Not Fit For Sea Duty: The Posse Comitatus Act, The United States Navy, and Federal Law Enforcement at Sea

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NOT FIT FOR SEA DUTY: THE POSSE COMITATUS ACT, THE UNITED STATES NAVY, AND FEDERAL LAW ENFORCEMENT AT SEA

The United States is about to face an unprecedented law enforcement challenge at sea. Already bedeviled by enormous problems in maritime resource protection, international narcotics smuggling and illegal waterborne immigration, the nation will soon enter an era of near-exponential growth in its need for a federal police presence afloat. This change in circumstances will result from inexorable advances in technology and from shifts in demographic reality.

One can trace most of the United States' maritime challenge to an international milieu in which the needs of an exploding world population cannot be offset by available resources.¹ As a consequence, accelerating competition for the sea's resources is inevitable.² At the same time, current ecological abuse of an increasingly overcrowded planet will necessitate more stringent environmental protection measures.³ Enforcement of those measures at sea will be

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¹ The United States Census Bureau projects that the world's population will grow by more than 35% by 2010. Most of that growth will take place in lesser developed regions at a rate five times that of the more developed world. United States Dep't of Commerce, Bureau of the Census, 108 Statistical Abstract of the United States 794 (1988).

² Studies claim that increases in the productivity of the world's arable land will not offset the overall growth in global population. See, e.g., 1 The Global 2000 Report to the President 3-4 (1980); Toufexis, Too Many Mouths, Time, Jan. 2, 1989, at 48-50. The world will likely turn to a much greater reliance on high seas fisheries, for example, as an essential source of its food. This increased fishing activity will necessitate a greater degree of governmental regulation, law enforcement and resource conservation efforts to ensure prudent and peaceful resource exploitation.

essential to preserve and protect the world's oceans. Regionally, greater economic and political difficulties, together with mushrooming populations in many neighboring nations, will produce a substantial increase in the number of immigrants attempting to enter the United States illegally by sea.

America's population will continue its shift to a life more situated toward the coastal environment. A coincident and increasingly wide gap between the nation's "haves" and "have-nots" will ensure that domestic criminal activity plagues this coastal population. In the offshore and oceanic regions of the world, American citizens will engage in more distant and extensive commercial, social and recreational activity on, under and over the seas. Not only will this increased level of American maritime activity necessitate expanded regulation and policing by the United States Government, it also will require physical protection from the depredations of a disaffected international criminal element. Finally, until the


5. This forecast applies with equal force to the nations of Central America, South America and the Caribbean. 1 THE GLOBAL 2000 REPORT TO THE PRESIDENT 1-2 (1980); Gardner, The Case for Practical Internationalism, 66 FOREIGN AFFAIRS 827, 831 (1988). Mexico, for example, is saddled with a galloping inflation rate, a staggering foreign debt, growing political dissension and a strikingly unequal distribution of wealth. Ratliff, The Future of Latin-American Insurgencies, in LATIN AMERICAN INSURGENCIES 161, 185 (F. Georges ed. 1986); Lake, Mexico On the Brink, NAT'L REV., Jun. 10, 1988, at 30, 31. Merely to maintain the status quo, Mexico would have to create more than one million new jobs every year. Chace, A New Grand Strategy, 70 FOREIGN POL'Y 3, 22 (1988).


7. United States demographic patterns portend a national environment in which a substantial and widening gap exists between a major population segment that is aging, white, well-educated and relatively well-off, and an equally significant segment that is increasingly young, ethnic, poorly educated and economically disadvantaged. Demographic Changes in the United States: The Economic and Social Consequences into the Twenty-first Century, Hearings Before the Subcomm. on Economic Resources, Competitiveness, and Security Economics of the Joint Economic Comm., 99th Cong., 2d Sess. 257 (1986). This is a classic recipe for societal disorder. A sharp increase in criminal activity is almost certain to result. Experience confirms that Americans take crime with them when they go to sea.

8. See Stavridis, Resource Wars, 983 U.S. NAVAL INST. PROC. 72 (1985) (suggesting that on the high seas the United States Navy may soon need to function as did the United States Army's cavalry in the American West, protecting scattered outposts of civilization in a barren and hostile environment).
United States repeals its current federal narcotics legislation, the massive drug smuggling problem at sea will continue to challenge maritime law enforcement.9

Traditionally, the United States Coast Guard has performed the nation's high seas law enforcement functions.10 Today, however, the volume and scope of the Coast Guard's duties tax its ability to police the seas.11 Expanded high seas law enforcement duties in the future will likely be more than the Coast Guard can handle.

One obvious solution to the need for an expanded law enforcement presence at sea is the United States Navy. With a fleet of more than 500 ships, more than one-half million officers and enlisted personnel, and a worldwide maritime surveillance, tracking and communications network, the Navy has the capability to enhance substantially the nation's high seas law enforcement efforts.12 Recently, however, courts and commentators have raised questions regarding the legality of employing the Navy to enforce federal civilian law.13

10. In 1790, Congress created the Coast Guard's predecessor, the United States Revenue Marine, to assist in enforcing the country's customs laws. In the nearly two centuries since, the Coast Guard has remained the primary maritime police force of the United States Government. See generally R. JOHNSON, GUARDIANS OF THE SEA (1987).
11. Law enforcement is only one of the Coast Guard's three principal missions, the other two being search and rescue, and military readiness. Beyond these three primary missions are a plethora of secondary duties that occupy an enormous amount of the Service's time and effort. DEP'T OF TRANSPORTATION, UNITED STATES COAST GUARD, COMMUNITY RELATIONS BRANCH, THE COAST GUARD, AN OVERVIEW (1986) [hereinafter THE COAST GUARD, AN OVERVIEW]. To carry out its duties, the Coast Guard can only call upon a force of some 37,000 active duty servicemen and a fleet of fifty seagoing ships. Id. at 6, 16. Moreover, despite a considerable expansion in the Coast Guard's workload over the past several years, the Service's budget has suffered a prolonged decline. See infra note 229. The prospect of a significant turnaround in the future is not very good. Id.
12. JANE'S FIGHTING SHIPS 1989-90 690-91 (R. Sharpe ed. 1989). If the personnel strength of the Marine Corps is included in this assessment, the overall size of the Navy swells to more than 750,000 officers and enlisted personnel. Id.
The Posse Comitatus Act of 1878 is the principal basis for contemporary legal challenge to the Navy's civilian law enforcement authority. A century-old relic of the nation's failed experiment with Radical Reconstruction, this re-invigorated legislation does not mention the Navy when it restricts use of certain branches of the United States armed forces for civilian law enforcement. Although not long ago the judiciary characterized it as both "obscure and all-but-forgotten," the statute has become a major factor in the conduct of the Navy's contemporary law enforcement activity at sea. The Act is criminally proscriptive in nature and is aimed directly at limiting Army and Air Force involvement in law enforcement. Application of the Act to the Navy would hobble United States Government efforts to police the oceans of the world—an unnecessary and undesirable outcome.

Note, Don't Call Out the Marines: An Assessment of the Posse Comitatus Act, 13 Tex. Tech. L. Rev. 1467 (1982) [hereinafter Note, Don't Call Out the Marines].

14. Ch. 263, § 15, 20 Stat. 145, 152 (codified as amended at 18 U.S.C. § 1385 (1988)). The Act states: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both." Id. A posse comitatus refers to the body of citizens pressed into service by the normal civilian law enforcement authority of a given jurisdiction (typically a county sheriff or federal marshall) to assist in the enforcement of the law. See infra note 96.


This Note considers first the propriety of applying the Act's limitations to the Navy's enforcement of civilian law at sea. The Act does not proscribe indirect assistance in enforcing the law. Consequently, this discussion will focus primarily on the legality of direct enforcement activity—searches, seizures and arrests. The Note further examines only naval activity conducted on, over or under international waters because applying the Act to naval units and personnel operating within United States' territory is sufficiently analogous to the situation the Army and Air Force face under the statute, and has been sufficiently treated elsewhere. Finally, the Note recommends alternatives for resolving today's uncertainty surrounding the Posse Comitatus Act, maximizing the United States' law enforcement effectiveness at sea, and protecting civil liberties.

THE CONSTITUTIONAL QUESTION

Use of the Armed Forces to Enforce Civilian Law

The framers of the Constitution were determined to limit the military's role in civilian life after experiencing the unpopular use of British troops to maintain order in the American colonies during the decade prior to independence. An intense distrust of standing armies permeated the former colonists' lives and found expression in a number of contemporary political writings. For example, the Declaration of Independence complained of military interference

20. For purposes of this discussion and unless otherwise indicated, the term "Navy" refers to both the United States Navy and members of the United States Marine Corps serving with naval units at sea. Although the Marine Corps is unquestionably a part of the Navy Department and, like the Navy, is not mentioned specifically in the language of the Posse Comitatus Act, the distinctions between Marine Corps personnel serving ashore and United States Army soldiers are relatively minor, and most of the legal limitations affecting the enforcement activity of the latter would probably apply to the former as well.

21. See infra notes 117-20 and accompanying text.

22. See, e.g., Furman, Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act, 7 MIL. L. REV. 85, 91-92 (1960); Meeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 MIL. L. REV. 83, (1975); Note, Recent Developments Relating to the Posse Comitatus Act, 1983 ARMY LAW. L.

23. See Meeks, supra note 22, at 86-87; see also J. GARRATY, THE AMERICAN NATION 84 (1966) (British military interference in the colonists' lives, especially in New England, was a major factor in the move towards independence); 1 SOURCES OF THE AMERICAN REPUBLIC 127 (1960).
in civilian affairs,\textsuperscript{24} and a number of state constitutions subsequently included proscriptions on the use of military force against civilians.\textsuperscript{25} The new nation's Articles of Confederation also prohibited the maintenance of most organized armed forces in time of peace.\textsuperscript{26}

The Constitution reflects a general concern about potential dangers associated with a standing army. The document creates a scheme in which the armed forces must answer to a civilian commander in chief;\textsuperscript{27} Congress possesses exclusive control over key factors relating to the military's maintenance and use;\textsuperscript{28} the population at large may bear arms;\textsuperscript{29} troops may not be quartered in civilian homes in time of peace;\textsuperscript{30} a strong citizen militia is encouraged;\textsuperscript{31} and the militia alone is expressly empowered to assist in enforcing the laws of the nation.\textsuperscript{32} Moreover, in urging ratification of the Constitution, one of its principal authors, Alexander Hamilton, stressed the document's capacity to keep the nation's military forces from playing a deleterious role in the day-to-day operation of peacetime civil society.\textsuperscript{33}

In spite of the framers' desire to hold the nation's military power in check, they did not prohibit use of the Army and Navy in enforcing the law of the land. Although the Constitution specifically gives responsibility for faithfully executing the laws of the United States to the commander in chief,\textsuperscript{34} it places no express limitation on his ability to employ the military in discharging his law enforcement obligation.\textsuperscript{35} The Constitution's ink was barely dry before
President George Washington led a contingent of federalized troops into Western Pennsylvania to enforce compliance with the United States' revenue laws. Although this provoked political debate at the time, the constitutionality of Washington's action appears to have gone essentially unquestioned.

