element" question later in this chapter.

A third category of section 1857 prohibited acts can be labeled under the general category "interference with enforcement." Violation of this provision carries the most serious consequences found in the FCMA. Subsections 1857(1)(D), (E), (F), and (H) make it illegal to deny an authorized officer permission to board; to forcibly oppose, intimidate, or assault an officer in the conduct of his or her search or inspection; to resist a lawful arrest for a section 1857 violation; or to interfere, delay, or prevent (by any means) the apprehension or arrest of another person, knowing that the other person has violated a provision of the Act. Violations of section 1857(1)(D), (E), (F), or (H) may result in six months' imprisonment, a fine of $50,000, or both. If, during a violation of these provisions, a dangerous weapon is used or an enforcement officer is placed in fear of imminent bodily injury, section 1859(b) allows 10 years' imprisonment, fines of $100,000, or both. More attention is given later in this chapter to questions of the degree of "force" required to
trigger certain of these provisions. It is worth noting that all of the section 1857 prohibitions, including those that describe criminal offenses, apply to crew members as well as to masters of vessels. While the older Bartlett Act (now superseded by the FCMA) was applicable only to masters, the FCMA section 1857 provisions apply to "any person," which the Act defines to include "any individual."

B. Who Enforces the Act?

Section 1861(a) places general enforcement responsibility on the Coast Guard and the Secretary of Commerce. Both agencies, however, may agree to use the resources of other federal agencies (including the Department of Defense) and of state agencies in enforcing the Act. As a result, it is possible that fishing vessels may be boarded by personnel of state Departments of Fish and Wildlife who are enforcing the federal Act.

C. What Are Enforcement Officers Authorized To Do?

Section 1861(b) describes the power of authorized officers. It allows arrests, with or without a warrant, of persons whom an officer has "reasonable cause to believe" have violated section 1857. Section 1861(b) authorizes officers, with or without a warrant, to "board, and search or inspect, any fishing vessel" subject to the provisions of the Act. Although it is likely that the practical difficulties of obtaining a timely warrant at sea provide the type of circumstances under which warrantless arrests or searches can be made, it is not at all clear that warrants and searches may be made free from the United States Constitution's Fourth Amendment requirement of probable cause. Section 1861(b)(1)(A) allows for warrantless arrests if based on "reasonable cause," a requirement that is unexplained in the legislative history of the FCMA but which seems to parallel the constitutional requirement. Section 1861(b)(1)(B), on the other hand, authorizes warrantless searches without mention of probable or "reasonable" cause. This is important to fishermen because section 1857(1)(D) and section 1859(a) make it a criminal offense to refuse an officer permission to board and search. The constitutionality of the warrantless search provisions of the Act is discussed later in this chapter.

Section 1861 grants officers other powers, the most comprehensive of which is the power to seize vessels, fish, or other evidence. Section 1861(b)(1)(A)(iii) provides for the seizure of a fishing vessel (including its gear and cargo) that "reasonably appears" to have been used in the violation of any of the provisions of the Act. Section 1861(b)(1)(A)(iv) authorizes the seizure of fish (wherever found) taken or retained in violation of the Act, and section 1860(e), dealing with civil forfeitures, establishes a rebuttable presumption that all fish found on board a seized vessel are "taken or retained in violation of the Act." Section 1861(b)(1)(A)(v) allows officers to seize any other evidence related to the violation.
Section 1861(b)(1)(C) additionally empowers officers to exercise "any other lawful authority." While it is unclear what powers this provision seeks to confer, at least two enforcement techniques are likely possibilities. First, the clause can be used to support the use of force in making arrests. As a general rule, officers may use whatever force is reasonably necessary to make an arrest, but they must not use excessive or unnecessary force. Further distinctions may be drawn depending on whether the force used is "deadly force" and whether it is used incident to an arrest for a felony or a misdemeanor. Whatever the "lawful" degree of force, however, section 1861(b)(1)(C) seems sufficiently broad to authorize its use. 2)

A second section 1861(b)(1)(C) power might be the exercise of the customary right of "hot pursuit," which refers to the recognized right of a coastal nation to chase and arrest a violator of its coastal laws beyond waters subject to its jurisdiction. Although the FCMA does not expressly confer this right on enforcement officials, Congress undoubtedly knew of its use under the Bartlett Act 3) and Congressional silence on the subject should not be used to infer disapproval. Instead, frequent reference in the legislative history of the FCMA to "adequate" enforcement authority might be read in conjunction with the broad language of section 1861(b)(3) to authorize a relatively common enforcement technique known to Congress to have been useful in past fishery management enforcement.

