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A Comment On Louisiana Wildlife Agents And Probable Cause: Are Random Game Checks Constitutional?

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COMMENTS

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I. INTRODUCTION

Wildlife agents occupy a unique place in law enforcement. Their primary responsibility is not to make the streets safe but to protect and ensure the regulated harvesting of wild fauna. Whether based in an upland region or in a coastal parish, wildlife agents spend their days and nights on patrol, often serving as the sole means of protecting the state's game and fish resources and of ensuring the safety of sportsmen.

Virtually every hunting and fishing activity has some licensing or permit requirement. There are also both daily and seasonal limits on the amount of particular fauna that can be legally taken by an individual.

Louisiana wildlife agents also have a statutory obligation to enforce the boating safety laws.¹ Wildlife agents are aware that many individuals incorporate boats into their hunting activities, so agents often make a brief game and fish inspection when checking boats to ensure compliance with the minimum safety standards.

The most common and effective method of enforcing these laws is through random "field stops" effected by wildlife agents. Typically the agent stops an individual² who appears to be either hunting or fishing, requests his or her license, and inspects any game or fish possessed to ensure legality. Agents operating in coastal regions of the state also inspect the licenses and catch of commercial fishermen and shrimpers. They also check boats for the required safety equipment while at the launch and on the water.

Virtually all of these stops are made without either probable cause or a reasonable suspicion to suspect that the individual is in violation of any law. In light of the present law concerning random stops or checks by traditional law enforcement agencies, concerns as to the constitutionality of the stops made by wildlife agents have arisen. To promote a better understanding of the application of traditional search and seizure law to wildlife agents, this comment will discuss the federal and comparative state jurisprudence addressing this issue. The comment will then discuss the state of the law in Louisiana. The remainder of the comment will attempt to resolve some of the conflicts presented by the jurisprudence, suggesting several different analyses of random field stops which support the reasonableness of this practice under both the United States and Louisiana Constitutions.

II. RANDOM SEIZURES AND THE UNITED STATES CONSTITUTION

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures.³ The Fourth Amendment applies only when a seizure occurs.⁴ When analyzing the consti-

1. See La. R.S. 34:851.29 (1985), discussed *infra* at note 109.

2. These stops are made of individuals who are on foot, who are driving in or around an area known to support hunting, and who are in boats.

3. U.S. Const. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4. For Fourth Amendment purposes, a seizure occurs when a government agent has "in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16 (1968); see also *Florida v. Bostick*, 111 S. Ct. 2382, 2386 (1991).

tutionality of a seizure under this amendment, a court must make an initial distinction between investigations of possible criminal violations and inspections made in relation to an administrative scheme. The different natures of these intrusions has resulted in the development of two distinct lines of cases addressing random stops by both traditional police agencies and wildlife agents.

A. Criminal Investigations

The United States Supreme Court addressed random stops by traditional police agencies in *Delaware v. Prouse*.⁵ *Prouse* challenged the constitutionality of random driver's license "spotchecks" by roving police patrolmen. With neither probable cause nor reasonable suspicion to believe that a particular car was being operated in violation of motor vehicle laws, police were stopping vehicles and inspecting the driver's license. Such "spot-checks" were held to be unconstitutional because the "intrusion on the individual's Fourth Amendment interests" was not offset by the "promotion of legitimate governmental interests."⁶ In analyzing the stop, the Court noted the inefficiency of the method used⁷ and the fact that the officers had virtually "unbridled discretion" as to which vehicles they chose to stop.⁸

However, stops made without probable cause at a stationary checkpoint were upheld several years later in *Michigan v. Sitz*.⁹ The Court relied on *Prouse* to test the constitutionality of the sobriety checkpoint. The roadblock was conducted pursuant to guidelines which limited much of the discretion of the officers. Also, the roadblock involved only a brief detention of the vehicles and was more efficient than the random stops considered in *Prouse*. In light of these factors, the roadblock satisfied the criteria of *Prouse* and was found reasonable.

The Court also defined the parameters of reasonable random stops in a line of cases concerning Border Patrol activities. Border Patrol agents were randomly stopping cars near the Mexican border to check for illegal aliens. The Court held that a roving patrol unit could only search a vehicle in the vicinity of the border if there was probable cause to believe that it contained illegal aliens.¹⁰ Roving patrols were, however, allowed to stop motorists in the general area of the border to inquire

5. 440 U.S. 648, 99 S. Ct. 1391 (1979).

6. *Id.* at 653-54, 99 S. Ct. at 1396.

7. *Id.* at 659, 99 S. Ct. at 1399 ("Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers." *Id.*).

8. *Id.* at 661, 99 S. Ct. at 1400.

9. 496 U.S. 444, 110 S. Ct. 2481 (1990).

10. *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S. Ct. 2535 (1973).

into the resident status of those in the car when there was reasonable suspicion supported by articulable facts that the car contained illegal aliens.¹¹ The Court took a different position regarding fixed checkpoints in *United States v. Martinez-Fuerte*.¹² Here, the Court allowed Border Patrol agents at fixed checkpoints on the border to stop, question, and visually inspect all vehicles passing through them despite the lack of probable cause or reasonable suspicion. The Court has recognized that Border Patrol agents enjoy a greater leeway than traditional police agencies in these areas only because of the importance of border control and the role of these activities in achieving that end.¹³

In *United States v. Villamonte-Marquez*,¹⁴ the Court addressed similar activities by the United States Coast Guard. A federal statute authorizes customs officials to board any vessel at any time and at any place in the United States to examine the vessel's manifest and other documents.¹⁵ Upon boarding a ship pursuant to this statute, customs officials accompanying the Coast Guard discovered bales of marijuana.¹⁶ Under "the overarching principle[s] of 'reasonableness' embodied in the Fourth Amendment," the Court reasoned "that the important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares [was] sufficient to require a different result" than that of *Prouse*.¹⁷ The Supreme Court upheld the constitutionality of both the statute and the seizure of the marijuana.

The above authority provides a consistent test used by the United States Supreme Court in weighing the constitutionality of a random stop—the balancing of the promotion of legitimate governmental interests against the intrusion of the procedure, the efficiency of the procedure, and the discretion afforded the individual officers.¹⁸ Though the responsibilities of wildlife agents and traditional police officers differ, the limited case law addressing parallel activity by wildlife agents indicates

11. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574 (1975).

12. 428 U.S. 543, 96 S. Ct. 3074 (1976).

13. *Id.* at 556-57, 96 S. Ct. at 3082.

14. 462 U.S. 579, 103 S. Ct. 2573 (1983).

15. 19 U.S.C. § 1581(a) (1988).

16. *Villamonte-Marquez*, 462 U.S. at 583, 103 S. Ct. at 2577.

17. *Id.* at 588, 103 S. Ct. at 2579-80.

18. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401 (1979). The cases leading to this point differ in most every aspect of the balancing test: the governmental interest varies from the regular police investigations of *Prouse*, to the viability of the border, to the regulation of the territorial waters or tax collection of *Villamonte-Marquez*; the methods used are both stationary and mobile; and the limits of the agent's actions are statutory, (*Villamonte-Marquez*) administratively established (*Sitz*), and left to the agent's gut-feelings (*Prouse*). The balancing of interests in each case differed accordingly, as did the result.

that the same constitutional mandates and tests apply to both groups. However, in a concurring opinion to *Prouse*, Justices Blackmun and Powell felt that it was important to distinguish the analysis used in cases involving wildlife agents from that used when traditional police agencies were involved:

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.¹⁹

Despite this suggestion, federal and state courts continue to apply the *Prouse* balancing process when determining the constitutionality of random checks by wildlife agents. However, because the Supreme Court has not defined the different "value factors" to be balanced, somewhat contradictory results have occurred in both court systems.

