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TRENDS, ANALYSIS, PERSPECTIVE



ACLU Joins Boater's Case Against Suspicionless On-Water Searches

Fred Karash says that, right from the start, the whole thing felt like a shakedown.

He and four friends were cruising aboard his 23-foot boat on Lake Erie in May 2016 when he saw lights swirling and a Pennsylvania Fish & Boat Commission patrol vessel approaching.

"They said, 'Disengage your boat. We're going to come aboard and do a safety check,'" the 38-year-old Karash recalls. "I said, 'I don't need one,' and they said, 'Get ready for us to tie off and come aboard.' So I complied. I didn't feel that I had much of a choice."

Karash says he remembers at least three waterways conservation officers being there. He says one straddled the two boats while another came aboard and asked him to turn on his blowers and open the boat's engine compartment, perhaps looking for smuggled goods. Finding nothing out of order, Karash says, the officer on board his boat then asked to see his fire extinguisher. He was told to beep his horn. "Everything was working," Karash says.

Finally, Karash says, the officer asked him and his friends to hold up five wearable life jackets, one for each person aboard.

"We did, and I had more jackets and throwables on my boat," he says. "But he said, 'That one's not a wearable device.' It was a Type II. The Coast Guard-approved packet that comes with it, there are instructions on how to wear it, and it says that it's wearable."

Karash said the officer then disembarked back to the patrol vessel, untied it from the boat and told him and his friends to wait while a ticket was issued, for failure to carry enough life jackets.

"They pushed off," he says. "They went a good quarter-mile away. We were joking that they probably had high-tech listening devices to listen to us. I don't know if they were running my record or what. They said, 'Wait here, we'll be back with your ticket.'"

Karash and his friends were waiting so long, he said, that they took out fishing poles and dropped some hooks in the water. He figures they fished for at least a half hour while waiting for the officers to return. "And they already had my fishing license and my driver's license," he says.

The officers came back, he says, and told him that they could tow his boat ashore, but that instead, they would give him a loaner life jacket that he could return at a marina. They issued him a ticket with a \$75 fine, and they left.

A half-hour later, he says, the sun went down.

"It was a crappy end," he says, "to a beautiful day in May."

Now, two years later, Karash and the Commonwealth of Pennsylvania are both awaiting a Superior Court ruling about what happened that day on Lake Erie. An attorney with the American Civil Liberties Union of Pennsylvania is representing Karash, and the case could affect the way judges nationwide rule in similar cases when boaters feel their rights have been violated.

At issue is whether Karash was subject to a random, suspicionless search without a warrant, in violation of his rights not only under Pennsylvania's Constitution, but also under the U.S. Constitution.

Put another way: Is it legal for officers to stop and search any boat they want, whenever they want, wherever and however they feel like searching?

It's a question that boaters have asked for more than a generation, and not just when encountering state-level patrols. The U.S. Coast Guard also maintains the right, including in coastal waters, to board "any vessel, including kayaks, canoes and personal watercraft, at any time to ensure the safety of those aboard and others nearby."

In 1986, a national policy was announced to crack down on drug

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trafficking, and there were reports of USCG inspections increasing, with the agency saying its actions were based on a nearly 200-year-old statute upheld by the U.S. Supreme Court in 1983. In 1987, a Great Lakes sailor was featured in The New York Times for challenging a USCG safety inspection aboard his 32-foot boat, claiming the suspicionless search was unconstitutional.

"If the law gives them the right to stop boats and search them without cause," the boater told The Times, "then the law should be changed."

The law was not changed, and the argument remains — today, in the form of boaters like Karash, with lawyers in his case saying that Pennsylvania's Constitution provides stronger protection of personal liberty than even the U.S. Constitution does.

According to attorneys for both sides in Karash's case, 28 states now allow boating safety checks without probable cause, while 15 states require some level of suspicion before an officer can stop and board a boat; only four states, however, have seen their regulations challenged up to the appellate court level, producing rulings that judges in other states typically consider when cases come before them.

And in those appellate-level cases, the rulings are mixed. In Ohio and Oregon, judges ruled that suspicionless searches violate boaters' rights, while in Texas and Louisiana, the rulings went the other way.

"The question is whether Pennsylvania will be like the 28 states that will allow this, or do we go in the direction of the 15 states that require suspicion," says Wayne Melnick, acting chief counsel for the Pennsylvania Fish & Boat Commission.

Until Karash decided to fight his \$75 ticket, Pennsylvania's upper-level courts had never even been asked to rule on the matter, says his ACLU attorney, Sara Rose. After all, most people either don't know how to fight, or can't be bothered to hire an attorney to fight, a low-level fine.

"Who's going to hire a lawyer for a \$75 citation?" she says. "It would cost you 10 to 100 times as much as the citation."

Karash's \$75 ticket is called a summary offense, the lowest possible level in Pennsylvania, like a speeding ticket for an automobile driver. In fighting the summons, Karash at first was no different from everybody who's ever tried to win in local court after getting caught in a back-road speed trap.