D. When Are Citations Issued?

Section 1861(c) authorizes enforcement officers to issue citations, at their discretion, in lieu of arrests or seizures for violations of the Act. Citations are written notice that a violation has been documented and also a warning that future offenses may be dealt with more severely. If the offending vessel holds a permit, the citation is noted on it. In any case, records of all citations are kept by the National Marine Fisheries Service (NMFS).

Citations are issued for "minor or technical violations," although NMFS regulations fail to define what "minor" infractions are. Unintentional first offenses such as good faith reliance on erroneous navigational charts or failure to display a permit in the proper manner are usually citable violations. On the other hand, intentional offenses such as impeding an enforcement officer are more serious. Although the officer's discretion in issuing citations is not necessarily exercised according to the offender's intent, such action is consistent with the consideration given to "degree of culpability" in fixing the severity of civil penalties under section 1858(a). Some violations might be so serious, however, that the offender's good faith or lack of intent would be irrelevant. But as the regulations currently stand, the officer's judgment in issuing a citation is quite broad.
Generally, issuance of a citation means that other forms of penalties are inappropriate. Section 1860(a) explicitly states that acts for which citations are sufficient sanctions are exempt from the Act's provisions for civil forfeiture. This express exemption, however, is absent from the provisions of the FCMA for civil penalties (fines). Arguably, the Act can be read to authorize civil fines for violations that had already resulted in citations. The implementing regulations help to clarify this possibility. Under NMFS regulations, issuance of a citation usually means that other penalties are inappropriate. But additional penalties may be allowed when further investigation or later review finds violations to be more serious than initially believed, or if later investigation reveals that citations are inadequate to "serve the purposes of the Act." Consequently, the civil penalty and forfeiture provisions might be imposed if the initial citation is later determined to have been an "insufficient" sanction.

Citations may be appealed within 60 days of issuance by filing an application for review with the NMFS Regional Director nearest the place where the citation was issued. The application must set forth reasons which make review appropriate "in the interest of justice." Under the provisions of the Act, the Director's decision is final and unappealable.

E. Civil Penalties

Any person found to have violated one of the section 1857 prohibitions is subject to a fine as high as $25,000 for each violation. Moreover, each day of a continuing violation constitutes a separate offense. In determining the actual amount of the fine, however, the Secretary of Commerce must take into account the "nature, circumstances, extent, and gravity of the acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."

The procedure by which civil penalties are assessed is relatively straightforward. The "violator" receives a notice of violation that contains a concise statement of facts believed to constitute a violation, reference to the specific statutory provision at issue, and the amount of the proposed penalty. The notice may also contain an initial proposal for compromise or settlement. The "violator" then has 45 days in which to respond. He or she may ask that no penalty be assessed or that the amount be reduced and may admit or contest the legal sufficiency of the charges. At the end of this 45-day period, NMFS assesses the amount of the penalty and serves a notice of assessment on the "violator."

If the "violator" is unsatisfied with the Director's action, he or she may file a dated written request for a hearing. The Director is free to modify or remit a civil penalty at any time. In 1983, the Act was amended to include new section
1858(e), which grants the Secretary power to subpoena witnesses or evidence necessary for the conduct of a civil enforcement hearing. If, at the end of the hearing process, a "violator" is still unsatisfied with the civil penalty, section 1858(b) provides for appeal to an "appropriate court of the United States," which means a federal district court.

In the event an assessment is not timely paid, section 1858(c) authorizes the Attorney General to recover the amount in federal district court. Although the Act itself does not impose an automatic statutory lien on an offending vessel, such vessels can be attached in the Attorney General's action for recovery. Moreover, if a foreign vessel fails to pay a civil penalty, section 1824(b)(12) requires the Secretary of Commerce to impose additional sanctions, which may include revocation or modification of the vessel's permit.

In January 1983 NMFS began enforcing the remedies provided under section 1858(c) in earnest. One goal of this stepped-up enforcement was to collect more than $330,000 in outstanding fines owed by about 60 commercial fishermen in New Jersey, Virginia, North Carolina, and Delaware who had violated the FCMA. There is, in addition, reported to be over $500,000 in uncollected fines and penalties assessed against foreign fishing vessels. NMFS officials have stated their intent to revoke fishing permits and seize assets, including vessels, necessary to recover the assessed amounts.