1. *Random Stops By Wildlife Agents Under Prouse in the Federal Courts*

Even before *Prouse* put the balancing of governmental interests against individual rights in the forefront of search and seizure law, federal courts were using this approach when random checks by wildlife agents were challenged. In *United States v. Greenhead*,²⁰ United States Fish and Wildlife Service agents were checking all of the hunting clubs in their area at the end of duck season to ensure that the clubs were complying with the tagging and possession laws. The agents unlocked a gate and entered the land of Greenhead (a hunting club) without any suspicion of criminal wrongdoing. The court affirmed the admission of evidence consisting of illegally taken and possessed ducks obtained as a result of the search.²¹

The *Greenhead* court used a balancing test identical to that used in *Prouse* as a means of upholding the constitutionality of the actions of the wildlife agents. The court cited the United States Supreme Court opinion of *Johnson v. United States*²² as authority for applying this type of test in weighing the legality of the entry made by the agents into the camp. The court stated that "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement

19. *Id.* at 664, 99 S. Ct. at 1401 (Blackmun, J., concurring).

20. 256 F. Supp. 890 (N.D. Cal. 1966).

21. *Id.* at 894.

22. 333 U.S. 10, 68 S. Ct. 367 (1948).

against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with."²³

Conceding that no probable cause existed, the court found this of no consequence in light of the potential consequences of ineffective game management:

I would have supposed that as true sportsmen the members of Greenhead, Inc., would have welcomed the Wardens on their property in order to make certain that wild ducks do not go the way of the heath hen and the passenger pigeon, if for no other good reason. And, of course, as law-abiding citizens I would have supposed that they would have wanted to be certain that no one had violated the law on their premises.²⁴

The judge felt that the agents "were simply doing what I suspect all good game management men do during the hunting season—'just looking around,'" and that their efforts "ought not be stultified by grossly expanded concepts of the right of privacy."²⁵ Presaging *Prouse*, the court reasoned that the minimal intrusion onto the land and into the camp was too slight to offset the importance of the agent's duties.

In *Davis v. Reynolds*, the court used the theory of *Greenhead* to uphold a Florida regulation granting state wildlife agents the authority to stop and search any vehicle on state operated game preserves.²⁶ The plaintiffs in *Davis* sought to enjoin enforcement of the regulation.²⁷ The court denied the injunction by stating that the plaintiff's presence on the management area "diminished his right to privacy."²⁸ Consequently, the situation then fell "within [one of] those enumerated cases where Fourth Amendment standards have been relaxed to promote the public welfare and security."²⁹

After *Davis*, it seems clear that one's expectation of privacy will be diminished, if not eliminated, while engaging in a highly regulated activity on state managed land. But not all federal courts share this view. In *United States v. Munoz*,³⁰ the Ninth Circuit held that the practice of stopping all vehicles in National Parks to check wood permits, inquire about park use, and check for game violations was contrary to the Fourth Amendment. In *Munoz*, a state "game trooper" discovered an

23. *Greenhead*, 256 F. Supp. at 893 (quoting *Johnson*, 333 U.S. at 14-15, 685 S. Ct. at 369).

24. *Id.* at 891 (footnote omitted).

25. *Id.* at 891, 894.

26. 319 F. Supp. 20 (N.D. Fla. 1970).

27. *Id.* at 21.

28. *Id.* at 23.

29. *Id.*

30. 701 F.2d 1293 (9th Cir. 1983).

illegally taken golden eagle as well as an illegally taken deer while making a random stop. Despite the high governmental interest in protecting threatened species such as the golden eagle, the court felt the intrusion was too great.³¹ The court relied on *Prouse* to determine that the method employed by the trooper did not sufficiently serve the governmental interest of deterring the misuse of national forest resources.³² In rejecting arguments similar to those used in *Davis*, the court noted that "[i]n light of the fact that Congress established national parks in part to preserve for people a setting for respite and reflection, there is irony in the contention that federal regulations governing the use . . . of the parks . . . cause a diminished expectation of privacy."³³ The court also rejected the theory that the "pervasively-regulated industry exception" to the usual Fourth Amendment requirements applied.³⁴ According to the court, the cases recognizing this exception were premised "on a consent implicit in a business-man's participation in a regulated industry"³⁵ and were thus inapplicable to the facts presented.³⁶

2. State Court Applications of *Prouse*

Some of the state supreme courts that have upheld random checks performed by wildlife agents have also done so by using the *Prouse* balancing test. The Oregon case of *State v. Tourtillott*³⁷ is in the forefront on the state level. *Tourtillott* recognizes a limited exception to probable cause requirements for wildlife agents. Addressing a challenge to a random game checkpoint stop, the court used a balancing test similar to that of *Prouse*. An officer of the Oregon State Police Game Division stopped the plaintiff at a roadblock set up to check hunters' compliance with game laws and found that she was driving without a license. In deciding that the checkpoint was not violative of constitutional provisions, the court held that "the governmental interest in the enforcement

31. *Id.* at 1301.

32. *Id.*

33. *Id.* at 1298.

34. *Id.* at 1298-99.

35. *Id.* at 1299.

36. It is important to note here the "open fields" doctrine described by the Court in *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984). This doctrine provides that a government intrusion into the open fields is not an "unreasonable search" proscribed by the Constitution, as an individual has no expectation of privacy in the open fields. *Id.* at 182-83, 104 S. Ct. at 1743. *United States v. Wylder*, 590 F. Supp. 926 (D.C. Or. 1984), held that a Fish and Wildlife Service agent did not violate the Fourth Amendment by entering onto private land without probable cause for the purpose of performing routine license checks (citing *Oliver*). If *Wylder* was correct, *Greenhead* and *Munoz* could each have been decided using this doctrine; if so, the result of *Greenhead* would be the same, but *Munoz* would apparently change.

37. 618 P.2d 423 (Or. 1980), cert. denied, 451 U.S. 972, 101 S. Ct. 2051 (1981).

of laws for the preservation of wildlife in this state is sufficiently substantial to justify the minimal intrusion upon the Fourth Amendment rights of those stopped for brief questioning and a visual inspection of their vehicles."³⁸

When addressing the *Prouse* requirements, the court indicated that this result was based more on necessity than on the traditional approach of deferring to the interests of the individual.³⁹ The intrusion on the rights of the individual by the stop was also *de minimus*, which made the stop less offensive to the court.⁴⁰ The need of the government to protect dwindling wildlife resources offset the minimal intrusion of asking a few questions and inspecting any required licenses. The agent's discretion was limited in this instance since the roadblock was set during hunting season in an area frequented by hunters and the agent stopped or slowed all approaching vehicles.⁴¹

The *Tourtillott* court also discussed why the "regulated industry" or administrative search exception did not apply to the facts of the case. One reason was that there was no "search" of the defendant.⁴² Another reason was that the court felt the case law surrounding administrative searches "arose from efforts to conduct warrantless searches of premises" and not of automobiles or individuals.⁴³ In any event, at least as far as the *Tourtillott* court was concerned, "[t]he result should not turn on whether the criminal law or the administrative law [is] being enforced."⁴⁴

In *State v. Halverson*,⁴⁵ the South Dakota Supreme Court followed the reasoning of *Tourtillott* by stressing that necessity required that these random stationary stops be made without probable cause.⁴⁶ A state statute granted wildlife agents the right to inspect game animals in the possession of any person.⁴⁷ The court found: "The only effective means of implementing this statute is by the use of road blocks or check point stops in game areas. Stops on probable cause would not satisfy the

38. *Id.* at 430.

39. *Id.*

40. *Id.*

41. *Id.*; Although the correctness of the court's conclusions is certainly debatable, several other state courts have cited the analysis used in *Tourtillott* with approval in upholding random checks by wildlife agents. See *Orr v. People*, 803 P.2d 509, 512 (Colo. 1990); *State v. Keehner*, 425 N.W.2d 41, 45 (Iowa 1988); *State v. Sherburne*, 571 A.2d 1181, 1184-85 (Me. 1990); *Drane v. State*, 493 So. 2d 294, 296 (Miss. 1986), *cert. denied*, 482 U.S. 916, 107 S. Ct. 3189 (1987).

42. *Tourtillott*, 618 P.2d at 431.

43. *Id.* at 432 (citations omitted).

44. *Id.* at 434.

45. 277 N.W.2d 723 (S.D. 1979).

46. *Id.* at 724.