Americans have long accepted presidential use of either federal troops or federalized militia to restore order and enforce the law in times of crisis. Most view this expedient as a legitimate exercise of the chief executive's constitutional power. Indeed, essentially the same body of men that created the Constitution specifically.

TION AND WHAT IT MEANS TODAY 191-92 (1978) (noting that the President has constitutional authority to take all measures necessary to ensure that domestic order is maintained and that the law is enforced); Furman, supra note 22, at 91-92 (stating that the President has implicit constitutional authority to use the armed forces as needed to enforce the law of the land). Former President and Chief Justice of the United States William Howard Taft once observed that

[the President is made Commander-in-Chief of the army and navy by the Constitution evidently for the purpose of enabling him to . . . take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the army for [this purpose], the action would be void . . . .] He is to maintain the peace of the United States. I think he would have this power under the Constitution even if Congress had not given him express authority to this end.

W. Taft, OUR CHIEF MAGISTRATE AND HIS POWERS 128-29 (1916).

36. The ill-fated Whiskey Rebellion of 1794 provided the occasion for this exercise of the military's law enforcement power. Pennsylvania farmers refused to pay a federal tax on distilled spirits and then threatened federal revenue officers sent to the region to collect the tax. Aided by a judicial determination that the regular civil authority was no longer able to enforce the law, President Washington determined that the farmers' actions rose to the level of rebellion against the United States Government. The nation's tiny regular army was engaged in fighting Indians farther to the west and was unavailable for additional duty. Relying on the inherent power of his office and the authority granted him by the Militia Act of 1792, Washington took nearly 13,000 federalized militiamen into the state to bring the delinquent taxpayers to justice. Interestingly enough, this law enforcing "Army of the Constitution" represented the largest military force that George Washington ever commanded in the field. J. Miller, THE FEDERALIST ERA 157-59 (1960); R. Weigley, HISTORY OF THE UNITED STATES ARMY 100-01 (1967). See generally L. Baldwin, WHISKEY REBELS (1939).

37. See Baldwin, supra note 36, at 259-72.

38. See THE MILITARY IN AMERICAN SOCIETY 1-36 to 1-44 (1978); Furman, supra note 22, at 87-92, 127 (discussing the frequency and acknowledged propriety of employing federal troops in this role); see also Engdahl, THE NEW CIVIL DISTURBANCE REGULATIONS: THE THREAT OF MILITARY INTERVENTION, 49 IND. L.J. 582, 583-96 (1982) (examining the law allowing use of federal troops in this role and, while questioning its constitutionality, acknowledging the popular acceptance of the practice and noting the virtual absence of calls for judicial scrutiny of it).

39. See sources listed supra note 38.
allowed for this contingency when it passed the Militia Act of 1792.\textsuperscript{40} Today, that Act's legislative progeny empowers the commander in chief to use the armed forces to both assist state governments\textsuperscript{41} and enforce federal law\textsuperscript{42} when regular civil authorities cannot effectively carry out their own law enforcement duties.\textsuperscript{43} To date, American presidents have exercised this discretionary power on at least thirty-two separate occasions.\textsuperscript{44} Moreover, the United

\textsuperscript{40} Technically, the Act of 1792 provided for aiding the states only through use of a federalized militia. Militia Act of 1792, ch. 28, 1 Stat. 264 (current version at 10 U.S.C. § 331 (1982)). No interpretive significance can be attached to omission of the regular army from the Act because that force was so small at the time. Furman, supra note 22, at 88 (citing Corwin, The President: Offices and Powers 1787-1957 131 (1957)); see Engdahl, supra note 25, at 12. Because Washington employed militiamen to quell the Whiskey Rebellion, contemporary Philadelphians concluded that the insurrection would "establish the principle that a standing army was necessary for enforcing the laws." Baldwin, supra note 36, at 112 (quoting Madison). Consequently, Congress modified the Militia Act, amending the statute to include specifically the regular "land or naval force" of the nation as well. Militia Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. § 331 (1988)).

\textsuperscript{41} 10 U.S.C. § 331 (1988). The most recent amendment to this section of the Code substituted "armed forces" for "land or naval forces" of the United States. Act of Aug. 10, 1956, Pub. L. No. 1028, ch. 1041, 70A Stat. 15. In all other relevant respects, this section is unchanged from the original statute of 1792.

\textsuperscript{42} 10 U.S.C. § 332 (1988). Unlike the provision for aiding state governments in times of domestic strife, Congress did not revise the language of this section to provide specifically for use of the "land and naval forces" of the United States until the outset of the Civil War. Act of July 29, 1861, ch. 25, 12 Stat. 281 (1861). As with the preceding section of the Code, that language was ultimately revised to refer to the nation's "armed forces." Act of Aug. 10, 1956, Pub. L. No. 1028, ch. 1041, 70A Stat. 15 (1956); see 50 U.S.C. § 220 (1982) (a Civil War-era statute that provides specifically for armed forces' assistance in enforcing customs laws in time of rebellion or civil disorder).

\textsuperscript{43} So strong is the general acceptance of this practice that even the debates surrounding the Posse Comitatus Act did little to shake either the popular or official conviction that such use of federal troops falls within the scope of the President's constitutional grant of authority. In fact, President Rutherford B. Hayes planned to use this enforcement power to put down yet another whiskey rebellion, this time in South Carolina, within weeks of the Posse Comitatus Act's enactment. T. Williams, Hayes, The Diary of a President 155 (1964). Less than four months later, Hayes ordered federal troops into New Mexico to enforce judicial process. Furman, supra note 22, at 97.

\textsuperscript{44} The Military in American Society 1-42 (1978) (This figure represents the number of instances in which the President has issued a Proclamation to Disperse pursuant to 10 U.S.C. § 334 (1988) in immediate anticipation of committing federal troops or federalized militia to restore local order in a time of civil strife.). But see The General Service Schools, Military Aid to the Civil Power 185 (1925) ("From the adoption of the Constitution to the present time [1925], federal troops have been used in the suppression of domestic disturbances on more than a hundred separate occasions.").
States Supreme Court eliminated any doubt as to the constitutionality of the practice a century ago.  

Congress has often authorized use of the nation's armed forces to either enforce or assist in the enforcement of a wide range of federal "civilian" laws. Today, these statutory grants of military enforcement power include protecting and assisting the investigation of crimes against foreign diplomats and high government officials, protecting Indian and public lands, supporting the nation's neutrality, enforcing health and quarantine laws, assisting in the enforcement of offshore fisheries laws, executing warrants relating to enforcement of federal civil rights legislation, and even protecting the rights of the discoverer of a guano island. Despite the considerable diversity of this legislation's subject matter and its enactment at intervals over most of the nation's history, no significant constitutional challenge to the military enforcement

45. See In re Neagle, 135 U.S. 1, 63-64 (1890).
52. 48 U.S.C. § 1418 (1982). Not only may the discoverer of such an island be protected at the President's discretion by the full might of the United States armed forces, but protection is extended to the discoverer's widow and heirs as well Id.
53. For example, the health and quarantine provisions derived from an eighteenth century statute (Act of Feb. 25, 1799, ch. 12, 1 Stat. 619), the civil rights enforcement power was provided for in a mid-nineteenth century statute (Act of Apr. 9, 1866, ch. 31, 14 Stat. 28), authorization to use federal troops to protect Yosemite and Sequoia National Parks originated at the outset of this century (Act of June 6, 1900, ch. 791, 31 Stat. 618), and provision for using military resources to assist in enforcing federal fishing regulations was enacted little more than a decade ago (The Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1861 (1982)).
provisions has ever arisen.\textsuperscript{54} Even when finding a violation of the Posse Comitatus Act, one federal court of appeals conceded that "the policy consideration underlying the ... Act is not absolute."\textsuperscript{55} Only recently has the issue of using military resources to enforce federal civilian law come under constitutional scrutiny.\textsuperscript{56} The origin of this nascent debate is found in the Supreme Court's consideration of a Vietnam-era first amendment case, \textit{Laird v. Tatum}.\textsuperscript{57}

In \textit{Tatum}, the Court addressed a situation involving the Army's domestic gathering of intelligence in the late 1960s.\textsuperscript{58} Although the Court determined that no constitutional violation existed, it nevertheless commented in dictum that military involvement in civilian affairs was a matter of grave concern.\textsuperscript{59} In particular, the Court noted that American resistance to military intrusion in civilian life had "deep roots in our history," and found early expression in both the third amendment and the Constitution's provisions for civilian control of the military.\textsuperscript{60} In a spirited dissent, Justice Douglas observed that the Constitution distinguishes clearly between the use of militia and regular troops in enforcing the law, and that the framers intended the former to be used only for that purpose.\textsuperscript{61}

\textsuperscript{54} The only challenges raised have been directed at the provisions concerning the neutrality laws. \textit{See supra} note 48. Even then, federal courts found no bar to the reasonable exercise of this power. In 1818, the Supreme Court opined that the authority to use land or naval forces for enforcement of the predecessor of 22 U.S.C. § 461 existed only when the civil authority was unable to enforce the law. Gelston \textit{v. Hoyt}, 16 U.S. (3 Wheat.) 246, 331-33 (1818). In 1912, a federal district court found that the military had overstepped its bounds as provided for in the predecessor of 22 U.S.C. § 462 when it failed to turn a civilian suspect over to civilian authorities within a reasonable time after his warrantless arrest. \textit{Ex parte Orozco}, 201 F. 106, 112 (W.D. Tex. 1912).


\textsuperscript{56} As recently as 1982, the United States Department of Justice stated that no constitutional basis existed for requiring a separation of military and civilian law enforcement activity. Zimmerman, \textit{Posse Comitatus: A New Law Lifts the Ban On Military Participation in Anti-Drug Smuggling Operations}, 9 \textit{Drug Enforcement} 17, 18 (1982).

\textsuperscript{57} 408 U.S. 1 (1972). Legal commentators had not previously dwelled upon the issue to any great extent. For example, prior to the 1972 \textit{Tatum} case, the only significant examination of the issue in light of the Posse Comitatus Act's statutory limitations disregarded the existence of any constitutional dimension to the matter. Furman, \textit{supra} note 22, at 87-92.

\textsuperscript{58} \textit{Tatum}, 408 U.S. at 2-3.

\textsuperscript{59} \textit{Id.} at 15-16.