F. Civil Forfeitures

In the past, vessel forfeiture had been the chief means of enforcing federal fishing laws. Under the FCMA, however, forfeiture is only one of several possible penalties. Ordinarily, forfeiture will be sought only for serious or repeated violations. Nonetheless, the forfeiture provision of the FCMA allows broad prosecutorial discretion, and every violator is potentially subject to forfeiture.

As we have seen, section 1861 authorizes enforcement officers to seize a fishing vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) that reasonably appears to have been used in violation of the Act. Officers may also seize fish illegally taken and retained; and a rebuttable presumption exists that all fish found on board a seized vessel have been illegally taken or retained. Section 1860 subjects such vessels and fish to judicial forfeiture.

After seizure of a vessel or catch, the Attorney General may begin forfeiture proceedings in federal district court. If judgment is entered for the United States, forfeiture orders are governed by those provisions of United States customs laws relating to the disposition of forfeited property.

A person whose vessel or catch has been seized subject to
forfeiture may file within 60 days a petition for relief with the appropriate Regional Director of NMFS. The petition may be for conditional release of the seized property, for mitigation, or for total remission of the property. The Director decides the matter after investigation of the petition. The Director may mitigate or remit the forfeiture if he or she finds that the underlying violation was committed without willful negligence or intent. He or she may also remit or mitigate if "other circumstances exist which justify" such action. In either case, discontinuance of forfeiture proceedings may be conditioned on the payment of a specified amount of money. Similarly, section 1860(d) provides for a postponement in the forfeiture process upon receipt of a satisfactory bond or other security. Once a vessel owner has supplied a bond or security for the release of a seized vessel under the provisions of section 1860(d), the owner is deemed to have consented to the court's in rem jurisdiction, and as a consequence waives any further jurisdictional defenses.9/ Seized fish may be sold, subject to court approval, for not less than fair market value. Alternatively, for ease of administration or to avoid delays and spoilage of perishable fish due to inadequate storage facilities, the government may seize all the proceeds from the alleged wrongdoer's sale of the fish.

G. Judicial Interpretation of Forfeiture Provisions

As explained above, the government is authorized by section 1860 of the FCMA to seize a vessel under certain conditions. All or any part of the vessel may be forfeited in a civil proceeding in connection with a serious violation. However, a federal court in United States v. Daiei Maru No. 210/ recently limited the government's power to assess penalties. The court held that although the Act permits a monetary penalty to be assessed against only part of a vessel (and her fishing gear, furniture, appurtenances, stores, and cargo), the statute does not allow a court to enter an in personam (personal) judgment against the owners of a vessel in order to hold the owners liable for the amount of the partial forfeiture.

The Daiei Maru No. 2 was arrested by Coast Guard personnel within the Fishery Conservation Zone (FCZ) for alleged violations of the FCMA, including failure to stop when instructed to do so,11/ interference by the vessel with its search and apprehension,12/ and discrepancies in the logging of the daily catch.13/ On the basis of these violations, the government claimed that the vessel was subject to forfeiture under the Act, and that the owners were also personally liable for a monetary penalty equal to the value of the vessel with her fishing gear, furniture, appurtenances, stores, and cargo. The court held that although the Act provides a comprehensive scheme of penalties for FCMA violators, it does not authorize an in personam action against a vessel owner in a forfeiture proceeding. The court suggested that if forfeiture does not provide an adequate remedy, the government is permitted under NMFS regulations 14/ to assess a civil fine against the owners.
H. Criminal Offenses

Section 1859(a) makes it a criminal offense to commit any act prohibited by subsections 1857(1)(D), (E), (F), or (H), all of which relate to interference with enforcement. Such offenses are punishable by a fine of up to $50,000, imprisonment for up to six months, or both. If a violator uses a dangerous weapon, or places an officer in fear of imminent bodily injury, the penalties become even more severe. A violation of section 1857(2), which proscribes foreign fishing without a permit, may be punished by a fine not to exceed $100,000.