47. *Id.*

purpose of the law since the number of hunters is large and game officers few."⁴⁸

The *Halverson* court also recognized that a "hunter tacitly consents to the inspection of any game animal in his possession when he makes application for and receives a hunting license."⁴⁹ This was only dicta, however, in that it did not address the facts of the case; the defendant was not hunting but was merely passing through the area. Commenting on the "slight" interruption of the travels of the non-hunter and the "public interest in the management and conservation of wildlife,"⁵⁰ the court simply used the *Prouse* test to find the stop legal.

B. Administrative Inspections

The United States Supreme Court has also discussed and recognized the constitutionality of random administrative investigatory checks. These checks differ from investigations of criminal activity in that they are premised on the police power of the state, which encompasses furthering public health, safety, and welfare through regulations and agencies.⁵¹ In *Camara v. Municipal Court of San Francisco*,⁵² the Court established the framework of a reasonable administrative search and held that administrative searches are reasonable when the government's interest in enforcing administrative regulations outweighs the limited intrusiveness of the search.⁵³ Three factors were considered: a long history of both judicial and public acceptance of the particular type of search, a state interest in preventing the conditions with no alternative means of enforcement, and inspections impersonal in nature and not aimed at discovering evidence of a crime.⁵⁴ A warrant allowing the search, however, was still required.

Nevertheless, later cases involving inspections of businesses subjected to pervasive government regulation recognized an exception to the warrant requirement of administrative searches. *New York v. Burger*⁵⁵ describes the factors which allow this exception: the inspection is authorized by a statute which limits inspector discretion, the government has a substantial interest in the area, and the "certainty and regularity" of the program provides an adequate substitute for a warrant.⁵⁶ The in-

48. *Id.*

49. *Id.* at 724-25.

50. *Id.* at 725.

51. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75-77, 90 S. Ct. 774, 776-77 (1970).

52. 387 U.S. 523, 87 S. Ct. 1727 (1967).

53. *Id.* at 536-37, 87 S. Ct. at 1735.

54. *Id.* at 537, 87 S. Ct. at 1735.

55. 482 U.S. 691, 107 S. Ct. 2636 (1987).

56. *Id.* at 702-03, 107 S. Ct. at 2644 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600, 101 S. Ct. 2534, 2539 (1981) (alteration in original)).

spections must also be "necessary to further [the] regulatory scheme."⁵⁷

The Court addressed administrative searches further in *Skinner v. Railway Labor Executives' Association*.⁵⁸ The Court recognized an exception to the probable cause requirement "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"⁵⁹ *Skinner* indicated that this justification is based on a balancing of "governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context."⁶⁰ If the balancing indicates that a person's expectation of privacy is minimal, that governmental interests are substantial, and that those governmental interests would be frustrated by an individualized suspicion requirement, the search may be reasonable even if conducted without reasonable suspicion.

Illinois has used the *Skinner* approach to uphold random mobile stops by wildlife agents. In *People v. Layton*,⁶¹ a challenge to evidence obtained by wildlife agents conducting random spotchecks of hunters was decided with a "special needs" analysis similar to that of *Skinner*.⁶² The court rejected a *Prouse*-type approach, reasoning that "*Prouse* had nothing to do with game wardens searching for game violations."⁶³ Analogizing hunting to a "highly regulated business," the court reasoned that those involved had a diminished expectation of privacy.⁶⁴ After recognizing the inherent difficulties involved with searches by wildlife agents and rejecting a pure "administrative search" analysis, the court established a narrow exception to the warrant requirement: "In this State, hunting is highly regulated, arguably more so than driving. Hunting is a privilege, not a right, to which licensing requirements apply. Because of the nature of hunting, we conclude that licensing (or hunting without a license) may be deemed consent to some intrusions."⁶⁵ The *Layton* court further noted that this exception, as they recognized it, is "limited to conservation and game officers pursuing game violations—and does not extend to law enforcement officers generally—and is an exception because of necessity."⁶⁶

57. *Id.* at 702, 107 S. Ct. at 2644.

58. 489 U.S. 602, 109 S. Ct. 1402 (1989).

59. *Id.* at 619, 109 S. Ct. at 1414 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3167 (1987) (quoting *N.J. v. T.L.O.* 469 U.S. 325, 351, 105 S. Ct. 733, 748 (1985) (Blackmun, J., concurring))).

60. *Id.*

61. 552 N.E.2d 1280 (Ill. App. 4th Dist.), *cert. denied*, 561 N.E.2d 700 (1990).

62. See discussion *supra* text accompanying note 58.

63. *Layton*, 552 N.E.2d at 1284.

64. *Id.* at 1286.

65. *Id.* at 1287.

66. *Id.*

This "implied consent" analysis required adding another element to the discussion in the case. The court commented on a "hunter's profile" which it felt provided the indicia of consent.⁶⁷ This element required the additional steps of defining the profile and determining if it was reasonably applied to the situation.⁶⁸ Such a limitation is a good idea because of the empirical limits it places upon those employing it and the ease with which abuse is uncovered.

In *State v. Keehner*⁶⁹ the highest Iowa court also distinguished *Prouse* and relied on an administrative exception approach. The court said that "the stop was, in fact, not truly 'random'" because it "resulted from the statutory authority granted to conservation officers to request and inspect hunting licenses."⁷⁰ The court supplemented this position with a finding that "an individual engaging in activity that may reasonably be interpreted as hunting knows that he or she may be stopped briefly and asked to display a license."⁷¹ Any "[e]xpectations to the contrary are unreasonable."⁷²

C. Statutory Authority as a Constitutional Requirement

The discussion in *Keehner* of the statutory authority of the wildlife agent raises another issue: what effect does the statutory authority granted to an agent have on the validity of the stop? *Munoz* mentioned the fact that there was no statutory authorization for the procedure and indicated that this alone would be enough to find the actions of the agent unreasonable.⁷³ The issue of statutory authority was also discussed in *Langle v. Bingham*,⁷⁴ where the court found that a Vermont wildlife agent had exceeded his statutory authority by entering a barn and seizing potentially illegally taken venison from a freezer. Noting that "[a] game warden is not a general enforcement officer of the State of Vermont; his authority is wholly derived from the state statutes," the court found the seizure to be in violation of *Langle's* constitutional rights.⁷⁵

67. *Id.*

68. See *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581 (1989) for a discussion on the use of profiles in law enforcement.

69. 425 N.W.2d 41 (Iowa 1988).

70. *Id.* at 44.

71. *Id.* at 45.

72. *Id.*

73. *United States v. Munoz*, 701 F.2d 1293, 1299 (9th Cir. 1983). The Louisiana Supreme Court has also indicated that this is a controlling factor in weighing the reasonableness of any action by a wildlife agent in *State v. Longlois*, 374 So. 2d 1208 (La. 1979), discussed *infra* note 93.

74. 447 F. Supp. 934 (D.C. Vt. 1978)

75. *Id.* at 939.

*United States v. Wylder*⁷⁶ presents an anomaly to this line of cases. The court dismissed the defendant's claim that Section 706 of the Migratory Bird Treaty Act⁷⁷ imposed a separate requirement that the agent have a warrant before entering the camp.⁷⁸ The court held that since the Fourth Amendment did not require probable cause, Section 706 could not require a warrant.⁷⁹

The authority has been found to exist implicitly in the Mississippi statutory scheme. The statute granting wildlife agents authority to conduct searches when they have probable cause was interpreted to deal only "with searches, not with seizures."⁸⁰ As a result, the initial stop by a wildlife agent was not limited only to situations in which the agent had probable cause. Citing *Tourtillott* and *Halverson's* "only effective means" discussion,⁸¹ the court indicated its belief that "[w]ithout such checks, there is no reason to suppose that Mississippi would have any more success in enforcing its game laws than South Dakota would."⁸²

Either via *Prouse* or the "administrative inspection" exception to the Fourth Amendment, these courts have indicated that the importance of effective game and fish management is paramount to the minimal intrusions it causes. Almost all of the discussions include a review of the statutory authority granted to the agent. Louisiana decisions also view statutory authority as a controlling element, but have not yet clearly established the relationship of game management and the intrusions that accompany it.

III. THE LOUISIANA CONSTITUTION, SEIZURES, AND WILDLIFE AGENTS

The foundation of Louisiana's search and seizure law is Article 1, Section 5 of the Louisiana Constitution of 1974.⁸³ Though the provision

76. 590 F. Supp. 926, 928 (D.C. Or. 1984).