But he's also a pediatric nurse who served as a medic in the U.S. Army from 2003-06, including 2½ years stationed in South Korea, and he saw a higher-level need to fight as well. He felt not only that he hadn't

committed any offense, but also that any evidence the officer might present against him in court was obtained during a search of his boat that violated the U.S. Constitution.

"I took an oath to that Constitution to protect against enemies foreign and domestic," he says. "That has to mean something. I signed a blank check, including giving my life, to protect these liberties, and I don't want to be at home and see them eroded."

Karash tried, at the first-level Magisterial District Court, to have the case tossed out. He had no lawyer and represented himself. He didn't argue about having enough life jackets or bring in witnesses to support his version of events; instead, he argued that the whole case should be dropped because the search of his boat was unconstitutional.

He lost, and appealed to Pennsylvania's Court of Common Pleas.

Where he promptly lost again.

"He tried to suppress the evidence from the search, the evidence of not having enough life jackets, by arguing that the search was unconstitutional," Rose says. "He did that at every level. But (to) those courts — this is just a \$75 citation. They're not thinking about the Constitution. It's not usually on their radar."

Karash kept fighting, next in Pennsylvania's Superior Court, which issued a decision from a three-judge panel. There, to many people's surprise, the average guy fighting the everyday PFD citation won.

That's when the Commonwealth appealed.

"Alarmed that the Superior Court decision would curtail their unfettered discretion to search any boat on Pennsylvania's waterways at any time," Rose wrote on the ACLU's website, the Commonwealth "asked the entire Superior Court to hear the case."

And that is where things stand today. The Commonwealth's appeal means that the three-judge panel's ruling has been eliminated, and a nine-judge panel is weighing the evidence anew, with a ruling from the larger body expected in the next six to 12 months.

In front of the nine-judge panel, Karash had the ACLU attorney helping him argue his bigger-picture points. The group reached out to Karash, Rose says, after being impressed by how far he'd gotten on his own.

"We thought it was an important Fourth Amendment issue," she says. "We knew that the state was going to be well represented, and we thought we'd try to level the playing field here."

The Commonwealth's argument, Melnick says, is that the law allows officers to stop and conduct a safety inspection of any boat without suspicion of wrongdoing. The law

in Pennsylvania has been clear on that point for decades, he says, with a goal of ensuring boater safety and conservation of resources.

"We've been doing things this way since the '80s," Melnick says. "This is the first time one of our safety inspections has been challenged like this."

The Commonwealth also has a financial reason to want to continue business as usual. Fines issued during stops like Karash's generate significant income for the Pennsylvania Fish & Boat Commission. According to the Pittsburgh Post-Gazette, the agency collected \$659,934 in fines and penalties during the 2016-17 fiscal year alone.

Rose says Karash's case also is likely to affect boaters far beyond Pennsylvania's borders. Judges in all 50 states are likely to take note of the Commonwealth's Superior Court ruling, she says, no matter which way it goes.

"While the Pennsylvania Superior Court decision would not be precedential to other states, if a challenge were to arise elsewhere, courts would take it into consideration," she says. "The three-judge panel considered other cases that had arisen in other states, and there is a split among the states. So the more courts that rule that these searches are unconstitutional, the more likely it is that courts in the next state will rule the same way."



ACLU attorney Sara Rose

The Pennsylvania case is so key to potentially tipping the nationwide judicial balance, Rose says, that if Karash loses this time around, the ACLU is likely to help him appeal to Pennsylvania's Supreme Court.

"We think it's an important issue," she says. "If the decision from the Superior Court says that there is no reason needed to stop and search a boat, we would probably want the Pennsylvania Supreme Court to review that."

Melnick — who told Soundings that Karash's version of events differs from that of the officer's, who "said he didn't even step foot on the boat" and that the entire episode "started off as a fishing license check"— said the case boils down to balancing "a legitimate governmental interest in boater safety versus a legitimate interest in privacy. The courts have acknowledged that both exist. There's a legitimate interest in making sure people have PFDs, for safety, and there's a legitimate interest in making sure people don't get harassed."

Karash, meanwhile, is sticking to his story and his case. He says his will to proceed is not about money; he doesn't stand to make any, even if he wins. He's spent about \$1,000 so far to avoid paying his original \$75 fine.

He's not so much angry as he is frustrated, he says, including by the fact that the Commonwealth is contradicting his version of what

An advertisement for Cutwater Boats. At the top, a stylized blue and white logo of a sail or wing is above the word "CUTWATER" in large, bold, white capital letters. Below this, in smaller white capital letters, is the tagline "THE WORLD'S FINEST SPORT CRUISERS". The main visual is a row of eight white sport cruisers parked on a wooden dock. Each boat has different equipment, including kayaks (yellow, red, blue, green) and various accessories. At the bottom of the ad, there is a row of logos: NMMO CERTIFIED (with a red checkmark), SUZUKI MARINE, YAMAHA, VOLVO PENTA, MADE IN USA, and a CE mark. To the right of these logos, the text "DISCOVER YOUR INNER EXPLORER AT:" is above the website "CutwaterBoats.com" in a large, white, sans-serif font.

happened aboard his boat.