While the policy of NMFS is to enforce the Act vigorously, criminal penalties are usually reserved for the most aggravated offenses. This policy is consistent with the international trend toward decriminalization of fishery-related offenses, as reflected in the treaty recently adopted by the Third United Nations Conference on the Law of the Sea.15/

In United States v. Marunaka Maru No. 8816/, for example, a Japanese vessel was alleged to have committed a series of egregious offenses, including fishing in the FCZ without a permit, refusing admittance to a Coast Guard boarding party, attempting to evade seizure, and positioning to ram the pursuing Coast Guard vessel. Yet following the vessel's seizure, the United States Attorney elected to initiate an in rem proceeding seeking forfeiture of the vessel and its catch. It thus appears that under certain circumstances even the most flagrant violators may be subject only to civil liability rather than criminal prosecution.

I. Permit Sanctions

In addition to the formal civil and criminal penalties spelled out in the Act, NMFS regulations authorize permit sanctions for any section 1857 violation, or for the nonpayment of civil or criminal fines. Under these regulations17/ the Director of NMFS may revoke, suspend, or modify a permit and may even prohibit the issuance of a permit in future years. These sanctions apply to foreign vessels holding section 1824 permits and to domestic vessels that hold a section 1853(b)(1) permit required by a Fishery Management Plan. In either case, the regulations provide for notice and hearing procedures that govern the Director's imposition of sanctions.

II. Particulars

A. Mental Element for Violations of the FCMA

In general, no particular mental element, or mens rea, is required in order for an accused violator to be found guilty of one of the section 1857 offenses. One may violate a provision of the Act regardless of intent, willfulness, negligence, or even knowledge.18/ (An exception is found in section 1857(1)(H), which proscribes interference with another's arrest knowing that
the other person has violated a provision of the Act.) At first glance, this strict liability may seem somewhat harsh, especially for a person found guilty of merely possessing illegal fish under section 1857(1)(G). This apparent harshness, however, is modified by provisions for consideration of an offender's "degree of culpability" in assessing civil penalties and of "willful negligence or intent" in considering remission or mitigation of forfeitures. Significantly, section 1859(b), which contains the criminal provisions of the Act, requires no similar consideration.

As a general proposition, a mens rea element is a necessary part of an offense in Anglo-American criminal jurisprudence. An equally well established exception says that the constitutional requirement of due process is not violated merely because mens rea is not specified as an element of a crime.\textsuperscript{19} This is especially true of statutes that are "essentially regulatory in nature,"\textsuperscript{20} a statutory category into which the FCMA clearly falls.

The discretion to exclude mens rea elements from offenses is broad but not unbounded. In

\textit{Holdridge v. United States},\textsuperscript{21} Judge (now Justice) Blackmun established certain constitutional requirements for an Act that excludes a mens rea element from its offenses. These requirements are that the statute be basically policy-oriented, that it establish a reasonable standard, and that it prescribe penalties that are relatively small and that do not "gravely besmirch" a person's reputation.

The \textit{Holdridge} test was applied in one of the last of the fishing enforcement cases to arise under the now-repealed Bartlett Act. In \textit{United States v. Ayo-Gonzalez},\textsuperscript{22} the federal court of appeals upheld the forfeiture of a foreign vessel and criminal conviction of its master in the absence of any proof of culpability or fault. The case involved a Cuban vessel illegally fishing within the 12-mile Contiguous Zone, as proscribed by the Bartlett Act. The vessel's captain claimed that he had innocently and inadvertently drifted into the Contiguous Zone only after having lost contact with the fleet's larger vessel that was relied on for navigational information. He attacked the constitutionality of a statute that fixed criminal penalties on a person who did not even know that he was violating the Act. Applying the \textit{Holdridge} criteria, however, the court upheld the conviction and held that the Bartlett Act was a policy-oriented statute, that it set reasonable standards, and that it established maximum penalties (including imprisonment for up to one year) that were relatively light and did not "gravely besmirch" or do "grave damage" to an offender's reputation. Although a similar constitutional attack has not yet been made on the FCMA, it is likely that the reasoning of \textit{Holdridge} would control.
B. How Much "Force" is Required to Trigger Violations of Section 1857(1)(E)?

Section 1857(1)(E) makes it unlawful for any reason to "forcibly assault, resist, oppose, impede, intimidate or interfere" with an officer in the conduct of his or her search or inspection. The adverb "forcibly" should be read as modifying all of the verbs, and not simply "assault."23/ The most significant legal question associated with this provision is how much force is required before one "forcibly" violates the Act? The question is of more than academic importance in view of the Act's reservation of severe penalties for more "serious" violations.