77. 16 U.S.C. § 706 (1988). This section provides in part:

Any employee of the Department of the Interior authorized by the Secretary of the Interior to enforce the provisions of this subchapter shall have power, without warrant, to arrest any person committing a violation of this subchapter . . . and shall have authority, with a search warrant, to search any place.

78. *Wylder*, 590 F. Supp. at 927-28.

79. *Id.*

80. *Drane v. State*, 493 So. 2d 294, 298 (Miss. 1986), *cert. denied*, 482 U.S. 916, 107 S. Ct. 3189 (1987).

81. *Id.* at 297.

82. *Id.*

83. La. Const. art. I, § 5 reads:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

parallels the Fourth Amendment, it is not simply a duplication of the federal protections. Article 1, Section 5 represents a decision by Louisiana citizens to give a "higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution."⁸⁴ This is evidenced by both the text of the Section and the application of it by Louisiana courts.

A. *Random Stops in Louisiana*

The core of Louisiana jurisprudence surrounding random investigative stops by police agencies is found in *State v. Church*⁸⁵ and *State v. Parms*.⁸⁶ These two cases are the Louisiana correlative of *Prouse*. Both cases deal with the constitutionality of random DWI roadblocks by police. *Parms* held that a random DWI roadblock was violative of the Fourth Amendment. Applying *Prouse*, the court cited the lack of neutral criteria governing the officers involved, the complete discretion as to the detention of any automobile, and the apparent ineffectiveness of such a roadblock.⁸⁷ The court found this particular roadblock unconstitutional under *Prouse*, and left the door open as to whether the practice in general is violative of the Louisiana Constitution.⁸⁸

State v. Church,⁸⁹ handed down nine months later, answered the question left open by *Parms*. Analyzing a DWI roadblock conducted pursuant to carefully drawn administrative guidelines, the court held that "the seizure occurred without reasonable suspicion or probable cause to believe that defendant Church had violated some law and was therefore unconstitutional under Article 1, Section 5, of the Louisiana Constitution of 1974."⁹⁰ This holding effectively closes the door on the ability of the police to conduct random DWI roadblocks in Louisiana. Though the checks may meet Fourth Amendment standards by being conducted according to administrative guidelines which eliminate randomness,⁹¹ the extended right of privacy offered by the Louisiana Constitution renders these particular stops by policemen unconstitutional simply by the fact that they are made without either reasonable suspicion or probable cause.⁹²

84. *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982).

85. 538 So. 2d 993 (La. 1989).

86. 523 So. 2d 1293 (La. 1988).

87. *Id.* at 1302-03.

88. *Id.* at 1303.

89. 538 So. 2d 993 (La. 1989).

90. *Id.* at 998.

91. See *Michigan v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481 (1990) and discussion *supra* text accompanying note 9.

92. *Church*, 538 So. 2d at 997-98. See also *State v. Matthews*, 366 So. 2d 1348 (La. 1978), requiring police to have at least "reasonable suspicion" before making an investigatory stop.

B. Wildlife Agents in Louisiana: State v. Longlois

Consistent with other state and federal courts, the Louisiana Supreme Court has indicated that a wildlife agent's authority is determined completely by the empowering statutes. In *State v. Longlois*⁹³ a wildlife agent arrested two individuals he saw smoking marijuana in their car in the woods. The court found that the agent acted beyond the limited powers conferred on him by the statute granting wildlife agents their authority to arrest. The statute empowering the agent at the time he effected the arrests did not expressly provide that a wildlife agent had the authority of a general law enforcement officer to cause an arrest for a narcotics violation.⁹⁴ Since the agent did not have the statutory authority to make the arrest, the supreme court found the arrest "unreasonable" and, thus, unconstitutional under the Louisiana Constitution.⁹⁵ This holding adopts for Louisiana what is the status quo in most other states—that a game warden is not a general enforcement officer of the State; his authority is wholly derived from the state statutes. Because *Longlois* has not been overruled, a wildlife agent in Louisiana needs statutory authority to make random field stops if these seizures are to be reasonable.

1. The Statutory Scheme

After *Longlois*, the Louisiana Legislature drastically changed the powers granted to wildlife agents. The 1985 Louisiana Legislative Session repealed the statute in place at the time of the arrest in *Longlois* and enacted what is now Louisiana Revised Statutes 56:55.2.⁹⁶ This statute provides that those wildlife agents who have completed certain training requirements have the same police authority as other law enforcement officers of the state.⁹⁷ All wildlife agents now go through the training

93. 374 So. 2d 1208 (La. 1979).

94. *Id.* at 1210.

95. *Id.*

96. 1985 La. Acts No. 876 repealed La. R.S. 56:108 and enacted La. R.S. 56:55.2, which contains substantially the same material as subsection (H) of La. R.S. 56:108, as amended by 1985 La. Acts No. 186, § 1.

97. La. R.S. 56:55.2(A) (Supp. 1992) provides:

A. In view of the vast expanse of marsh and isolated wildlife habitat extant throughout the state, and to facilitate the effective protection of private and public rights and property, particularly in but not limited to these isolated areas, duly commissioned wildlife officers and agents of the enforcement division . . . of the Department of Wildlife and Fisheries who have graduated from [a specified training program] . . . and those commissioned wildlife officers . . . who are presently serving in the department prior to June 26, 1989, shall, in addition to the authority otherwise conferred by law upon such officers, be vested with the same authority and powers conferred by law upon other law enforcement officers of this state, provided that a qualification and requalification for firearms used be established within the department

required by the statute, and thus enjoy complete law enforcement authority. The infirmities found by the *Longlois* court to reverse that conviction are now gone since wildlife agents in Louisiana presently have the same arrest powers as any State Police officer. Louisiana Revised Statutes 56:54 supplements the powers of 56:55.2 by granting commissioned wildlife agents the authority to cause an arrest for fish and game violations.⁹⁸ This provides the basic authority necessary to enforce state game laws. Without this provision, the agent would be powerless to enforce game law in the field.⁹⁹

But to remain true to the state constitutional requirements of *Longlois*, a wildlife agent in Louisiana must also have the statutory authority to perform an investigatory check without probable cause.¹⁰⁰ Three disparate statutes may provide this authority. Louisiana Revised Statutes 56:54(A) imposes a duty on wildlife agents to see that every person dealing in any way with the wildlife, fish, and game of the state has an official license.¹⁰¹ Louisiana Revised Statutes 56:103(E) provides in part that "Licensees shall have licenses in their possession when hunting and shall exhibit them on demand of any person authorized to enforce the provisions of this Subpart."¹⁰² Under the "Fishing and Fish Industry Licensing" Part of Title 56,¹⁰³ Louisiana Revised Statutes 56:301.1 re-

98. La. R.S. 56:54(B) (1987) provides:

B. The assistant secretary of the office of forestry, employees of the office of forestry, the secretary, commissioned wildlife agents, commissioned wildlife sheriffs, deputy sheriffs, constables, deputy constables, marshals, and other police officers of this state may, without a warrant, arrest any person violating any of the laws or regulations under the jurisdiction of the department, especially R.S. 41:1009 and R.S. 56: 1478.1, and may immediately take such person in custody for examination or trial before any officer or court of competent jurisdiction of this state or of the United States, and may serve and execute any warrant or other process issued by any officer or court of competent jurisdiction of this state for the enforcement of such laws and regulations.

99. This grant is not exclusive to wildlife agents; it extends to all police officers of the state.

100. See *supra* text accompanying note 93. In light of the plenary grant of law enforcement authority to wildlife agents by La. R.S. 56:55.2, it would seem that the concomitant authority to make warrantless searches in exigent circumstances would necessarily attach. A traditional police officer can make searches without a warrant or probable cause only with consent of the individual. *Florida v. Bostick*, 111 S. Ct. 2382, 2386 (1991). For any actions more intrusive than the *limited* inspection of game and gear that is part of a reasonable "field check," the constitution would properly limit wildlife agents to the "consent" exception as well.

101. La. R.S. 56:54(A) (1987) provides:

A. Wildlife agents shall see that every person dealing in any way in any of the wildlife, fish, and game of the state in territory assigned to him for which a license must be obtained, has in his possession, and is the owner of, an official license.