"Cops change their stories all the time," Karash says. "That's not anything new. They're trained in what to do in order to get a conviction. They'll say they would never perjure themselves — that's not true. I was there. I know what happened."

Karash says his case is about where the line ultimately gets drawn in terms of personal liberty, a point that he and Rose say he has made by filing a half-dozen other cases in the Commonwealth as well.

"He's fought traffic tickets," she says. "He's fought other things. He is a person who stands up for his constitutional rights. Thank goodness for people like him."

Perhaps most ironically, Karash doesn't even have a likelihood of running into a waterways conservation officer ever again. He sold his boat, saying that his friends soured on the idea of going boating with him after that day, and that he needed money to take some time off and travel this summer — on land.

He says he just doesn't want what happened to him to happen to anybody else.

"They're saying that because you choose to operate a boat, you give up all your rights," he says. "What's the limit of that search? Can they make me pee in a cup? Draw my blood? Pull my hair

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follicles? Some neutral person has to interpret what's allowed and what the limitations are. He could've stopped me seven or eight times from noon till 8 o'clock and still be within his rights, and they're not doing anything about it."

Melnick says that as a practical matter, that kind of constant interaction with waterways conservation officers is unlikely.

However, he adds, there are times of year when officers do perform a high rate of suspicionless checks, and when boaters and

anglers simply accept them.

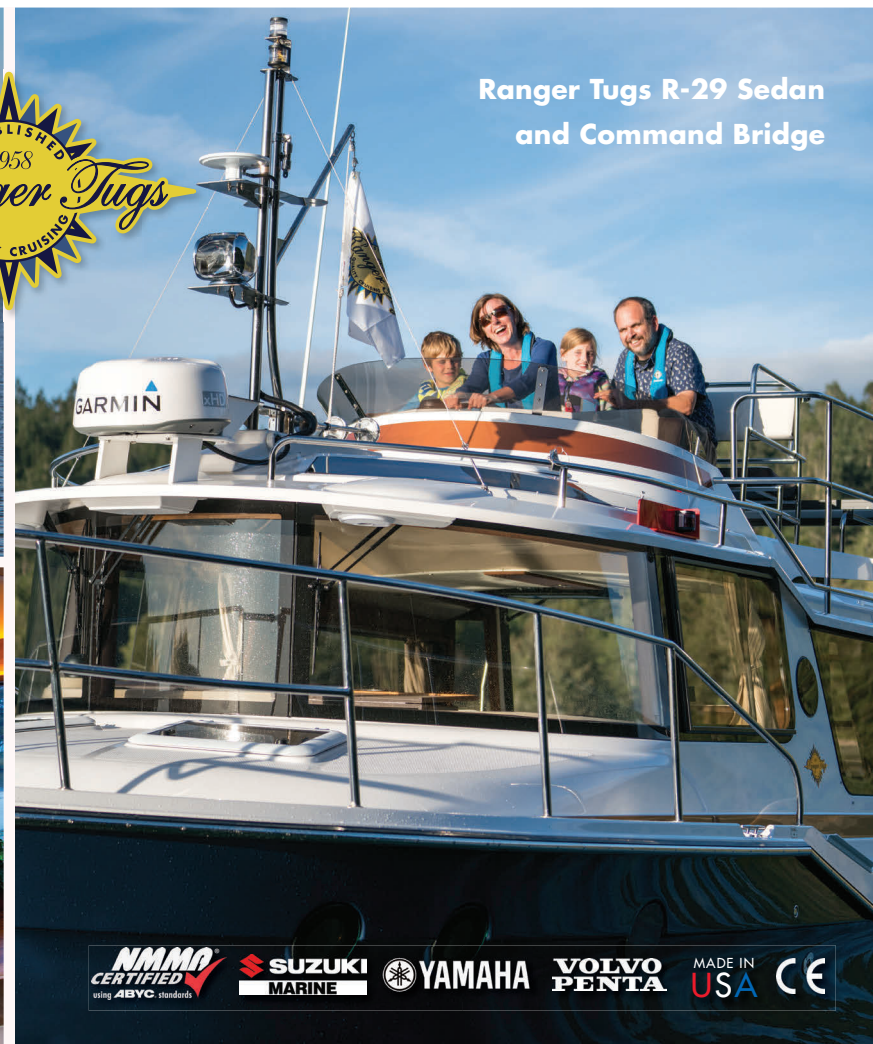
"We have less than 100 officers for the whole Commonwealth," Melnick says. "You won't see waterways conservation officers every day, but if you do see one when you're out fishing, they have the statutory right to check your license. The opening day of trout season is a big day when people get their licenses checked. You wear it on your hat or your shirt, and they see it and they move on."

Karash isn't thinking about those odds. He's thinking about his own scoreboard, which he describes with a laugh, in a way that sounds anything but funny.

"I'm 6-and-0 against the state right now," Karash says. "They'll figure it out soon enough." ■



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