

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

**This document is from the files of the Office of  
the Maine Attorney General as transferred to  
the Maine State Law and Legislative Reference  
Library on January 19, 2022**

RICHARD S. COHEN  
ATTORNEY GENERAL



STEPHEN L. DIAMOND  
JOHN S. GLEASON  
JOHN M. R. PATERSON  
ROBERT J. STOLT  
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

80-14

January 25, 1980

Donald McIntosh, Chief  
Marine Patrol  
Department of Marine Resources  
State House  
Augusta, ME 04333

Re: Marine Patrol Enforcement Procedures:  
Random Stops of Vessels for Safety  
and Fishing License Checks

Dear Mr. McIntosh:

You have inquired as to the constitutionality of random vessel stops by Maine coastal wardens for the purpose of safety and fishing license checks in light of the recent decisions in Delaware v. Prouse, 440 U.S. 648 (1979), and United States v. Piner, 26 Cr. L. 1007 - 1008 (9th Cir. September 5, 1979). We have determined that this long-time warden enforcement practice is constitutionally sound and involves no infringement of the Fourth Amendment rights of the vessel occupants.

We caution you, however, that this area of search and seizure law is evolving rapidly and has evoked conflicting opinions from the several Courts of Appeal in similar cases. To date, no court has ruled specifically on the marine warden's random stop powers and therefore this opinion analyzes related cases concerning other law enforcement officials.

The most recent United States Supreme Court case on the subject of random stops is Delaware v. Prouse. Although the Supreme Court declared totally random stops of automobiles by police officers to be in violation of the Fourth Amendment, its holding was not explicitly extended to fish and game warden enforcement procedures. However, the analytical approach of the Prouse majority opinion may be used as a model for analysis of the Maine warden practice. The Prouse model for evaluation of a particular law enforcement practice balances its intrusion on an individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

Donald McIntosh, Chief  
January 25, 1980  
Page 2

When analyzed under the Prouse formula, the Maine coastal warden practice of random stops is distinguishable from the Delaware automobile situation. In Delaware v. Prouse, the Court determined that the governmental interest in highway safety could be adequately served by alternative mechanisms and held that license and registration spot checks were not a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests. In the marine enforcement situation, however, governmental interests are intensified by the urgency of the safety and conservation concerns, as well as the lack of effective alternative enforcement mechanisms. At the same time, individual Fourth Amendment interests are diluted by the highly regulated nature of the marine fishing and boating industry.

Specifically, the State of Maine has attempted to promote its governmental interest in safe boating operation through the Maine Watercraft Registration and Safety Act, 12 M.R.S.A. §7791 et seq. The enforcement provision of this act expressly authorizes random stops and boardings by coastal wardens. 12 M.R.S.A. §7055. Such boardings are necessary, as most items of safety equipment, such as life jackets, fire extinguishers and engine flame arresters, are not observable without boarding. The lack of effective alternative enforcement procedures distinguishes the marine situation from the Delaware automobile situation and its alternative enforcement procedures, including roadblocks, licensing, annual inspection, and registration.

Furthermore, the State interest in conservation of its marine resources, reflected in its comprehensive licensing scheme (12 M.R.S.A. §6301 et seq.) and fishery conservation regulations, creates an imperative need for effective enforcement. If coastal wardens were prohibited from conducting random stops and boardings of fishing vessels, the State would be left without any effective enforcement mechanism to insure compliance with its licensing program, applicable to in-state and out-of-state fishermen. Unlike automobile stops, the marine random stop procedure is an extremely effective means of detecting license and safety violations. The Department has estimated that roughly 50 percent of such random stops produce evidence of statutory violations.

Elimination of the random license check procedure would seriously hamper effective conservation of the State's marine resources. In order to determine whether violations of harvesting and licensing statutes may be occurring, wardens must make immediate and close-hand observations. Wardens must be able to verify the credentials of the fisherman, the specie and condition of the resource harvested and the nature of the gear used. Obviously, these facts can be ascertained

only upon close inspection. For instance, a coastal warden must be able to board the craft in order to determine whether probable cause exists to suggest that an individual is harvesting without a license, taking lobsters with improperly vented traps (12 M.R.S.A. §6433), taking short (12 M.R.S.A. §6431), egg-bearing or v-notched lobsters (13 M.R.S.A. §6436), harvesting scallops less than three inches in diameter (12 M.R.S.A. §6721) or molesting lobster gear owned by another (12 M.R.S.A. §6434). No effective alternative to on-site boarding exists, given the lack of central off-loading areas where a roadblock-type check of catch might be conducted, and the fact that most catch off-loading is conducted on private property in Maine.<sup>1</sup>

The concurring opinion of Justice Blackman, joined in by Justice Powell, in Delaware v. Prouse noted the unique enforcement problems inherent in fish and game warden procedures. Justice Blackman wrote:

And I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties. In a situation of that type, it seems to me, the Court's balancing process, and the value factors under consideration would be quite different. 440 U.S. at 664

Thus the Court's conclusion in Delaware v. Prouse should not be considered controlling in the coastal warden situation.