102. La. R.S. 56:103 (1987).

103. La. R.S. 56:301-:308 (1987).

quires persons taking fish to have a license in their possession and "show such license upon demand to a duly authorized agent of the department."¹⁰⁴ These three statutes appear to be the sole basis on which a wildlife agent can effect a stop of a person and request to see his or her license. The statutes do not mention probable cause, and no case has interpreted any of these sections. The issue then that remains unresolved is: does the statutory scheme allow stops by Louisiana wildlife agents without probable cause?

It is interesting to note that the statute granting the authority to effectuate searches contains a probable cause requirement.¹⁰⁵ The language of Section 55 has been interpreted to give the section its fullest meaning. In *Guilbeau v. Tate*,¹⁰⁶ the first circuit court of appeal interpreted former Louisiana Revised Statutes 56:108,¹⁰⁷ the substance of which has been reproduced nearly verbatim as Louisiana Revised Statutes 56:55, as allowing an agent to "visit or examine, with or without a search warrant . . . any place . . . whenever they have probable cause to believe that any provision of this Sub-part has been violated."¹⁰⁸ This suggests that an agent with probable cause can search almost anywhere. Both *Guilbeau* and the search statute impose a probable cause requirement; similar to the licensing statutes, though, neither address seizures of individuals.

As noted earlier, Louisiana wildlife agents are also obligated by statute to conduct boating safety inspections.¹⁰⁹ Louisiana Revised Sta-

104. La. R.S. 56:301.1(B) (1987).

105. La. R.S. 56:55(A) (1987) provides in part:

[A]ny commissioned wildlife agent may *visit, inspect and examine*, with or without search warrant, records, any cold storage plant, warehouse, boat, store, car, conveyance, automobile or other vehicle, airplane or other aircraft, basket or other receptacle, or any place of deposit for wild birds, wild quadrupeds, fish or other aquatic life or any parts thereof *whenever there is probable cause to believe that a violation has occurred*. (Emphasis added).

106. 94 So. 2d 896 (La. App. 1st Cir. 1957).

107. This statute was repealed by 1985 La. Acts No. 876, § 4. 1985 La. Acts No. 876, § 3 enacted La. R.S. 56:55.2, the current statute granting arrest authority to wildlife agents. Former La. 56:108 contained the grant of both the arrest authority and the authority necessary to cause a search. Presently, La. R.S. 56:55 provides the search authority. The pertinent text of these two statutes is found *supra* notes 97 and 105.

108. *Guilbeau*, 94 So. 2d at 899 (quoting former La. R.S. 56:108 (repealed 1985)).

109. La. R.S. 34:851.29 (1985), provides that

It shall be the duty and responsibility of every wildlife agent . . . of this state . . . to enforce the provisions of this Part, and in the exercise thereof, they are hereby authorized to stop and board any vessel for the purpose of addressing inquiries to those on board . . . and in addition, examin[e] such vessel for compliance with this Part. Officers so boarding any vessel shall first identify themselves and such officer in the performance of his duties shall be without liability for trespass.

tutes 34:851.29 provides that, for the purpose of enforcing boating safety law, an agent is "authorized to stop and board any vessel." Consistent with the previous licensing statutes, no statement on probable cause is made. There has been no Louisiana case law that has addressed the constitutionality of this section.¹¹⁰ The United States Supreme Court, however, has interpreted and upheld a similar statute that applies to the Coast Guard.¹¹¹

2. *The Jurisprudence*

Considering the number of hunters and fishermen in Louisiana, case law addressing stops by wildlife agents is surprisingly limited. Even more surprising is that much of the case law is the result of *civil* actions against wildlife agents rather than criminal prosecutions of alleged poachers.

*Guilbeau v. Tate*¹¹² involved a suit brought against a wildlife agent for, *inter alia*, trespass and false imprisonment. Tate had entered onto the plaintiff's land without probable cause under the guise of performing a "routine check."¹¹³ There was, however, a history of conflict between the two parties which prompted the court to find that Tate "was not acting . . . in good faith and without malice" when investigating the plaintiff.¹¹⁴

The statutory scheme in place at the time allowed a wildlife agent with probable cause to search almost anywhere.¹¹⁵ However, the court found that Tate had no probable cause to suspect a violation of the law. Tate thus had no right to enter the plaintiff's property without a search warrant, and the plaintiff did not consent to his entry.¹¹⁶ Since the agent was acting "outside of his strict authority," he "became an ordinary trespasser"¹¹⁷ and was not acting as an officer in the performance of his duties.

110. Though the majority opinion did not address the constitutionality of the statute, in *State v. McHugh*, 598 So. 2d 1171, 1176 (La. App. 1st Cir.), *writ* granted, 605 So. 2d 1105 (1992), Judge Lanier wrote a concurring opinion that read in its entirety: "I concur in the result. La. R.S. 34:851.29 is unconstitutional insofar as it is in conflict with the United States Supreme Court decision of *Delaware v. Prouse*, [citation omitted], and the Louisiana Supreme Court decision of *State v. Parms*." (Citations omitted). *Id.* at 1176 (Lanier, J., concurring).

111. *United States v. Villamonte-Marquez*, 462 U.S. 579, 103 S. Ct. 2573 (1983), discussed *supra* note 14.

112. 94 So. 2d 896 (La. App. 1st Cir. 1957).

113. *Id.* at 897.

114. *Id.* at 900.

115. *Id.* at 899.

116. *Id.*

117. *Id.* at 900.

Longlois, as discussed, continued this line of reasoning.¹¹⁸ In *Longlois*, a criminal case, the Louisiana Supreme Court held that the extent of the statutory authority was the controlling factor.¹¹⁹ Probable cause was not at issue; Agent Carson had witnessed the individuals smoking marijuana. But, as in *Guilbeau*, the agent exceeded the statutory authority granted to him at the time. Consequently, Agent Carson was acting as a private citizen when he effected the arrest. Simple possession of marijuana is a misdemeanor, and private citizens may only arrest for felonies; therefore, the arrest was illegal.¹²⁰ Clearly, Louisiana courts take the view that the lack of statutory authority alone renders the actions of a wildlife agent invalid.

Nevertheless, two recent cases have addressed the constitutionality of investigatory stops by wildlife agents without approaching the issue of statutory authority. *Moresi v. State*¹²¹ was a civil rights action in which the court discussed the reasonableness of the actions of a wildlife agent in conducting a search pursuant to what he, in good faith, thought the law allowed. Because the court found that "the agents had a particularized and objective basis for suspecting that the hunters were engaged or had engaged in game violations," the issue of truly random stops by wildlife agents was not decided.¹²²

The court did briefly discuss random game checks to support its finding that the agents did not violate "clearly established statutory or constitutional" rights: "It was not clear at the time of these searches, and is still not today, whether the constitution or federal law prohibits game agents from making random or checkpoint stops in the marsh for the purpose of ensuring compliance with hunting and fishing laws."¹²³ Justice Dennis then cited the Blackmun and Powell concurrence in *Prouse* and several state court opinions approving random and checkpoint stops by game agents.¹²⁴ Without reaching a decision on the issue, the court stated that although it did "not necessarily agree with these authorities, it cannot be said that their interpretations of the federal constitutional jurisprudence is unreasonable."¹²⁵ The court also conceded that "reasonable jurists may disagree as to whether the *Church-Parms* holding involving motor vehicle sobriety checkpoints is directly and fully controlling with respect to game agents' stops of sportsmen in the marsh

118. *State v. Longlois*, 374 So. 2d 1208 (La. 1979), discussed *supra* text accompanying note 93.

119. *Id.* at 1210.

120. *Id.*

121. 567 So. 2d 1081 (La. 1990).

122. *Id.* at 1087.

123. *Id.*

124. *Id.* at 1087-89.

125. *Id.* at 1089.

for questioning with respect to possible game or boating violations.”¹²⁶

Justice Marcus concurred in the result of *Moresi*, expressly agreeing with the other states who have upheld random stops of vehicles by wildlife agents.¹²⁷ However, the issue of random stops by wildlife agents remains unresolved, with the majority opinion concealing the direction the court will take when the issue is squarely presented.