The necessary quantum of force is obviously a question of degree. In United States v. Bamberger, a federal court of appeals found that an analogous provision of the Federal Criminal Code did not mean to "sweep in all harassment of government officials involving 'laying a finger' on them. Nor is it used to penalize frustrating an official, without more, even if that action is deliberate."24/ Thus mere harassment is not forcible interference. Perhaps the best indication of the "necessary" amount of force is seen in specific examples. In United States v. Frizzi,25/ spitting in an officer's face was held to be "forcible assault." In Bamberger, the physical restraint of a prison guard and removal of keys constituted sufficient "force." In Carter v. United States,26/ accelerating a car while a federal officer was attempting to enter and search it was enough to sustain a conviction for "forcible" resistance. Finally, in United States v. Goodwin,27/ the court had no difficulty in finding "kicking and flailing" as constituting sufficient force. On the other hand, the court in United States v. Cunningham,28/ suggested that mere deception of an officer or mere refusal to unlock a door through which federal agents sought entry did not constitute forcible acts.

Courts are divided over whether threats of force are themselves forcible acts. Cunningham concluded that threats were not. In Bamberger, however, the court agreed with the assertion that although an implied threat of force in the indefinite future did not constitute a violation, a person who has the present ability to inflict bodily harm upon another, and willfully threatens or attempts to inflict bodily harm, may be found guilty of forcibly assaulting such person.

C. The Warrantless Search Provision

Section 1861(b)(1)(A)(ii) authorizes officers, with or without a warrant, to "board, and search or inspect, any fishing vessel which is subject to the provisions of this Act." Conspicuously missing from this authorization is the requirement that the boarding officer must have probable cause to believe that a violation has occurred. "Reasonable grounds" are required in section 1861(b)(2) for an officer to make a warrantless arrest. The Act's warrantless search provision thus raises two

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issues. First, is it permissible to search without a warrant under all circumstances? Second, in a warrantless search, does the Fourth Amendment require that an officer have probable cause to believe that a violation has occurred? These issues, in turn, raise yet a third fundamental issue: the applicability of Constitutional protections to foreign vessels. That issue is discussed first.

As a starting point, the protections of the Fourth Amendment apply to searches of domestic vessels and foreign vessels. Once aliens become subject to liability under United States law, they also have a right to benefit from its protection. The Fifth Circuit Court of Appeals has concluded, in particular, that the applicability of the Fourth Amendment was not limited to domestic vessels or to our citizens; once we subject foreign vessels or aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment.

As a general proposition, the Fourth Amendment requires an enforcement officer to obtain a warrant based on probable cause to believe an illegal act has occurred before conducting a search. There are, however, many exceptions to this rule. The warrant requirement has been excused when the search is incident to a lawful arrest, is conducted in hot pursuit of a criminal suspect, involves critical circumstances pertaining to officer safety or potential destruction of evidence, or when it is an administrative search or is made at a border. A warrantless search under the FCMA is most likely an "administrative search," even though it might fit other categories. This is important because administrative searches may be constitutional with neither a warrant nor probable cause.

Searches pursuant to regulatory authority have become more prevalent as regulatory authority has grown, and case law has grown with it. In Camara v. Municipal Court and in See v. City of Seattle, the United States Supreme Court held that a warrant was necessary, but that it could be based upon a showing that the warrant was part of a neutral enforcement plan. Probable cause to believe that a violation of law occurred does not seem necessary to obtain a warrant. Collonade Caterina Corp. v. United States and United States v. Biswell held that there was no warrant necessary for inspections in highly regulated industries: Collonade involved the liquor industry and Biswell involved firearms. The Court found that individuals involved in these industries cannot reasonably have the same expectations of privacy as individuals in different trades, in light of the pervasive regulation of firearms and alcohol.

The question thus arises: is fishing also a "pervasively regulated industry" within the meaning of the Biswell and Collonade exceptions? Courts are answering the question in the affirmative. In State v. Mach, the Washington Court of Appeals held that commercial gillnet fishing has a history of regulation that subjects gillnet fishermen to warrantless
searches under the Biswell doctrine. The Mach court relied on several decisions in other state courts that had also treated fishing as a heavily regulated industry.40/