\textsuperscript{60} \textit{Id.} at 15; \textit{see supra} notes 27-32 and accompanying text.

\textsuperscript{61} \textit{Tatum}, 408 U.S. at 16-24 (Douglas, J., dissenting). In making his point, Douglas quoted framer Luther Martin saying "'when a government wishes to deprive its citizens of
More than a decade passed before Tatum’s dictum bore substantial juridical fruit. That occasion came in a 1985 Eighth Circuit case, Bissonette v. Haig, 62 that grew out of the 1973 occupation of the Indian reservation at Wounded Knee, South Dakota. Once again, the Army’s involvement in civilian affairs was at issue. 63 This time, however, the court concluded that the issue of military participation in civilian law enforcement activity rose to a constitutional level of concern. 64 Expanding on the Supreme Court’s dictum in Tatum, the Court of Appeals for the Eighth Circuit determined that such conduct potentially imperiled first, fourth and fifth amendment personal freedoms. 65 Nevertheless, the court ultimately decided that no constitutional transgression had occurred. 66

The balance of the federal bench’s opinions does not reflect the Eighth Circuit’s willingness to find a constitutional dimension to the question of military enforcement of civilian laws. On the one hand, in United States v. Gerena, 67 a federal district court cited freedom, and reduce them to slavery, it generally makes use of a standing army.” 62 Id. at 18 (Douglas, J., dissenting). This danger, Douglas warned, “exists not only in bold acts of usurpation of power, but also in gradual encroachments.” 63 Id. (Douglas, J., dissenting).

62. 776 F.2d 1384 (8th Cir. 1985), aff’d on rehearing, 800 F.2d 812 (8th Cir. 1986) (en banc), aff’d, 485 U.S. 264 (1988).

63. The defense alleged that a violation of the Posse Comitatus Act had taken place. Id. at 1385-86. At Wounded Knee, the Army provided and maintained equipment loaned to civilian law enforcement agencies, provided an aerial surveillance flight, and offered technical and tactical advice concerning how the civilian agencies might best resolve the confrontation. See United States v. Red Feather, 392 F. Supp. 916, 921 (D.S.D. 1975); United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974), dismissed, 510 F.2d 808 (8th Cir. 1975).

64. Bissonette, 776 F.2d at 1387.

65. “[M]ilitary enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote.” Id. The court in Bissonette ignored the possibility that military personnel could be trained to uphold the individual civil rights cited. Note, A Proposal for Direct Use, supra note 18, at 302 n.92. This omission represents a significant gap in the court’s logic.

66. To reach this conclusion, the court fashioned a two-part test to determine whether an unreasonable interference with civilians’ rights had taken place. Bissonette, 776 F.2d at 1389. This approach departed sharply from a history of interest-balancing to determine the constitutional reasonableness of government conduct. See Note, Fourth Amendment, supra note 13, at 430-31.

67. 649 F. Supp. 1179 (D. Conn. 1986) (involving the use of Navy helicopters and two Air Force bases to facilitate the transfer of a politically sensitive federal prisoner and his Marshal’s Service custodians from Puerto Rico to Connecticut).
Bissonette with approval,\(^{68}\) agreeing that questions concerning the armed forces' enforcement activity in the civilian community involved a constitutional interest in "maintaining a society free from military dominance."\(^{69}\) On the other hand, a number of other circuits remain unconvinced, however. In the past six years, the First,\(^{70}\) Fourth,\(^{71}\) Fifth\(^{72}\) and Ninth\(^{73}\) Circuit Courts of Appeals have all considered cases involving military law enforcement, but none discussed the issue in constitutional terms.\(^{74}\) At most, therefore, the use of military resources to enforce civilian law can be described as a developing but unsettled area of constitutional law.

**The Special Case of the Navy**

Even assuming that the Constitution limits the United States armed forces' ability to enforce civilian law, no compelling reason exists to extend such a limitation to United States Navy units operating on, over or under the high seas.\(^{75}\) The framers of the Constitution contemplated that the few dangers inherent in a standing navy were distinct from and far less significant than the hazards associated with the creation and maintenance of a military force ashore.\(^{76}\) Then, just as now, Americans viewed the existence of a sizable permanent navy as more of a threat to economic well-being

\(^{68}\) Id. at 1182.

\(^{69}\) Id. at 1183. Like Bissonette, the court in Gerena conceded that "not every military involvement rises to the level of constitutional ignominy," id. at 1182, and determined that no constitutional violation had occurred. Id. at 1183.


\(^{71}\) United States v. Griley, 814 F.2d 967 (4th Cir. 1987).

\(^{72}\) United States v. Hartley, 796 F.2d 112 (5th Cir. 1986).

\(^{73}\) Showengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987).

\(^{74}\) See United States v. Cotten, 471 F.2d 744, 749 (9th Cir.) (in which the court commented on the "novel[ty]" of an argument that a violation of the Posse Comitatus Act might violate the accused's constitutional rights), cert. denied, 411 U.S. 936 (1973).

\(^{75}\) By definition, the term "high seas" refers to waters outside the territorial limits of any state. B. Brittin & L. Watson, International Law for Seagoing Officers 121 (1981).

\(^{76}\) The framers distinguished between the two by limiting appropriations for the Army to no more than two years, but placing no similar limit on the expenditure of funds "to provide and maintain a navy." U.S. Const. art. I, § 8, cls. 12-13. Moreover, [in] reviewing the work of the Constitutional Convention one finds no trace of a discussion of naval power apart from the general war power. There was a good deal of debate which was concerned with the danger to popular liberty from a standing army or from the abuse of state militia by the proposed fed-
and international peace than to individual liberty or democracy. Moreover, navies traditionally enforced the laws of a sovereign state at sea. Far from objecting to the new American nation's continuation of this practice, both the framers and their immediate successors embraced the idea of using the Navy to enforce civilian laws and encouraged its application.

Significantly, the concept of a popular militia pervades the Constitution and most discussions of the American military's constit-

eral government, but no one cited a standing navy as a menace to the liberty of the whole people.


The principal reason for the divergent views of the different branches of the service was that navies, by their nature, were unable to intervene in domestic politics or to threaten personal liberties ashore. Madison, for example, wrote that he was especially pleased that the new nation's primary means of defense would be a strong navy because its batteries could never be used by the government to endanger fundamental American freedoms. The naval clause of the Constitution, Madison noted, had not excited the kind of opposition that seemed to trouble the rest of the document. W. Millis, Arms and Men 49-50 (1956). See generally J. Reid, In Defiance of the Law (1981) (discussing the colonial era standing army controversy against the backdrop of both the English and American constitutions).

77. S. Huntington, The Soldier and the State 156 (1957); see Smelser, supra note 76, at 17 (Opponents to an unlimited power to maintain a navy at the Constitutional Convention objected to the clause on the very different grounds that "[i]t would . . . arouse European nations against the United States," and because "the United States could not afford a navy.").

78. See infra notes 192-96 and accompanying text. In fact, Great Britain intensively employed ships of the Royal Navy to enforce the English revenue laws in the period prior to America's independence. See generally T. Barrow, Trade and Empire (1967). Nevertheless, unlike the case in which British troops were present in American civilian life, the literature of the colonial period and the constitutional debates that followed are virtually silent regarding the propriety of a navy engaged in law enforcement work offshore. See supra notes 23, 76 and accompanying text.

79. Among the first acts of the framer-dominated Congress under the Constitution was passage of the Revenue Act of 1789. Revenue Act of 1789, ch. 5, 1 Stat. 29. Although the nation possessed no navy at the time, the Act authorized the appointment of "naval officer[s]" as officers of the customs in various American ports and empowered them to enforce the revenue laws of the United States. Id., 1 Stat. at 43. A year later—and in the continued absence of a national navy—the same body passed the Revenue Act of 1790, which authorized the creation of a force of revenue cutters for the enforcement of customs laws afloat. Revenue Act of 1790, ch. 35, § 62, 1 Stat. 145, 175. Accordingly, almost at the outset of the nation under the Constitution, Congress established a federal maritime scheme in which the nation's only "navy" was assigned civilian law enforcement activity as one of its primary organizational duties.

tutional role in civil society.\textsuperscript{81} Those who see a constitutional limit on the use of federal military resources to enforce civilian law ground much of their belief in the framers' preference for the use of state militiamen.\textsuperscript{82} Although the country's militia survives today in the form of the Army and Air Force National Guards, no analogous system of state naval forces remains.\textsuperscript{83} Even if such a system existed, it would be inapplicable to the enforcement issue on the high seas. The \textit{raison d'etre} of a state militia is the defense of the territorial integrity and domestic order of its respective state.\textsuperscript{84} The high seas, however, are located outside the territory of any of the states.\textsuperscript{85} Because the framers envisioned the occasional need for some military enforcement of the nation's laws,\textsuperscript{86} the nation's Navy, at the very least, should be authorized to perform that function at sea as the natural substitute for the analogous use of state militia forces ashore.

The Constitution authorizes the use of military resources to enforce the law when civil authorities are unable to cope with the challenge.\textsuperscript{87} This authorization is particularly relevant in determining the Navy's high seas enforcement role because civilian law enforcement activity generally stops at the boundaries of the nation's

\textsuperscript{81} See, e.g., \textit{Military Intervention in Democratic Societies} (1985); Furman, \textit{supra} note 22, at 100-02; Meeks, \textit{supra} note 22, at 88; Seimer & Effron, \textit{Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act}, 54 ST. JOHN'S L. REV. 1, 24 n.106 (1979); Note, \textit{A Proposal for Direct Use}, \textit{supra} note 18, at 293-94.

\textsuperscript{82} See sources listed \textit{supra} note 81; see also Laird v. Tatum, 408 U.S. 1, 16-24 (1972) (Douglas, J., dissenting) (distinguishing the militia from the armed forces and arguing that the Army's surveillance of citizens' political activity was unconstitutional).

\textsuperscript{83} The absence of a naval militia has been a fairly constant feature of American military history. Although a number of state naval militias were created around the turn of this century, Congress legislated virtually all of them out of existence during the First World War. Most of the defunct militias' membership joined the new United States Naval Reserve. See Akers, \textit{The Groundwork for Today's Naval Reserve}, 434 U.S. NAVAL INST. PROC. 494-500 (1939). Today, naval militias exist only in New York and Alaska, where they are employed principally in disaster relief work ashore. Telephone interview with Commander Tom Straugh, Commanding Officer, Alaska Naval Militia (July 3, 1989); Telephone interview with Mr. Charles Carrol, Personnel Coordinator, New York Naval Militia (July 5, 1989).

\textsuperscript{84} \textit{See generally} S. HUNTINGTON, \textit{supra} note 77, at 169-73.