The countervailing individual Fourth Amendment interests are less significant in the present situation than those found in the Prouse case. The Prouse court emphasized the concept of "subjective intrusion" and acknowledged that random stops of automobiles may have a particularly unsettling effect upon the ordinary person. However, the Maine coastal warden situation differs in two respects. First, the fishing and boating industry might be characterized as a highly regulated industry in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise. Cf. United States v. Biswell, 406 U.S. 311 (1972) (federal regulation of firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). (federal regulation of liquor). Second, all licensed fishermen are notified of and expressly authorize inspection by coastal wardens in their license application. This express inspection authorization eliminates or greatly reduces the subjective intrusion factor, as fishermen expect coastal warden inspection.

---

1. Maine Port Development 1979, prepared by the Maine Department of Transportation in cooperation with the Maine Department of Marine Resources, p. 23.

Several Circuit Courts of Appeal have ruled on the subject of random stops in the closely analogous case of Coast Guard documentation and safety checks. While the Coast Guard practice of random stops for document and safety checks had been upheld by the First and Fifth Circuits prior to the Prouse decision, the Ninth Circuit Court of Appeals recently relied on the Prouse decision in United States v. Piner, 26 Cr. L. 1007 - 1008 (9th Cir. September 5, 1979), to hold that totally random stops and boardings after dark were impermissible under the Fourth Amendment.

In United States v. Miller, 589 F.2d 1117 (1st Cir. 1978), the First Circuit held that a "boat, like an automobile, carries with it a lesser expectation of privacy than a home or an office". Although the court holding directly concerned a Coast Guard boarding and vessel search in a suspected drowning case, court dicta further declared warrantless safety and document checks of vessels to be constitutional. Expressly excluding specialized craft such as houseboats or vessels obviously used as homes from its decision, the court reasoned that the privacy expectation of a boat owner is necessarily limited since boats, like autos, have long been subject to frequent limited intrusion by regulatory and safety officials and the mobility of ocean vessels has justified warrantless custom inspections far from the technical borders of the United States. Although it preceded the Supreme Court's decision in Prouse, the Miller dicta has been reinforced by the Maine Federal District Court decision in United States v. Hilton, 469 F. Supp. 94 (D.Me. 1979), (another pre-Prouse case) where the court directly held Coast Guard random stops and boardings for safety and documentation checks to be constitutional.

The recent Ninth Circuit case, United States v. Piner, may foreshadow a modification of the Miller doctrine by the First Circuit. Although Piner affirmed the constitutionality of daylight safety and documentation checks, the Ninth Circuit held that similar nighttime boardings were permissible only under certain circumstances:

A stop and boarding after dark must be for cause, requiring at least a reasonable and articulable suspicion of noncompliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer. 26 Cr. L. 2025 (emphasis added)

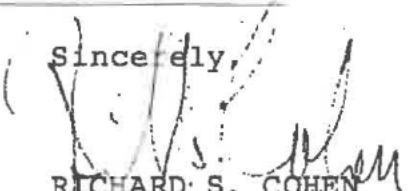
In light of these developments, the Department of Marine Resources might consider adopting administrative guidelines that limit the discretion of the warden in choosing a vessel for nighttime boarding. A less intrusive spotcheck mechanism suggested by the Prouse concurrence is the selection of every tenth vehicle for license checks. However, if such guidelines prove impractical in the marine environment, the Department may choose to rely on the rationale of the First and Fifth

Donald McIntosh, Chief  
January 25, 1980  
Page 5

Circuits to justify random stops of vessels at any time of the day or night. United States v. Miller, 589 F.2d 1117 (1st Cir. 1978); see also United States v. Warren, 578 F.2d 1058 (5th Cir. 1978); United States v. Hillstrom, 533 F.2d 209 (5th Cir. 1976); United States v. One 43 Foot Sailing Vessel, 538 F.2d 694 (5th Cir. 1976).

In sum, we believe that there are sufficient and relevant distinguishing factors to justify continuation of the random stop practice by coastal wardens. Neither Delaware v. Prouse nor United States v. Piner compels the conclusion that the practice is constitutionally unsound. On the contrary, we believe that the random stop procedure in the marine resource situation represents an acceptable balance between governmental interests and individual Fourth Amendment interests, as required by Delaware v. Prouse.

Sincerely,

  
RICHARD S. COHEN  
Attorney General

RSC/cab