The recent first circuit case of *State v. McHugh*¹²⁸ addresses the issue of game checks made during the course of a boating safety check. Returning by boat from a weekend hunting trip, McHugh and several others were stopped by six Louisiana wildlife agents. The agents were “conducting game violation and boat safety checks.”¹²⁹ After stopping the McHugh party’s boats, an agent asked if they had been hunting or fishing. A buck head was visible in the boat’s live well, and one member of the party let the agents view a dressed and quartered deer in an ice chest. Since the deer was not tagged,¹³⁰ the agents cited the occupants of the boat and confiscated the deer carcass.

Defendants moved to suppress the evidence of the illegally possessed deer, claiming the initial stop was unconstitutional. The trial court denied the motion without making an inquiry into probable cause, suggesting that wildlife agents could make these types of stops. The first circuit court of appeal took exception to this premise, conducted its own inquiry into the facts, and found that no probable cause existed.¹³¹ A discussion of *Prouse*, *Parms*, and *Church* immediately followed.

The court made efforts to describe the unclear effect of the traditional roadblock cases on stops by wildlife agents. Recognizing that “the issue presented . . . is res nova,”¹³² the court opted to apply *Church* to the facts. True to *Church*, one reason for suppressing the evidence was that the agents had no probable cause to stop the McHugh boats. Another reason was that “the discretion of the agents in this case was unbridled”¹³³ due to failure of the Department of Wildlife and Fisheries to provide a manual or guidelines directing the procedure. The state had also never established the effectiveness of the procedure.¹³⁴ Nor had

126. *Id.* at 1094.

127. *Id.* at 1096 (Marcus, J., concurring).

128. 598 So. 2d 1171 (La. App. 1st Cir. 1992), writ granted, 605 So. 2d 1105 (1992).

129. *Id.* at 1172.

130. La. R.S. 56:125(B) (1987) requires that any deer that has been “divided” must have a tag on each part indicating the sex of the animal, the date taken, and the name of the individual hunter who killed the animal.

131. *McHugh*, 598 So. 2d at 1174. The testimony of one of the agents supports this finding: “Sgt. Miculek candidly admitted that, prior to stopping defendants, he had no reason to believe that defendants had committed a game violation.” *Id.*

132. *Id.* at 1175.

133. *Id.* at 1176.

134. *Id.*

the state established or attempted to establish that "less intrusive methods were not available."¹³⁵ This reasoning is classic *Church*.

As the most recent word on this issue, *McHugh* leaves some important issues unresolved. The court noted that the wildlife agents had a statutory obligation to make boating safety inspections and the statute that grants agents the authority to effect a search.¹³⁶ Also noted was the statute that grants wildlife agents the same authority as other law enforcement officers.¹³⁷ However, the court did not mention the remainder of the statutory scheme defining the agent's authority. In light of *Longlois*, the meaning of this omission is unclear; would the court have addressed the statutory issue only if it had found first that the stop was constitutional? Does this suggest a weakening of the *Longlois* holding?

The court did suggest that one way of upholding random stops by wildlife agents would be to distinguish *Church* by recognizing "the peculiar nature of wildlife enforcement."¹³⁸ Even so, continued the court, this alone would not be enough; the amount of discretion the agents had would have rendered the procedure infirm, presumably under *Prouse*.¹³⁹ This raises another unresolved issue: To what extent must the discretion of the agents be constrained? If only hunters and fishermen are being stopped, is not any discretion minimal? Or must there be no discretion even within the limited group of individuals that wildlife agents are statutorily obligated to regulate?

IV. SUGGESTIONS ON RESOLVING THE ISSUE IN LOUISIANA

Despite the questions left by *McHugh*, there are still several valid means by which a court can recognize that wildlife agents enjoy a limited exception to the probable cause requirement of traditional search and seizure law. These approaches are generally discreet, but as long as *Longlois* remains the law every analysis of the constitutionality of a wildlife agent's actions must begin with a discussion of the statutory authority granted by the legislature.

A. Interpretation of the Statutes

As noted earlier, there are three statutes in Louisiana that may apply to random stops by wildlife agents. Louisiana Revised Statutes 56:54(A) requires wildlife agents to check that every person dealing in any way

135. *Id.*

136. *Id.* at 1172-73 (citing La. R.S. 34:851.29 and La. R.S. 56:55(A)), *see supra* notes 105 and 109.

137. *Id.* at 1174 (citing La. 56:55.2(A)), *see supra* note 97.

138. *Id.* at 1176.

139. *Id.*

with the wildlife, fish, and game of the state is properly licensed.¹⁴⁰ Supplementing this are two specific licensing provisions, one addressing hunters, the other addressing fishermen. In the "Wild Birds and Wild Quadrupeds" Sub-part of Title 56, Louisiana Revised Statutes 56:103(E) provides that "[l]icensees shall have licenses in their possession when hunting and shall exhibit them on demand of any person authorized to enforce the provisions of this Subpart."¹⁴¹ Similarly, under "Fishing and Fish Industry Licensing,"¹⁴² Louisiana Revised Statutes 56:301.1(B) requires persons taking fish to possess a license and "show such license upon demand to a duly authorized agent of the department."¹⁴³

Neither Section 103(E) nor Section 301.1(B) requires that the agent have probable cause before "demanding" a person's license. On the other hand, neither statute explicitly allows the agent to act without probable cause. But this lack of specificity is actually immaterial to the agent's authority. These two statutes are directed at the licensees, not the agents. Section 103(E) and 301.1(B) mandate presentation of the license; the only requirement is that the person demanding the license be authorized to enforce the provisions. The question now becomes whether Louisiana Revised Statutes 56:54(A) requires that an agent have probable cause before demanding a person present his or her license.

Section 54 does not mention probable cause; Louisiana Revised Statutes 56:55, which grants wildlife agents authority to conduct searches, however, does mention probable cause.¹⁴⁴ Section 55 only allows a wildlife agent to make a search when probable cause is present. By interpreting these two statutes *in pari materia*, similar to the approach used by the Mississippi Supreme Court in *Drane*,¹⁴⁵ it seems that the Louisiana Legislature intended to allow wildlife agents to make a license check without probable cause or even reasonable suspicion. A demand for a license is far less intrusive than a search, and any greater intrusion should require probable cause.¹⁴⁶

140. See *supra* text at note 101.

141. La. R.S. 56:103 (1987).

142. La. R.S. 56:301-:308 (1987).

143. La. R.S. 56:301.1 (1987).

144. See *supra* note 105 and accompanying text.

145. *Drane v. State*, 493 So. 2d 294 (Miss. 1986), *cert. denied*, 482 U.S. 916, 107 S. Ct. 3189 (1987), see *supra* text accompanying note 80.

146. The validity of this position is supported by further action of the Louisiana Legislature. By enacting La. R.S. 302.1(4) (added by 1986 La. Acts No. 904, § 1), the legislature provided another exception to the probable cause requirement of La. R.S. 56:55. This section, which pertains to licensing procedures and costs, provides in part that "[a]n enforcement agent or officer may inspect a fisherman's catch to insure compliance with this Paragraph." La. R.S. 302.1(4) (1987). The lack of a probable cause requirement here shows that the scheme of La. R.S. 56:55 is designed to limit substantial intrusions, which a brief license check pursuant to La. R.S. 56:54 or a brief tallying of the number and type of fish caught clearly are not.

B. *Analyzing Random Stops by Louisiana Wildlife Agents*

A finding of statutory authority does not in itself render a stop constitutional. Authority is merely a starting point.¹⁴⁷ The fact that a person is being detained by a government agent invokes the protections of both the Fourth Amendment and Article 1 of the Louisiana constitution. Though neither provision expressly requires probable cause, both require that the stop be reasonable.¹⁴⁸ Despite the method or test used, the unique practical aspects of a wildlife agent's responsibilities support a finding that it is reasonable for these agents to enjoy a limited exception to the probable cause requirement. Several aspects of the different methods are similar, but each method can autonomously support the reasonableness of this activity.