\textsuperscript{85} \textit{See supra} note 75.

\textsuperscript{86} \textit{See} U.S. CONST. art. I, § 8, cl. 15.

\textsuperscript{87} \textit{See supra} notes 41-45 and accompanying text.
No comprehensive civil authority exists that would be supplanted by Navy law enforcement activity carried out more than three miles offshore. On the contrary, the exclusion of naval units from active law enforcement at sea converts the oceans' surface into a kind of legal "no man's land," in which the enforcement of United States law is the exception instead of the rule. Any constitutional concern regarding military enforcement activity's displacement of its civil counterpart therefore is inapplicable to the Navy's work performed on the high seas.

No credible constitutional challenge arises from using the Navy to enforce civilian law on the high seas. The Constitution offers no prohibition of such activity. Instead, the document implicitly authorizes use of the Navy in civilian law enforcement. The framers accepted this idea without significant objection, and no major policy reasons have arisen since to undermine the validity of their determination. Consequently, the only meaningful legal impediments to a high seas Navy enforcement power must emerge from either federal statutory law or public policy concerns.

THE STATUTORY QUESTION

The Posse Comitatus Act of 1878

The most significant legal impediment to the Navy's enforcement of civilian law at sea is the Posse Comitatus Act of 1878.

88. See Seimer & Effron, supra note 81, at 54.
89. Ashore, closeness of society results in crimes being observed and reported almost as they occur. The same cannot be said of crimes taking place on the unpopulated reaches of the high seas. The immense geographic challenges implicit in the situation are overwhelming and seaborne criminal activity may go undiscovered or unpunished as a result.
90. See infra notes 143-48 and accompanying text.
91. See supra notes 34-35 and accompanying text.

Prior to the amendments since 1981, see supra note 15, Congress had amended the Posse Comitatus Act on three occasions: Act of June 6, 1900, ch. 786, § 29, 31 Stat. 321, 330 (excluding the territory of Alaska from the operation of the Act); Reenacted Act of Aug. 10, 1956, Pub. L. No. 84-1028, § 18(a), 70A Stat. 626 (including the United States Air Force upon its separation from the Army—the Air Force was separated from the Army in the National Security Act of 1947, ch. 343, §§ 207, 208, 61 Stat. 495, 502); and Alaska Omnibus
Nevertheless, this statute's origin did not involve the nation's Navy, nor did the legislators' enacting the measure indicate an intent to bind the Navy.\textsuperscript{93} Even if such an intention existed, no evidence supports a belief that the Act's limitations apply to naval units operating on the high seas.\textsuperscript{94} Instead, the Navy's principal hurdle to law enforcement at sea is an executive \textit{policy determination} that extends the otherwise inapplicable Posse Comitatus Act's proscriptions to the Navy.\textsuperscript{95} This possible restriction of Navy law enforcement, therefore, is largely attributable to the Navy's own implementation of the policy determination, not congressional action.

The common law historically supported employing a posse comitatus to assist in law enforcement.\textsuperscript{96} The Judiciary Act of 1789\textsuperscript{97} continued the practice in the United States. Although the Act is silent on employing the military as part of the posses it authorized, American jurists and scholars generally accepted this power as implicit in the statute's language.\textsuperscript{98} In any event, using American soldiers and sailors as members of numerous posses comitatus was a common feature of the United States' early legal history.\textsuperscript{99}

Not until the period immediately before the American Civil War did popular objection to the use of troops for law enforcement pur-
poses warrant even an abortive legislative response.\textsuperscript{100} Later, perceived military excesses in the years of Reconstruction inflamed the same passions.\textsuperscript{101} Consequently, in 1877 and 1878, legislation limiting the Army’s power to enforce the law appeared again on the congressional agenda.\textsuperscript{102} The primary motivation behind both of these initiatives concerned Army law enforcement activities.\textsuperscript{103} The debates surrounding the 1878 measure focused on the dangers associated with the Army’s intrusion into civilian affairs.\textsuperscript{104} Consequently, the Posse Comitatus Act, the result of these deliberations, addressed only Army activity.\textsuperscript{105}

\textsuperscript{100} In response to the use of the Army to suppress the “Kansas disorders” of the 1850s, some congressmen tried to amend the Army Appropriation Act of 1856 to prohibit the employment of any part of the military force in a posse comitatus. See Cong. Globe, 34th Cong., 2d Sess. 59 (1856); see also U.S. General Service Schools, Military Aid to the Civil Power 187-89 (1925) (a brief discussion of the Army’s law enforcement activity in Kansas from 1854-58).

\textsuperscript{101} See infra notes 102-03.

\textsuperscript{102} The 1877 legislation, like that of 1856 and 1878, was proposed as a rider to the routine Army Appropriation Bill. The language of the 1877 measure differed from that of 1878 in that it was much more narrowly drawn and focused primarily upon use of the Army to keep pretenders in positions of governmental authority within the reconstructed South. See 5 Cong. Rec. 2152 (1877). Nevertheless, the debates surrounding both this failed amendment and the appropriation bill itself indicate that a number of the legislators were eager to limit the Army’s law enforcement power on a much more general level. See Seimer & Effron, supra note 81, at 19-24. On May 20, 1878, Congressman Kimmel proposed to amend the year’s Army Appropriation Act by providing that “it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a posse comitatus or otherwise, except in such cases as may be expressly authorized by an act of Congress.” 7 Cong. Rec. 3586 (1878) (statement of Rep. Kimmel). This proposal ultimately became the Posse Comitatus Act of 1878.

\textsuperscript{103} The principal complaints leading to the passage of the 1878 amendment concerned the Army’s role in the South in relation to the bitterly disputed presidential election of 1876, and its employment in the North in response to the 1877 labor disputes in the industrialized regions of the country. 7 Cong. Rec. 3538, 3579-86, 3845-50, 4239-48, 4295-304, 4358, 4648, 4684-86 (1878); see U.S. General Service Schools, Military Aid to the Civil Power, supra note 100, at 189-93 (discussing the law enforcement role of the Army in the “Kansas disorders” from 1854-58); Furman, supra note 22, at 93-94 (outlining use of federal troops to restore order in Kansas when pro-slave citizens began taking up arms); Seimer & Effron, supra note 81, at 24-43 (stating Congress’ debate over passing the Posse Comitatus Act included concerns about the role of the Army in both the 1876 election and the “crash of 1873,” which provoked redress through strikes).

\textsuperscript{104} The debates surrounding the passage of the Act in 1878 focused on Army activities almost exclusively. 7 Cong. Rec. 3538, 3579-86, 3845-50, 4239-48, 4295-304, 4358, 4648, 4684-86 (1878).

\textsuperscript{105} The final version of the Act reads:
For nearly 100 years, the Posse Comitatus Act remained virtually untouched by the nation's legal system. Although a handful of defendants attempted to dust off the legislation, they failed to convince the courts that the Act applied to their controversies. In the first of these efforts, a nineteenth century federal court rejected the petitioner's attempt to rely on the Act to overturn a court-martial conviction for murder. \(^{106}\) After more than sixty years of dormancy, in a trio of Second World War treason cases, \(^{107}\) three different circuit courts of appeals agreed that the Act did not apply to law enforcement actions in an occupied enemy land. \(^{108}\) Twenty-five years later, the same rationale denied another attempt to apply the Act's proscriptive features to military conduct in an active war zone. \(^{109}\) Indeed, the Posse Comitatus Act's only signifi-

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From and after passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.


106. Ex parte Mason, 256 F. 384 (C.C.N.D.N.Y. 1882) (soldier assigned to guard duty at the District of Columbia city jail convicted by Army court-martial of murdering a prisoner in his custody; sought to have his conviction overturned on the grounds that his assignment to duty at the civilian facility violated the Posse Comitatus Act and, therefore, his crime was not committed while subject to lawful military authority and, hence, was not cognizable by a military court; rejected by the reviewing court because of a Supreme Court determination that the offense was properly cognizable by a court-martial); see Note, supra note 35, at 717.

107. D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949).

108. All three cases involved American citizens who made propaganda broadcasts for either the Empire of Japan or Nazi Germany during the war; each accused had been apprehended by military authorities in the occupied territories and then transferred to the United States to stand trial in a federal civilian court. D'Aquino, 192 F.2d at 338; Gillars, 182 F.2d at 962; Chandler, 171 F.2d at 921.

cant relevance, prior to 1974, arose in 1961 when the statute barred a plaintiff's tort claim against the Air Force for violating the Act. In the middle of the 1970s, however, two unrelated events injected the Posse Comitatus Act with new vigor, relevance and meaning. The first event involved the 1973 armed occupation of the American Indian reservation at Wounded Knee, South Dakota. Radical members of the American Indian Movement occupied the town for a little more than two months. The Indians hoped to draw attention to the plight of their people in the face of alleged violations of Indian treaty rights by the United States Government. During this episode, the United States Army provided and maintained equipment used by the civilian law enforcement agencies, offered advice and undertook a surveillance flight of the area in a military helicopter.

In the wake of the Wounded Knee confrontation, a series of related cases resulted in the first detailed judicial examination of the Posse Comitatus Act and offered the first meaningful legal guidelines concerning the statute's application. Although all the courts considered the same evidence, each took a slightly different approach to the issue. The result was a collective judicial product comprising "a confusing patchwork" of relevant legal standards. As a consequence, the proper test in determining a violation of the Posse Comitatus Act is far from clear today. The court in United

110. Wrynn v. United States, 200 F. Supp. 457 (E.D.N.Y. 1961) (An Air Force helicopter used in the search for an escaped civilian prisoner struck a tree, causing debris to injure a bystander; the bystander's attempt at a recovery from the government under the Federal Tort Claims Act failed because, by violating the Posse Comitatus Act, the helicopter pilot was no longer acting within the scope of his authority as an officer of the United States Government.).

111. See generally A. Josephy, Jr., Now That the Buffalo's Gone 246-52 (1982).

112. Id.

113. The Indians were particularly concerned about the United States' violation of its 1868 treaty with the Sioux nation. See id.

114. See supra notes 62-63 and accompanying text.


116. Note, Fourth Amendment, supra note 13, at 413. For a detailed discussion of the diverse holdings of these nearly identical cases, see id. at 408-13, 428-30.
States v. McArthur117 formulated the test most frequently used: The Act is violated when military activity subjects civilian suspects to an exercise of military power that is "regulatory, proscriptive, or compulsory in nature."