In United States v. Tsuda Maru, a federal district court upheld warrantless searches of foreign vessels under the FCMA. Significantly, the court held that the "federal interests present and the pervasive and historical regulation of fishing bring this case well within the exception to the warrant requirement defined in [Biswell] and [Colonnade]."41/ The facts in Tsuda Maru deserve careful attention. On January 26, 1979, the vessel was boarded and inspected by Coast Guard and NMFS personnel within the FCZ off Alaska. Officials conducted the search without a warrant, and there was no indication that the boarding officers had probable cause to suspect a violation of the Act. The officers determined that a violation of the FCMA had occurred, and they seized the vessel. After its arrival in Kodiak, the ship was searched three more times. Concerning this sequence of events, the court concluded that "after the initial boarding and inspection ... the Coast Guard and other enforcement personnel had probable cause to justify the seizure and subsequent searches ...." The court's holding is somewhat cryptic in that it fails to explain why probable cause was needed for the last three searches if probable cause wasn't necessary for the first search. Nonetheless, the court clearly suggests that probable cause was not needed to justify the initial inspection at sea.42/

In a recent United States Supreme Court case, United States v. Villamonte-Marquez et al.,43/ the court held that vessels in Inland waters are subject to suspicionless boarding by the Coast Guard. This case involved a boarding made in order to inspect documents, as authorized by Title 19 of the U.S. Code, section 1581(a) (The Tariff Act of 1930). While this decision is not definitive of a case arising under the FCMA, it is strongly suggestive of a judicial approval of suspicionless searches. However, there are distinct differences between the statutes that might compel a different conclusion.

Section 1581 of the Tariff Act of 1930 authorizes customs officers to "at any time go on board of any vessel...at any place...and examine the manifest and other documents." Section 1861 of the FCMA authorizes officers to "board, and search or inspect, any fishing vessel." The FCMA differs from the Tariff Act in two respects. First, in the opinion of the majority, the words "at any time" and "at any place" confer express authority to board without suspicion. Such words are lacking from the FCMA. Secondly, the FCMA authorizes much more extensive and intrusive action by an officer. Authority to board and examine documents is much different than "searching and inspecting." The Tariff Act recognizes this distinction: section 1595, pertaining to searches and seizures, requires that an officer "have cause to suspect" a violation of the law, and that he or she must obtain a warrant to search.
The Villamonte-Marquez court relied heavily on the fact that the First Congress clearly authorized suspicionless boarding in a statute that is a "lineal ancestor" to the Tariff Act. The First Congress has no relevance to interpretations of the FCMA, for the subject matter and language of the statutes are not comparable.

Two circumstances point to the validity of suspicionless searches under the FCMA. The first is the commercial nature of the vessel, which arguably is entitled to less protection from suspicionless searches, as in Collonade. The second is the necessities of enforcement: "The nature of waterborne commerce in waters providing ready access to open sea"44/ is an important circumstance according to the court. At this time, however, it is not clear if the FCMA authorizes suspicionless searches.

A second justification for not having a warrant, applicable to foreign vessels only, is that the operators of such vessels have consented to warrantless searches. In a 1983 case, United States v. Kaiyo Maru No. 53,45/ the Ninth Circuit Court of Appeals held that, because owners or operators of foreign vessels must agree to allow boarding and inspection of their vessels by authorized U.S. officers as a condition of their FCMA permits, such boardings and inspections or searches are constitutional without a warrant.46/

If the constitutionality of warrantless searches of fishing vessels is settled, the scope of such searches is less so. Fishing enforcement searches are not without limit. Specific searches might not need to be based on probable cause, but an administrative warrant may be required of the overall administrative plan of which the specific search is a part. The purpose of a general administrative warrant is to ensure that searches are made pursuant to neutral criteria and are reasonable in scope. This, in turn, may require regulatory bodies such as regional Councils to develop enforcement plans and search procedures that limit a boarding officer's discretion. Additionally, there are distinct constitutional limits of the scope of fishing enforcement searches. Both the Tsuda Maru and Kaiyo Maru No. 53 courts noted that the scope of the search is implicitly restricted to those areas of the ship that must be inspected to enforce fishing regulations. Presumably this would exclude living quarters and the crew's personal property where the expectation of privacy is entitled to more protection.

III. Conclusion

The legal issues concerning enforcement of the provisions of the FCMA are intricate and not yet fully resolved. Yet the practical difficulties of enforcement across broad expanses of open ocean are of primary concern to those charged with ensuring that the mandates of the FCMA are obeyed. An unsteady economy and budget cuts at all levels of government are reflected in diminishing resources available to enforcement agencies. Eight years of success in the implementation of the Act would appear to jus-
tify continued allocation of the financial resources necessary to achieve effective enforcement, the obvious key to future success of the FCMA.