1. *A Prouse, Church, or McHugh-Type Analysis*

Prouse and *Church* (and *Church's* genesis, *Parms*) relied on several common factors in testing the constitutionality of roadblock stops by traditional police agencies. The roadblocks may comply with the Fourth Amendment when "the government interest is compelling, the intrusion minimal, and adequate neutral criteria are present."¹⁴⁹

That fish and game preservation is a "compelling interest" of the state is evidenced by the amount of statutory and regulatory attention it receives.¹⁵⁰ In *McHugh*, the first circuit court of appeal recognized the extreme importance of game preservation but was not willing to say that it "exceeds that of human life, requiring us to suspend constitutional rights in wildlife cases, but not in cases involving drunk drivers or narcotics violations."¹⁵¹ This statement suggests that a "compelling interest" alone is sufficient to support random stops. However, this is an incorrect application of the tests of *Prouse* and *Church*. There is no "comparison" to other state interests in the balancing test. *Prouse* and *Church* describe a test in which each aspect of a random stop is weighed against the others. Even assuming that the prevention of drunk driving

147. *State v. Longlois*, 374 So. 2d 1208 (La. 1979).

148. A warrantless search and seizure is per se unreasonable unless it is justified by a specific exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967).

149. *State v. Church*, 538 So. 2d 993, 996 (La. 1989) (citing *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391 (1979)).

150. The term "compelling interest" is a term of art and has several different meanings which vary according to the type of analysis used. A "compelling interest" in an equal protection analysis might not be a "compelling interest" in a due process analysis, and vice versa.

151. *State v. McHugh*, 598 So. 2d 1171, 1176 n.2 (La. App. 1st Cir.), writ granted, 605 So. 2d 1105 (1992).

reached the highest possible level of "compelling," random stops of drivers would be unreasonable and thus unconstitutional if the procedure used was too intrusive, if those involved had unbridled discretion, or if the method used was grossly ineffective.¹⁵² When balanced against the minimal intrusion and high effectiveness of random game stops, as well as the statutorily limited discretion of an agent, the compelling state interest of effective game preservation is clearly sufficient to warrant a limited exception to the probable cause requirement.

The brevity and limited scope of a typical, and more importantly, reasonable random check by a wildlife agent demonstrates the minimal intrusion required by *Prouse* and *Church*. The extent of an agent's activity should be a request for and inspection of any required licenses. A cursory inspection of any gear and game possessed may also be made. Should probable cause exist, more intrusive measures may be allowed.¹⁵³

The nature of the violations involved demonstrates the effectiveness of allowing these stops. A poison-tipped arrow looks like a legal arrow unless it is held in one's hands; an illegal eleven inch speckled trout looks the same through a pair of binoculars as does a legal twelve inch fish. It may take a fisherman eight hours and several stops to take over his daily limit of fish. Short of following every fisherman in the state and counting each and every fish he keeps, there is no other way to ensure compliance with creel limits set on a biological basis than to allow wildlife agents the ability to count the fish in his box unannounced.

The Louisiana Legislature has removed the discretion of wildlife agents by specifying that the agent "shall" check "every person" dealing in any way with the wildlife of the state.¹⁵⁴ Thus, any individual whose activity could reasonably be interpreted as hunting or fishing must be stopped. No discretion is afforded the agent. This mandate, however, adds another step to the traditional analysis. Courts would have to make an initial determination that the person stopped met some sort of limited "sportsman's profile" that warranted the agent's actions.¹⁵⁵

As *McHugh* recognized, *Church* added a probable cause requirement to the *Prouse* test.¹⁵⁶ In light of traditional police activities, this seems

152. This was the case in both *Prouse* and *Church*.

153. These are the parameters of a reasonable "field check" as applied to either the individual hunter on foot, in a vehicle in an area known to support hunting, or operating a boat. The *limited* exception to probable cause should not extend any further than this context when wildlife agents are *enforcing game and fish law*. A wildlife agent who acts beyond the scope of a reasonable limited "field check" is acting as a quasi-police officer or quasi-drug agent and should be held to the same constitutional standards.

154. La. R.S. 56:54(A) (1987).

155. See *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581 (1989).

156. *State v. McHugh*, 598 So. 2d 1171, 1174-75 (La. App. 1st Cir.), writ granted, 605 So. 2d 1105 (1992).

appropriate, especially given the enhanced protections granted by the Louisiana Constitution.¹⁵⁷ But wildlife agents do not engage in traditional police pursuits (e.g., drug intervention, DWI checks, pursuing fugitives). To use the *Church* test will require that an exception to the strict probable cause requirement be recognized in this limited application.

At the roadblock found unconstitutional in *Church*, 949 vehicles were stopped in three hours, thirteen of which had intoxicated drivers.¹⁵⁸ The simple magnitude of this endeavor, its relative inefficiency notwithstanding, justifiably stirs a visceral reaction that *something* more than what the Fourth Amendment offers is needed to stop this. All the court had left to use was probable cause which, after *Hernandez*, could be based on Article I, Section 5. The inverse of the *Church* reasoning is just as strong a reason for wildlife agents to enjoy a limited exception to the probable cause requirement. A typical wildlife agent will not stop 949 people in a year, much less in three hours. The sheer expanse of land for which each agent is responsible, the limited resources available to him, the increasingly important need for efficient harvesting of these finite resources, and the lack of any externally detectable indicia of illegal activity stirs a reaction equal to that presumably felt by the Louisiana Supreme Court in *Church* that something needs to be done to enable a wildlife agent to ensure that a given individual is licensed to participate in the voluntary activity¹⁵⁹ and has harvested only the amount of natural resources that scientific research has determined will allow those natural resources to perpetuate. Limited relief from the probable cause requirement is the only plausible solution, and, given the probable cause requirement of *Church*, is necessary to afford wildlife agents the authority to stop and check individuals believed to be hunting or fishing.

2. Through an "Implied Consent" Theory

A finding that *Church* is distinguishable from the factual situation discussed above, as alluded to in *McHugh*, still leaves open other means of supporting the reasonableness of random checks by wildlife agents. The easiest method would be for a court to find that by "engaging in activity that may reasonably be interpreted as hunting" or fishing, an individual "knows that he or she may be stopped briefly and asked to display a license."¹⁶⁰ This would place the stop within the "consent" exception to the Fourth Amendment.¹⁶¹

157. State v. Hernandez, 410 So. 2d 1381 (La. 1982).

158. State v. Church, 530 So. 2d 993, 997 (La. 1989).

159. See *supra* text accompanying notes 65-66.

160. State v. Keehner, 425 N.W.2d 41, 45 (Iowa 1988).

161. Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991).

Using "implied consent" contains an inherent truth that makes this approach less subject to criticism or evasion than does the *Prouse* or *Church/McHugh* analysis. Hunting and fishing are for the most part luxuries, both of which are subject to pervasive state regulation. Driving, in comparison, is also pervasively regulated, but driving is a necessary requisite of life in most areas today.¹⁶² This distinction gives the "implied consent" argument substantial credibility.

This type of analysis does require some kind of objective criteria which establishes the consent. *Keehner* and *Layton* used a "hunter's profile" as a means of determining that an individual consented to being checked by a wildlife agent.¹⁶³ The test, in order to justify this particular exception, must limit the discretion of the wildlife agent to a point that he or she may only stop those who are "engaged in an activity which may be reasonably interpreted as hunting"¹⁶⁴ or fishing.¹⁶⁵ Case by case determinations by the courts would easily establish the parameters, but the actual scope of this test is fairly well self-defined. Clearly, an individual with a gun in the woods or a person with a fishing pole next to a lake is within the scope. Just as clear, a couple enjoying a sunset should not be checked for hunting licenses. The middle ground would need judicial guidance, possibly with deference to the experienced wildlife agent, analogous to the deference given to an experienced police officer,¹⁶⁶ but with a requirement that the agent articulate his basis for believing the person checked was hunting or fishing.

3. The "Administrative Search" Exception

Using an administrative search approach offers another means of demonstrating the reasonableness of these checks. The tests set out in *New York v. Burger*¹⁶⁷ and *Skinner v. Railway Labor Executives' Association*¹⁶⁸ are readily applicable to random checks by wildlife agents of commercial fishermen. Both also apply to random checks of recreational sportsmen because of the nature of the pursuit involved; the complex cumulation of statutes and regulations is geared towards the protection and perpetuation of finite natural resources, as opposed to prescribing activity that protects citizens from themselves and others.