Other courts, particularly at the state level, use a less mechanical approach, deciding the issue based upon a determination of whether military participation in the event was merely incidental to permissible military activity.119 Underlying the states' formulation is the ultimate question whether the military participation in civilian law enforcement is "passive" in nature.120

The other critical Posse Comitatus Act event of the mid-1970s involved the use of United States Marine Corps servicemen in an undercover operation investigating the illegal possession and sale of military weapons in a civilian community. The resulting case, United States v. Walden,121 is significant for two reasons. First, it represents a federal court's willingness to find a violation of the Act by Navy personnel.122 Second, the case introduced the judicial practice of not applying the federal exclusionary rule to evidence gathered while in violation of the Posse Comitatus Act.123 Pursuant


118. Id. at 194; see United States v. Hartley, 486 F. Supp. 1348 (M.D. Fla. 1980) (using test expounded in McArthur, Court held Act not violated when assistance is in the form of handling and testing shrimp after it had been sent to government warehouses), aff'd, 678 F.2d 961 (11th Cir. 1982); United States v. Gerena, 649 F. Supp. 1179 (D. Conn. 1986) (ruling that the use of military equipment and facilities in transporting civilian defendant to the courthouse did not violate the Act under McArthur). But see People v. Burden, 94 Mich. App. 209, 288 N.W.2d 392 (1979) (rejecting McArthur test as being unsupported by any statute or rule of law), rev'd on other grounds, 411 Mich. 56, 303 N.W. 2d 444 (1981).


120. See, e.g., State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied sub nom. 454 U.S. 973 (1981) (the use of officers in removing military personnel from situations potentially involving breach of civil laws was incidental aid to civilian law enforcement); Nelson, 298 N.C. at 573, 260 S.E.2d at 629 (surrender of evidence to civilian authorities for use in civilian criminal prosecution held to be a "passive" role by military); State v. Trueblood, 46 N.C. App. 541, 265 S.E.2d 662 (1980) (Army officer's role in surveillance of defendant in civil investigation was "passive" and therefore not violative of the Posse Comitatus Act).


122. See id. at 373.

123. See id. Common judicial thought now is that the exclusionary rule will be applied only when violations of the Posse Comitatus Act become sufficiently frequent, id., or egregious, Taylor v. State, 645 P.2d 522, 524 (Okla. Crim. App. 1982). At least one commentator
to *Walden*, federal and state courts have resolved occasional Posse Comitatus controversies without ever reaching the issue of the statute’s violation.\textsuperscript{124} This judicial practice does not settle the present uncertainty regarding the applicable standard for judging the legality of military enforcement activity.

Until *Walden*, the Navy was convinced that any Posse Comitatus Act limitations applicable to it were self-imposed. The Navy’s view was that “the act is relative to the Army” and “does not apply to Naval personnel.”\textsuperscript{125} Acceptance of this exception to the Act derived from both the statute’s language and its well-documented

has suggested that imposing the exclusionary rule is unwarranted because the Act does not provide for the exclusion of evidence obtained in violation of its provisions, but does provide another (criminal) sanction calculated to deter the same conduct. Note, *The Posse Comitatus Act as an Exclusionary Rule: Is the Criminal to Go Free Because the Soldier Has Blundered?*, 61 N.D.L. Rev. 107, 129 (1985). Other commentators, however, have suggested that the exclusionary rule should be applied more vigorously. Note, *Fourth Amendment*, supra note 13, at 428-33 (suggesting that the application of the Posse Comitatus Act be relaxed in favor of a more strict application of the exclusionary rule as a check on unreasonable military interference in civilian life); Note, *Navy’s Role*, supra note 13, at 1962-65 (advocating the use of the exclusionary rule to deter the Navy from engaging in even a constructive violation of the principles contained in the Posse Comitatus Act).

\textsuperscript{124} See, e.g., United States v. Roberts, 779 F.2d 565 (9th Cir.), cert. denied, 479 U.S. 839 (1986); United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979); State v. Danko, 219 Kan. 490, 548 P.2d 819 (1976); cf. United States v. Griley, 814 F.2d 967 (4th Cir. 1987) (holding Posse Comitatus Act not violated, but stating that the exclusionary rule would not apply even if the Act was violated); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979) (military’s “passive” role in a civilian criminal investigation did not violate the Act; however, the exclusionary rule would not have applied), cert. denied sub nom. 446 U.S. 929 (1980). *Contra* Taylor v. State, 645 P.2d 522 (Okla. Crim. App. 1982) (suppressing evidence obtained during arrest when a military serviceman, in the enforcement of civil law, drew his pistol during the arrest and participated in the search of defendant’s house).

\textsuperscript{125} Furman, supra note 22, at 98 n.78 (quoting 1954 Op. JAGN 2213, Apr. 6, 1954, 4 Dig. Ops., LOD, § 15.1). Although the Army sent Posse Comitatus Act implementation guidelines to its units in the field on two occasions shortly after the statute’s passage, the Navy did not. The Navy obviously did not consider itself bound by the new Army-specific legislation. *See* N.Y. Times, Oct. 4, 1878, at 5, col. 3.
legislative history.\textsuperscript{126} The Posse Comitatus Act’s principal scholar emphatically seconded the exception’s existence.\textsuperscript{127}

Even though the Navy knew that the Posse Comitatus Act did not limit directly its ability to enforce the law, by the mid-1960s Navy policy treated the Act as if it did in fact apply to the Navy.\textsuperscript{128} Before long, a series of official directives promulgated by both the Navy and the Department of Defense reflected the Navy’s election to abide by the statute’s provisions.\textsuperscript{129} As a result, the Navy routinely denied civilian requests for assistance in law enforcement activity ashore.\textsuperscript{130} On the other hand, the use of Marine Corps helicopters to respond to a New Orleans sniper incident in 1973 demonstrated that the Navy’s election to refrain from participating in civilian law enforcement work was far from absolute.\textsuperscript{131} The Navy violated its own regulations again when marines engaged in the civilian investigative operation addressed in \textit{Walden}. The Navy’s policy of self-restraint formed the basis for the finding against the Navy in \textit{Walden}.\textsuperscript{132}

\textsuperscript{126} \textit{See supra} notes 104-05. The only reference to the Navy during the House debate regarding the Act was in the language of the initial amendment, which sought to impose restrictions that applied to the “land or naval forces.” \textit{7 Cong. Rec.} 3586 (1878) (statement of Rep. Kimmel). Similarly, during the debate in the Senate, only two remote suggestions were made that the proposed amendment might somehow bind the naval service. \textit{7 Cong. Rec.} 4297, 4304 (1878) (statements of Sen. Matthews and Sen. Conkling).

\textsuperscript{127} \textit{Furman, supra} note 22, at 98 (The “Act imposes no restrictions on the Navy” because it was “proposed as a result of misuse of the Army and as an amendment to the Army Appropriation Act.”).

\textsuperscript{128} “Although . . . not prohibited under the Posse Comitatus Act . . . the policy of the Navy is to follow the spirit of the statute.” \textit{Meeks, supra} note 22, at 101 (quoting 1965 Op. JAGN 5184, July 23, 1965).

\textsuperscript{129} \textit{Id.} The 1968 Department of Defense directive notes that “the Act is regarded as national policy applicable to all military services of the United States.” \textit{Id.} (quoting \textit{Dep’t of Defense, Directive No. 3025.1} (June 8 1968)). Virtually the same language exists in the 1971 Defense Department directive. \textit{Id.} (citing \textit{Dep’t of Defense, Directive No. 3025.1} (Aug. 19, 1971)). A 1973 Navy directive states that “it is the policy of the Navy and Marine Corps generally to comply with the restriction imposed by the statute.” \textit{Id.} (citing 1973 Op. JAGN 1508, Feb. 26, 1973).

\textsuperscript{130} For example, in 1973 and 1974 the Navy denied requests by local municipalities to use Navy brig facilities on a temporary basis during repair work to the city’s jail because such civilian use would be impermissible in light of the executive policy decision to apply the limitations of the Posse Comitatus Act to the Navy. \textit{Id.} at 119.

\textsuperscript{131} \textit{See N.Y. Times, Jan. 9, 1973, at 1, col. 2; id. at 22, col. 2; id. at 23, col. 1.}

Following *Walden*, both the Navy and the Department of Defense continued to apply the Posse Comitatus Act to the Navy as a matter of executive policy. Nevertheless, neither institution has wavered from its longstanding view that the Act does not apply to any military service other than the Army and the Air Force. During the period between *Walden* and the 1981 amendments to the Posse Comitatus Act, both the United States Congress and the Supreme Court of Alaska confirmed the Navy's interpretation of the statute. In *Jackson v. State*, the Supreme Court of Alaska concluded that the Act encompassed only the Army and Air Force based upon the Act's legislative history. That Congress specifically deleted mention of the Navy from the original Act and permitted to die a 1974 amendment that would have included the service, particularly impressed the court. Later congressional initiatives to amend the Act by either having "the Armed Forces of the United States" replace "the Army or the Air Force," or mak-
ing the Act specifically applicable to the Navy similarly failed to gain any meaningful legislative momentum. Prior to the 1981 amendments to the statute, the Posse Comitatus Act applied to the United States Navy only to the extent desired by that service and the Department of Defense.

Even if the Posse Comitatus Act of 1878 applied directly to the Navy, the statute’s application probably would not extend to law enforcement activity on the high seas. Before the Act’s 1981 amendments complicated an already uncertain statutory interpretation, commentators generally agreed that the Act did not apply to actions outside the United States’ territory. The Act’s geographic exceptions addressing sites at the margins of the nation’s territory give this interpretation of the statute historic weight. Additionally, an extraterritorial exercise of enforcement power by any branch of the United States armed forces would not frustrate the Act’s primary purpose—“precluding the military from supplanting or supplementing civilian authorities as the primary instruments of law enforcement.” Indeed, the fear of exposing civilian government to the threat of military rule and the suspension

141. See supra notes 139-40. No discussion of these amendments appears in the Congressional Record. See also Seimer & Effron, supra note 81, at 46-47 nn.183-84.
142. See supra notes 105, 125-42 and accompanying text; see also Rice, New Laws and Insights Encircle the Posse Comitatus Act, 106 MIL. L. REV. 109, 127 (1984); Note, Fourth Amendment, supra note 13, at 407.
143. See Furman, supra note 22, at 107; Seimer & Effron, supra note 81, at 10; Note, A Proposal for Direct Use, supra note 18, at 294.
144. During the debates surrounding the passage of the original Act, various congressmen said the Act would not apply in Texas (owing to lawlessness along the border with Mexico) and in the Pacific Northwest (where problems enforcing American neutrality near Canada in the face of belligerency between Russia and Great Britain existed). 7 Cong. Rec. 3848-49 (1878). Later, problems with enforcing an anti-riot statute in the territory of Alaska prompted an amendment to the Act that excepted its application there from 1900, Act of June 6, 1900, ch. 786, § 29, 31 Stat. 330, until Alaska attained statehood in 1959, Alaska Omnibus Act, Pub. L. No. 86-70, § 17(d), 73 Stat. 141 (1959). In the Pacific Ocean, the Act did not apply in either American Samoa or the Pacific Trust Territories, so long as each was governed by the United States Navy. See Furman, supra note 22, at 110.
145. Seimer & Effron, supra note 81, at 54; see supra notes 80-91 and accompanying text.
146. Seimer & Effron, supra note 81, at 54.
of constitutional liberties is irrelevant to activities undertaken outside United States' territory, provided that those actions are ultimately subject to civilian control.

The 1981 Amendments

In 1981, Congress again moved to act on the issue of military assistance in civilian law enforcement activity. Its principal concern was the nation's apparent failing efforts to interdict the importation of massive quantities of illegal drugs. At the same time, Congress recognized that the ambiguity surrounding applicability of the Posse Comitatus Act's criminal proscription made local military commanders reluctant to provide even permissible assistance to civilian agencies combatting drug smuggling. Most legislators agreed that the amendments clarified the limits of legal military assistance. More difficulty arose, however, with a proposed authorization for the Navy to make searches, seizures and arrests. Much of the debate concerning the wisdom of this provision turned on fears of sending minimally trained military personnel into the law enforcement arena. The legislators' reluctance to

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147. As expressed most recently by the Eighth Circuit Court of Appeals in Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985), aff'd on rehearing, 800 F.2d 812 (8th Cir. 1986)(en banc), aff'd, 485 U.S. 264 (1988).
148. See Note, A Proposal for Direct Use, supra note 18, at 301.
150. Id.
151. Id.
153. This was the driving force behind resistance to Bennett's more liberal draft of the amendment. See 127 CONG. REC. 14,979-87, 15,662-88 (1981). Typical was a comment by Rep. Hughes, who observed that
   if we permitted the average military personnel to participate in the arrest or seizure . . . we would open up Pandora's box, because civilian law enforcement personnel make enough mistakes now, and they are trained. So if anything, what we are trying to do is we are trying to minimize the effect of a motion to suppress.
   Id. at 15,665 (statement of Rep. Hughes). Similarly, in referring to the reason why White's draft did not include the same direct enforcement authorization found in Bennett's proposal, Rep. Sawyer said that "[t]he basic reason for that difference is that it was felt by the Judiciary Committee that military personnel are not trained in the niceties of civil law en-
give the Navy direct law enforcement power stemmed principally from a concern that the government would lose smuggling cases in court due to the Navy's technical mistakes in the field.\textsuperscript{154} Ultimately, the direct enforcement measure failed, the victim of an unlikely lobbying alliance comprising the federal drug enforcement agencies, the Pentagon and civil libertarians.\textsuperscript{155}

The 1981 amendments to the Posse Comitatus Act\textsuperscript{156} provided more detailed guidance regarding permissible and prohibited activity than the original statute of 1878. Moreover, most of these amendments addressed specifically the "Army, Navy, Air Force and Marine Corps"\textsuperscript{157} or "personnel of the Department of Defense."\textsuperscript{158} This time, Congress did not leave its intent to include the Navy within the scope of the legislation open to question.

The first three sections of the 1981 legislation merely codified the existing practices of loaning military equipment to civilian agencies,\textsuperscript{159} training civilians in the operation and maintenance of military gear,\textsuperscript{160} sharing information collected in the course of military operations,\textsuperscript{161} and taking civilian needs into consideration when planning routine military activity.\textsuperscript{162} The new statute's sixth section provided that any assistance offered could not degrade the military's preparedness.\textsuperscript{163} The seventh section dealt with the need for an established scheme whereby the Department of Defense re-

\begin{itemize}
\item \textsuperscript{154} Id. at 14,980 (statement of Rep. Sawyer).
\item \textsuperscript{155} See generally Hearings on H.R. 3519, supra note 134, at 20-21, 31. The civil libertarians feared establishing a precedent in which military force would be directed at activities within the civilian community. The Department of Defense feared a drain on its resources and a distraction from its primary purpose of maintaining combat readiness. The federal law enforcement agencies feared losing control of their high visibility roles in the war on drugs to a mammoth Pentagon bureaucracy certain to overshadow them all. Note, Fourth Amendment, supra note 13, at 420-21.
\item \textsuperscript{158} Id. § 374.
\item \textsuperscript{159} Id. § 372 (1982).
\item \textsuperscript{160} Id. § 373 (1982 & Supp. IV 1986).
\item \textsuperscript{161} Id. § 371.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id. § 376 (1982).
\end{itemize}
ceived reimbursement for the reasonable cost of any assistance rendered.\footnote{164}{Id. § 377.}

Although the Navy held little interest in those sections, the fourth, fifth and eighth sections of the 1981 legislation immediately caught the Navy's attention. The fourth section appears to bar the use of Navy resources to interdict suspected lawbreaking vessels or aircraft outside the United States' territory,\footnote{165}{The fourth section provides, inter alia, that in certain "emergency circumstance[s]," equipment used for civilian law enforcement may be operated "outside the land area of the United States" by "personnel of the Department of Defense," provided that it "is not used to interdict or to interrupt the passage of vessels or aircraft." \textit{Id.} § 374 (1982 & Supp. IV 1986). In 1986 this section was amended. Department of Defense Authorization Act, 1987, Pub. L. No. 99-661, § 1373(c), 100 Stat. 3824, 4007 (1986); Defense Drug Interdiction Assistance Act, Pub. L. No. 99-570, § 3056, 100 Stat. 3207, 3207-77 (1986). The current version is similar to the original, but permits the interception of vessels or aircraft only for the purpose of directing them to locations designated by "appropriate civilian officials." \textit{10 U.S.C.} § 374 (1988).}

Nevertheless, the concluding language of the statute's fifth section\footnote{166}{"The Secretary of Defense shall issue such regulations as may be necessary to ensure that the provision of any assistance ... to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force or Marine Corps in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity. ..." \textit{10 U.S.C.} § 375 (1988).} and the non-preemption clause in the eighth and final section of the 1981 amendments effectively render moot these apparent departures from the Posse Comitatus Act's past inapplicability to the Navy.\footnote{167}{The fifth section concludes with the proviso, "unless participation in such activity by such member is otherwise authorized by law." \textit{Id.}} To a large degree, the eighth section's non-preemption language merely freezes the Navy's law enforcement authority precisely where it was before the 1981 amendments' enactment.\footnote{168}{"Nothing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law prior to the enactment of this chapter." \textit{Id.} § 378. In 1984, this section was amended to substitute "before December 1, 1981" for "prior to the enactment of this chapter." \textit{Id.} § 378 (1988).}

\footnote{169}{Commentators generally agree on interpretation of the 1981 amendments. \textit{See}, e.g., Rice, \textit{supra} note 142, at 27 ("As the Navy and Marine Corps had neither been subject to the original nor the new Act, restraints applicable only to the new Act do not affect them. This position is reinforced by section 378 . . . ."); Hilton, \textit{Recent Developments Relating to the Posse Comitatus Act}, 1983 \textit{THE ARMY L.} 1, 7 (1983) (The importance of § 378 "lies in its...").}
Since the enactment of the 1981 amendments to the Posse Comitatus Act, the Navy’s official attitude has not changed significantly regarding the legality of its enforcement activity at sea. The Navy still applies the Act’s limitations to itself as a matter of executive policy, merely modifying the language of its self-imposed restraint to conform with the terms of the otherwise inapplicable 1981 amendments. In practice, however, the Navy is far more active in the enforcement of federal laws. Navy ships now routinely carry Coast Guard boarding teams, and this “indirect” Navy as-

preserving the option of using Navy and Marine Corps personnel in those instances in which the Posse Comitatus Act prohibits the use of members of the Army or Air Force” and can be read only that way because an explanatory fig leaf attempting to hide de facto Navy enforcement of United States law.

An illustration makes the point: In November 1982, the Coast Guard seized the smuggling vessel Recife in the Caribbean with an illicit cargo of more than 50,000 pounds of marijuana. The Coast Guard arrested eleven crewmen. Officially, Coast Guardsmen made the seizure and arrests with the “indirect” assistance of the Navy. On this occasion, however, the Navy’s “indirect” assistance took the form of locating and investigating the suspect vessel, dispatching a Navy helicopter to photograph her, developing and analyzing those photographs aboard a Navy aircraft carrier, twice diverting a Navy guided missile cruiser to intercept and hail the suspect vessel, flying the Coast Guard boarding party to the cruiser, ferrying the boarding party from the cruiser to the Recife in a Navy whaleboat, “covering” the Coast Guard boarding party by manning weapons both aboard the cruiser and in the whaleboat alongside the Recife, handling all of the communications between the Coast Guard detachment at the scene and the Coast Guard’s district headquarters in Miami, and once the Coast Guard boarding party had actually seized the Recife, providing logistics support necessary for the Coast Guardsmen to take the Recife and her crew safely to Puerto Rico for criminal prosecution in a United States
sistance has resulted in a significant number of narcotics seizures and arrests.\footnote{173}

In the wake of the 1981 legislation, the federal courts are wrestling with the amended Posse Comitatus Act’s applicability to Navy law enforcement activity at sea. In the Court of Appeals for the Ninth Circuit’s opinion, the original 1878 statute does not limit the Navy’s conduct at all,\footnote{174} but a district court in the District of Columbia was unwilling to reach the same conclusion.\footnote{175} The evident contradiction presented by the fourth, fifth and eighth sections of the 1981 amendments muddies the situation even more. Those few courts that considered the issue chose, like the court in \textit{Walden} more than a decade before, to base their decisions on whether the Navy activity in question violated the service’s internal regulations.\footnote{176} Consequently, the principal legal impediment to

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\footnote{173. Congress mandated that the Coast Guard place boarding teams on Navy ships and provided funding for an additional 500 Coast Guard law enforcement officers for that purpose in 1986. 10 U.S.C. § 379 (1988). During the period from May 1982 through September 1988, this practice resulted in more than 65 narcotics interdictions, 325 arrests of civilian smuggling suspects, and seizures of more than 767,000 pounds of marijuana and 1,889 pounds of cocaine. \textit{General Law Enforcement Digest}, supra note 172, at 15-17.}

\footnote{174. Showengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987) (Navy personnel searched the office of a Navy civil servant suspected of committing sexual offenses; court concluded that, because the Posse Comitatus Act does not apply to the Navy, the plaintiff had no cause of action against that service); United States v. Roberts, 779 F.2d 565 (9th Cir.) (Coast Guard boarding team seized marijuana smuggling vessel while operating from a Navy warship; court stated that it would not read the Navy into the language of the Posse Comitatus Act), \textit{cert} \textit{denied}, 479 U.S. 839 (1986).}

\footnote{175. United States v. Yunis, 681 F. Supp. 89 (D.D.C. 1988) (court applied same analysis of Posse Comitatus Act to the Navy’s assistance in apprehension and transport of a suspected terrorist as it applied to those services mentioned specifically in the Act).}


In \textit{Roberts}, the Ninth Circuit determined that § 378 of the 1981 amendments must be read literally. As a consequence, the court inquired only whether the Navy’s actions in this smuggling interdiction violated the law as it existed on December 1, 1981. \textit{Roberts}, 779 F.2d at 667-68. On that date, the relevant Navy directive, \textit{Office of the Secretary, Dep’t of the Navy, Instruction No. 5820.7, Cooperation with Civilian Law Enforcement Officials} (May 15, 1974), limited departure from the Posse Comitatus Act principally to those situa-
Navy law enforcement operations on the high seas remains its desire to abide by the limitations contained in the original Posse Comitatus Act and the 1981 amendments.