162. See John Michael Harlow, Note, *California v. Acevedo: The Ominous March of a Loyal Foot Soldier*, 52 La. L. Rev. 1205, 1206, 1237 (1992), for a discussion of the development and importance of the automobile in the United States.

163. *State v. Keehner* 425 N.W.2d 41, 44-45 (Iowa 1988); *People v. Layton*, 552 N.E.2d 1280, 1287 (Ill. App. 4th Dist.), cert. denied, 561 N.E.2d 700 (1990).

164. *Keehner*, 425 N.W.2d at 45.

165. See *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581 (1989).

166. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

167. 482 U.S. 691, 107 S. Ct. 2636 (1987).

168. 489 U.S. 602, 109 S. Ct. 1402 (1989).

The tests also apply, probably more so than the *Prouse* test, to boating safety checks.¹⁶⁹

By applying the *Camara* criteria for a reasonable administrative inspection and the *Burger/Skinner* tests for a probable cause exception, it is evident that limited random game checks by wildlife agents are well within the bounds of reasonableness. First, *Camara* requires a long history of both judicial and public acceptance of the particular type of search; the public has long accepted limited random game checks. A Louisiana wildlife agent is obligated by statute to stop every person he encounters. This has been the law since 1912.¹⁷⁰ The limited case law that has arisen out of the amount of people checked each year can only demonstrate the assumption carried by sportsmen and poachers alike: if an agent comes across someone who appears to be hunting or fishing, a brief check is sure to follow. Second, *Camara* requires that there be a state interest in preventing the conditions with no alternative means of enforcement.¹⁷¹ The state is interested in preserving the finite fish and game resources that depend on the powers of government for protection. As discussed earlier, the functional realities of game and fish violations do not lend themselves to detection through general observations. Brief, limited checks of licenses, gear, and game are the only practical methods of ensuring compliance with state-imposed harvesting methods and limits.

Finally, administrative inspections must also be impersonal in nature and not aimed at discovering evidence of a crime.¹⁷² Wildlife agents do not search an individual's person during a proper field check; the agent makes only cursory inspections of licenses, gear, and game. The detection of criminal activity aside from fish and game violations is an occasional result of these checks, however. This seems contrary to the general rule that administrative searches are not proper methods of gathering evidence of criminal activity.¹⁷³ *Burger* did not make this distinction, however,

169. Most boats have certain minimum safety equipment requirements (e.g., life preservers, fire extinguishers, flare guns). Automobiles also have minimum equipment requirements and are subject to annual certifications. A car with the proper equipment (properly functioning brakes and lights) carries a certification sticker that indicates this. No such indicia is used for boats. Indeed, it would be pointless to attempt to use such a system for boats because of the ease with which life preservers and the other safety equipment could be removed and transferred between vessels. As there is no functional indicia of an improperly equipped boat, unannounced inspections provides the only practical method available to ensure compliance.

170. The absence of a "long history of judicial acceptance," or even judicial disapproval, of these stops in Louisiana is the basis of this comment and, presumably, the Louisiana Supreme Court's desire to review *State v. McHugh*.

171. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537, 87 S. Ct. 1727, 1735 (1967).

172. *Id.*

173. *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S. Ct. 641, 647 (1984).

finding no reason to render an administrative search unconstitutional on the sole basis that crimes had been discovered which were unrelated to the particular scheme being pursued.¹⁷⁴

Burger also established when probable cause or a warrant was not a prerequisite to an administrative search. An inspection may be made without probable cause only when the inspection is authorized by a limiting statute, the governmental interest is "substantial," and the random checks are "necessary to further the regulatory scheme."¹⁷⁵ *Skinner* adds to this a "special needs" exception, to be used only when a probable cause requirement is "impracticable."¹⁷⁶

The statute obligating a wildlife agent to effectuate license checks removes all discretion from the activity; he must stop every person he encounters. Whether game management is a "substantial" interest, though, has not been decided by the courts. In light of the expansive statutory, regulatory, and budgetary attention given to it, however, a court would be hard pressed to say that Louisiana has only a minimal interest in properly managing its wildlife and fisheries resources. Balanced against the other factors, the degree of the state's interest is sufficient to warrant these minimal intrusions.

This balancing is suggested by the *Skinner* "special needs" exception. By balancing the governmental interests in effective game management against the privacy interests of a sportsman and the impracticality of a probable cause requirement in this context, a "special need" is demonstrated that justifies an exception.

V. CONCLUSION

In *Parms*, the Louisiana Supreme Court cited substantial case law from other state supreme courts as guidance in its decision.¹⁷⁷ The first case the court cited was *State v. Tourtillott*,¹⁷⁸ which mentioned that the Oregon constitution, like Louisiana, offers greater protection of an

174. *New York v. Burger*, 482 U.S. 691, 716, 107 S. Ct. 2636, 2651 (1987); This is also consistent with the "plain view" doctrine discussed in *Horton v. California*, 496 U.S. 128, 133-44, 110 S. Ct. 2301, 2306 (1990). This doctrine recognizes that the Fourth Amendment does not protect things discovered or viewed by a police officer who is lawfully positioned.

175. *Burger*, 482 U.S. at 702-03, 107 S. Ct. at 2644.

176. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 1414; A "special need" is recognized when there is "'beyond the normal need for law enforcement'" a situation that "'make[s] the warrant and probable cause requirement impracticable.'" *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S. Ct. 733, 748 (1985) (Blackmun, J., concurring))).

177. *State v. Parms*, 523 So. 2d 1293, 1296-1301 (La. 1988).

178. See discussion *supra* text accompanying note 37.

individual's right of privacy than the Fourth Amendment.¹⁷⁹ The court also cited South Dakota and Illinois Supreme court cases which held that random DWI checkpoints by police officers without probable cause violate their respective state constitutions.¹⁸⁰ However, these same states have also held that the importance of proper wildlife management warrants random checks of a limited nature by wildlife agents, and as such this activity is constitutional.¹⁸¹ Though only persuasive authority, these cases indicate a recognition by other states that the extended protections of their respective constitutions are dynamic enough to adapt to the unique functional aspects, and more importantly the practical results, of a wildlife agent's responsibilities.

Neither the United States Supreme Court nor the Louisiana Supreme Court has decided the constitutionality of these stops. One can only hope that when this happens the court will keep in mind the fate of the carrier pigeon, the bald eagle, and the recent decimation of Louisiana's red drum and speckled trout fisheries. Proper game management has allowed the white-tailed deer population in Louisiana to reach the highest level in recorded history; the American alligator has been removed from the threatened species list as a direct result of state-imposed and regulated harvesting programs.

Without the ability to ensure that individuals involved in the taking of wild game or fish do so within legal guidelines, the efforts of more than just the wildlife agents are frustrated. Administrators weigh biological data against political pressure to determine what limits are the most beneficial to all involved, including the animals. Biologists spend countless hours in the field studying populations and data to determine what, if any, amount of thinning is needed to maintain or improve the conditions of an area. For nothing more than a love for the outdoors, thousands of individuals spend hundreds of thousands of dollars a year to participate in what has become a part of the heritage of Louisiana.

Wildlife agents do not need constitutional *carte blanche* to satisfy these interests; as discussed, however, the limited random stops conducted by wildlife agents are a constitutionally reasonable method of ensuring compliance with state fish and game law. A court has several bases for upholding this activity when it is properly analyzed in its totality. Only by recognizing this limited exception will effective game management be able to continue. A refusal to do so invites uncontrollable exploitation

179. *Parms*, 523 So. 2d at 1296.

180. *Id.* at 1297 (citing *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976)), 1299 (citing *People v. Bartley*, 486 N.E.2d 880 (Ill. 1985)).

181. See the discussions of *Layton* (Illinois), *supra* note 61 and accompanying text; *Tourtillott* (Oregon), *supra* note 37 and accompanying text; and *Halverson* (South Dakota), *supra* note 45 and accompanying text.

of the finite natural resources that have come to depend on the abilities of government for their protection.

Donald C. Douglas, Jr.