**THE POLICY QUESTION**

*The Unique Nature of the Enforcement Environment*

Although good reasons exist to fear the intrusion of a standing army into civilian police functions on land, the same concerns do not apply when the activity's locus is on the high seas. The law enforcement environment at sea is fundamentally different from that ashore. At sea, the physical setting is more dangerous and demanding, the nature of civilian activity conducted is of limited scope and subject to extensive governmental regulation, and the trackless territory involved is characterized by an absence of both law enforcement personnel and a civil population to assist them. Federal courts have acknowledged repeatedly this basic environmental distinction. As recently as 1983, the United States Supreme Court reaffirmed its recognition of the disparity between the two settings when it pointed out that each calls for the employment of different judicial standards. The United States Coast

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177. See supra notes 88-90 and accompanying text.

178. E.g., United States v. Freeman, 579 F.2d 942, 946 (5th Cir. 1978) ("[T]he national frontiers of the oceans are much more difficult to police than the territorial boundaries of the land.").

179. United States v. Villamonte-Marquez, 462 U.S. 579, 593 (1983) (refusing to apply the standard announced in Delaware v. Prouse, 440 U.S. 648 (1979), for random automobile stops to the similar stop of a vessel in a narrow channel 18 miles inland because "[t]he
Guard, for example, may make searches, seizures and arrests at sea without being impeded by the shoreside requirement of first obtaining a warrant. Similarly, federal law permits Coast Guard enforcement officers to stop and board vessels at sea without any suspicion of illegal activity, while police officers on land must have some articulable suspicion before stopping and detaining a citizen.

The foregoing discussion is not meant to suggest that American citizens and others subject to the operation of United States law on the high seas are somehow outside the ambit of the Constitution's guarantee of civil rights and liberties. Quite the opposite is true. Instead, the Court's situs-oriented distinction relates principally to determining which governmental intrusions and limited deprivations of liberty are reasonable given the special circumstances attendant to enforcing the law at sea. Because drawing
this line is necessarily subjective, substantial disagreement continues regarding just where the mark should be placed.\textsuperscript{184} Nevertheless, a distinction exists between juridical latitude granted to enforcement agents ashore and to those afloat. One cannot condemn the notion of Navy law enforcement at sea because analogous conduct ashore would be objectionable on public policy grounds.\textsuperscript{185} Navy law enforcement at sea must stand or fall on its own merits.

\textit{The Historical Precedent}

Navies around the world have historically enforced their nations' laws at sea.\textsuperscript{186} For the most part, this naval enforcement has been a matter of necessity. Navy vessels often are the only means by which a government can exercise its proscriptive power at sea. Few nations can afford to maintain both a navy for purely military purposes and a Coast Guard-like enforcement organization capable of carrying out a maritime police function more than a few miles from that nation's shores.\textsuperscript{187} Understandably, in addressing piracy
and the slave trade, two seagoing crimes against humanity, both the 1958 and 1982 Law of the Sea treaties specifically indicated that arrests and seizures were to be "carried out by warships." The drafters of both treaties merely restated customary international law.

The United States has a long history of using its Navy for high seas law enforcement. The suppression of piracy was one of the very first missions assigned to the nation's Navy. As a consequence, the Navy once spent an enormous amount of time hunting suspected brigands and bringing them to justice in American courts. Although the last known trial of a pirate captured by the Navy was in 1831, the Navy campaigned against piracy as late as

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189. The texts of the 1958 and 1982 treaties are nearly identical. Both state that seizures for piracy "may only be carried out by warships or military aircraft, or other ships or aircraft on Government service authorized to that effect." Convention on the High Seas, opened for signature Apr. 29, 1958, art. 21, 13 U.S.T. 2312, 2318, T.I.A.S. No. 5200, at 1218, 450 U.N.T.S. 82, at 92 [hereinafter 1958 Treaty]; United Nations Third Conference on the Law of the Sea, opened for signature Dec. 10, 1982, art. 107, The Law of the Sea: Official Text of the United Nations Conference on the Law of the Sea With Annexes and Index 35 (1983) [hereinafter 1982 Treaty]. Similarly, the articles governing suppression of the slave trade explicitly contemplate enforcement by "warships." 1958 Treaty, art. 22, 13 U.S.T. at 2318, 450 U.N.T.S. at 92; 1982 Treaty, art. 110, Official Text at 35-36. The "right of approach" or "right of visit" concept also reflects the depth of the customary use of Navy vessels for law enforcement work. Under that doctrine, mere suspicion that a vessel may be of the same nationality as the warship involved, even if the suspect vessel is flying the flag of another nation, is sufficient grounds for stopping her and sending aboard a party under the command of a Navy officer to confirm or deny the suspicion. 1958 Treaty, art. 22, 13 U.S.T. at 2318, 450 U.N.T.S. at 92; 1982 Treaty, art. 110, Official Text at 35-36. Implicit in this grant of authority is the recognition that the warship has some enforcement power over vessels of its nation in the first place. No other reason for risking interference with the right of genuinely foreign vessels to navigate upon the high seas could be logically imagined. Finally, international law explicitly reserves to warships the right of "hot pursuit" of suspected law breaking vessels. 1958 Treaty, art. 23, 13 U.S.T. at 2318-19, 450 U.N.T.S. at 94, 96; 1982 Treaty, art. 111, Official Text at 36-37. See S. McDougal & W. Burke, supra note 188, at 878, 881, 885, 894, 904.

190. So strong was the custom of using Navy vessels for law enforcement duty that the 1956 International Law Commission, which sought to first codify the customary law in the 1958 treaty, desired to limit the recognition of this high seas enforcement power concerning piracy only to warships or military aircraft. B. Dubner, The Law of International Sea Piracy 122 (1980).

192. Id. at 154.
1870. More recently, Navy ships responded to an alleged act of piracy aboard a Portuguese cruise liner in the Caribbean in 1961. The United States' anti-piracy statute still authorizes the use of Navy vessels for its enforcement. In the early half of the nineteenth century, American warships similarly spent much of their sea time enforcing the nation's laws suppressing the slave trade. Fifty years later and half a world away, the United States deployed Navy gunboats to combat pelagic seal poaching in the Bering Sea. Even though similar enforcement campaigns are virtually unheard of today, current legislation specifically authorizes the Navy to assist in enforcing a wide range of federal laws.

The Coast Guard Example

Although the legitimacy of the Navy's inherent law enforcement power may be questioned, the propriety of using the United States Coast Guard to enforce American law on the high seas has never been seriously doubted. This dichotomy seems curious, particularly given that no meaningful difference exists between the two services in this regard. Like the Navy, the Coast Guard is a mili-

196. See E. ENGLE & A. LOTT, supra note 191, at 157-58. The suppression of the slave trade was so firmly ingrained in the United States Navy's institutional psyche that, on the occasion of "salvaging" a German commerce raider during a "neutrality patrol" in 1941, the captain of the United States Navy cruiser making the capture later thought it best to characterize his boarding as an investigation of a suspected slaver to avoid the diplomatic protests likely to attend an otherwise objectionable act by a neutral power. P. ABBAZIA, Mr. ROOSEVELT'S NAVY 346-49 (1975).
197. Between 1891 and 1900, the United States employed Navy gunboats to prevent off-shore poaching activity. The Navy shared this mission with the United States Revenue Cutter Service, an ancestor of the U.S. Coast Guard. R. JOHNSON, supra note 10, at 9. The termination of the Navy's participation in this event, occurring as it did well after passage of the Posse Comitatus Act, was not due to any question of legal propriety, but rather resulted from a need to employ Navy gunboats elsewhere. See J. SWEETMAN, AMERICAN NAVAL HISTORY 113-34 (1984).
198. See supra notes 46-52 and accompanying text.
199. Jackson v. State, 572 P.2d 87, 92-93 (Alaska 1977); Note, Don't Call Out the Marines, supra note 13, at 1491-92. See generally R. JOHNSON, supra note 10 (Coast Guard's primary mission was law enforcement both before and after passage of the Posse Comitatus Act; the Act had no discernible effect on the service).
tary service—armed, trained and ready for combat duty; it has participated in nearly all major conflicts engaged in by the United States during the past 200 years. The Coast Guard’s high seas enforcement vessels are United States’ “warships,” and routinely use specialized military hardware when carrying out their law enforcement duties on the high seas.

The Coast Guard can claim no inherent institutional superiority to performing civilian law enforcement work, especially with regard to training. Any willing student, irrespective of the uniform he wears, can receive law enforcement instruction. Currently, most Coast Guard law enforcement officers receive almost no detailed law enforcement training. Instead, only individuals in key

200. “The Coast Guard . . . shall be a military service and a branch of the armed forces of the United States at all times.” 14 U.S.C. § 1 (1982). The most recent reminder of the Service’s status as a member of the nation’s corps of fighting forces occurred in April 1988 when the Reagan Administration planned to assign a flotilla of Coast Guard cutters to the American “combat” operation in the Persian Gulf. See N.Y. Times, Apr. 24, 1988, § I, at 1, col. 1.


203. Most seagoing Coast Guard cutters carry a deck gun or several large machine guns. Navy accounts fund much of this weaponry, most of which is the same type used by the Navy for engaging an enemy in battle. The weaponry has been used frequently to fire warning shots either across the bows of suspect vessels or into those vessels to make them stop. In the period from 1980-88, for example, Coast Guard cutters directed nearly 1,000 rounds of heavy machine gun fire into more than a dozen different vessels to force them to stop for law enforcement boarding. GENERAL LAW ENFORCEMENT DIGEST, supra note 172, at 18. It is hard to see how the coercive effect of a Navy vessel performing law enforcement work at sea would be substantially more impressive than that routinely created now by most of the Coast Guard’s high seas enforcement units.

204. A point not lost on Congress: “There is no particular mystique about the Coast Guard. . . . [T]o say that they are much more capable of doing these things than the military is not true.” 127 Cong. Rec. 15,675 (1981) (statement of Rep. Bennett).

205. In 1988, for example, the Coast Guard provided law enforcement training to its own personnel and students from nearly two dozen foreign nations. Telephone interview with Petty Officer Potts, Logistics Coordinator, International Training Team, Coast Guard Maritime Law Enforcement School (Jan. 18, 1989). The Coast Guard should have little difficulty providing similar training for the United States Navy.

206. Federal law mandates that every commissioned, warrant and petty officer in the Coast Guard shall be a federal law enforcement officer. 14 U.S.C. § 89(a) (1982). Of the nearly 39,000 military members of the Coast Guard, 28,000 people are legally empowered to perform federal law enforcement. THE COAST GUARD, AN OVERVIEW, supra note 11, at 6; Telephone interview with Master Chief Petty Officer Roach, Statistician, Enlisted Personnel Branch, Office of Personnel, Coast Guard Headquarters (Jan. 18, 1989); see 14 U.S.C. §
enforcement-related billets are targeted for the Coast Guard’s principal law enforcement training effort.\textsuperscript{207} The same approach could be applied easily to selected Navy personnel.\textsuperscript{208} As it is, military police programs in the other armed forces are much more extensive, employing twice as many law enforcement specialists as the Coast Guard has people in uniform.\textsuperscript{209}

As for the ability to maintain law enforcement proficiency in the field, the nation’s Coast Guard and Navy again have essentially the same weaknesses and strengths. Like the Navy, the Coast Guard’s attention is divided between enforcement-related activities and a variety of other primary pursuits.\textsuperscript{210} Many Coast Guard units engage in no law enforcement. Even in those units that devote considerable time to maritime police work, the actual occurrence of a seizure or arrest is surprisingly rare.\textsuperscript{211} Most Coast Guard law enforcement officers complete their careers without ever making a

\textsuperscript{89(a) (1982). Nevertheless, the Coast Guard has identified only 3,200 jobs within the organization that involve a meaningful amount of law enforcement work. Telephone interview with Lieutenant McGloughan, Senior Instructor, Coast Guard Maritime Law Enforcement School (Oct. 13, 1988). Individuals assigned to those relatively few billets are the focus of the service’s law enforcement training effort. \textit{Id.} The others may receive law enforcement training, but the likelihood of this happening is remote. The Coast Guard’s internal qualification policies require officers to receive limited exposure to law enforcement training (often nothing more than a single lecture of several hours’ duration), and include no requirement for its petty officers either to receive such training or to demonstrate any knowledge on the topic. \textit{See Dep’t of Transportation, United States Coast Guard, Coast Guard Institute Pamphlet D45201, Military Requirements for E-4 (Aug. 1985) [hereinafter Pamphlet D45201].}

\textsuperscript{207. \textit{See Pamphlet D45201, supra note 206.}}

\textsuperscript{208. \textit{See Note, A Proposal for Direct Use, supra note 18, at 304.}}

\textsuperscript{209. The Army and the Marine Corps together have approximately 26,000 military police officers; the Air Force has 39,000 aerospace security personnel; and the Navy has 1,800 masters-at-arms as opposed to approximately 38,000 uniformed personnel of all ranks and specialties in the Coast Guard. Telephone interview with Sergeant-Major Malavet, Proponency Branch, Military Police School, United States Army (Jan. 18, 1989); Telephone interview with Gunnery Sergeant Bradley, Enlisted Assignment Monitor for Military Policy, Headquarters, United States Marine Corps (Jan. 18, 1989); Telephone interview with Command Sergeant-Major Perkins, Chief Enlisted Manager, Office of Security Police, United States Air Force (Jan. 18, 1989); Telephone interview with Master Chief Petty Officer Cochran, Master at Arms Detailer, Naval Military Personnel Command, United States Navy (Jan. 18, 1989); \textit{The Coast Guard, An Overview, supra note 11, at 16. These individuals in the Department of Defense make many more arrests each year than do members of the Coast Guard. 127 Cong. Rec. 15,675 (1981) (statement by Rep. Bennett).}}

\textsuperscript{210. \textit{See supra note 11.}}

\textsuperscript{211. Intervals of several years between such instances are not uncommon.}
search, seizing evidence or placing a suspect under arrest. Moreover, unlike law enforcement specialists in the other armed forces, the Coast Guard's enforcement officers are assigned enforcement duty on a collateral basis. Each has a primary specialty other than law enforcement that governs his assignment pattern, advanced professional training and overall service experience.

Related to similarities in law enforcement proficiencies, the Navy is every bit as capable of safeguarding a civilian suspect's civil liberties as the Coast Guard. This point is especially significant in light of Congress' concern about losing court cases due to untrained personnel. This concern motivated Congress to omit a grant of Navy search, seizure and arrest authority in the 1981 Posse Comitatus Act amendments.\(^2\)\(^1\)\(^2\)\(^1\)\(^3\) Surely, Navy personnel can be trained in the subtleties of civilian law enforcement procedure. In fact, military members may be especially well suited for the task when the protection of an accused's civil rights are concerned. For example, the procedural rules associated with the military justice system are more protective of a suspect's rights generally than are their civilian counterparts.\(^2\)\(^1\)\(^3\) Moreover, an appreciation for and a detailed knowledge of those rights are inculcated in members of

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212. See supra notes 152-54 and accompanying text.

213. For example, whereas a civilian is entitled to a reading of his Miranda rights only in a situation of custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966), a military suspect is entitled to the same rights-oriented warnings as soon as he is suspected of wrongdoing and is questioned about conduct relating to that suspicion. Manual for Courts-Martial, United States, app. 2, § 831, art. 31(b) (1984). Moreover, unlike the civilian rules, military justice requires that an individual be informed of the specific misconduct of which he is suspected at the time that he is informed of his rights. Id. Similar additional protections pervade the military justice system. For example, individuals have a right to appointed counsel regardless of the indigence of the accused and a formal, open, inter partes proceeding on the record to determine the existence of probable cause and whether the accused should be taken to trial (as opposed to the closed, ex parte grand jury proceeding used in the civilian criminal justice system). Id. § 828, art. 32. Trial lawyer F. Lee Bailey, who has defended clients in both the military and civilian justice systems, has written that "[i]t is ironic that many people criticize the military system of justice as inferior and unfair. . . The fact is, if I were innocent, I would far prefer to stand trial before a military tribunal governed by the Uniform Code of Military Justice than by any court, state or federal." F. Bailey, For the Defense 38 (1976). But see Note, Navy's Role, supra note 13, at 1959 (saying that "law enforcement concepts such as 'probable cause,' reasonable suspicion,' and 'due process' are alien to [military] personnel"); Note, Don't Call Out the Marines, supra note 13, at 1493 (The use of the military in civilian law enforcement would be a "de facto implementation of the Uniform Code of Military Justice in society and [would] move the country toward a subtle but insidious species of martial law" because military personnel
the military at every level. By the time an officer rises to command a field unit, he has become exceptionally well versed in the protections that the American system of justice extends to one accused of violating the law.\footnote{14} Coast Guardsmen themselves are military members subject to and indoctrinated in the Uniform Code of Military Justice.\footnote{15} Their ability to enforce the law competently at sea rebuts any supposed incompatibility between military enforcement of civilian law and the protection of those suspects' constitutional rights.

Congress has considered transferring the Coast Guard's functions to the Navy. Indeed, Congress considered initiatives that would require the Navy to take over the Coast Guard's law enforcement function on at least two occasions before the passage of the Posse Comitatus Act,\footnote{16} and on five occasions since.\footnote{17} Many of the initiatives nearly passed.\footnote{18} None failed due to any concern about its legality.\footnote{19} Instead, the most frequent reason given for an initiative's failure was one of efficiency: a desire to keep the Navy unfettered by the distraction of law enforcement duties.\footnote{20}

\begin{quote}
"become an embodiment of military behavior, military values, and, most critically, military justice."
\end{quote}

\footnote{14}{During the 1981 debates on the Posse Comitatus Act amendments, one of the debate participants, Senator McCollum of Florida, said:

I have spent 4 years on active duty in the U.S. Navy's Judge Advocate General Corps. I have been a reservist ever since that time wearing that particular banner. And I can tell the Members that the military law under the UCMJ is far more stringent in this area of its requirements than the civilian criminal law area. The military personnel, particularly the officers in command of the vessels and the craft and the units involved, have very strong backgrounds and stringent backgrounds in obeying the constitutional principles involved in enforcing laws of this [narcotics smuggling] nature. So I do not think that problem merits the kind of attention that it has gotten today. Although it should be discussed, it does not hold water.

\footnote{15}{10 U.S.C.F. § 261, 803 (1988).}

\footnote{16}{These initiatives occurred in 1843 and 1859. H.R. Doc. No. 670, 62nd Cong., 2d Sess. 299-349 (1912); S. Evans, The United States Coast Guard 1790-1915 35 (1949).}

\footnote{17}{The post Posse Comitatus Act initiatives occurred in 1889, 1912, 1919 and 1933. R. Johnson, supra note 10, at 3, 19-22, 57-62, 128-32.}

\footnote{18}{Id.}

\footnote{19}{The 1912 initiative, for example, failed primarily because of President Taft's poor relationship with Congress and the occurrence of the Titanic disaster that year. Id. at 21-22.}

\footnote{20}{Id. at 19-21.}
The Situation Today and Tomorrow

The Navy is effectively engaged in high seas law enforcement operations today. Although most of this activity is directed at combating maritime narcotics smuggling,\(^\text{221}\) the Navy has enforced federal immigration laws in the recent past.\(^\text{222}\) Congress has endorsed this conduct on several occasions with the passage of supporting legislation.\(^\text{223}\) As a consequence, using Navy vessels to detect, track and intercept suspects at sea has become a major part of the nation's maritime law enforcement effort.\(^\text{224}\) Moreover, the degree of the Navy's involvement in these operations and the nature of the "assistance" it has rendered the Coast Guard and other agencies make it hard to distinguish between the Navy's work and the Coast Guard's authorized law enforcement activities.\(^\text{225}\) Pro-


\(^{222}\) During 1980, for example, Navy ships carried Coast Guard boarding teams and engaged in law enforcement patrols in the international waters between Cuba and the southern coast of Florida. *Hearings on H.R. 3519*, supra note 134, at 54 (statement of Rear Admiral Thompson, Chief, Office of Operations, U.S. Coast Guard).

\(^{223}\) In addition to the 1981 Posse Comitatus Act amendments authorizing the use of Navy vessels as platforms from which the Coast Guard could perform its enforcement function, 10 U.S.C. § 374 (1982), Congress authorized funding for some 500 Coast Guard law enforcement officers for specific assignment to patrol duty aboard Navy vessels. 10 U.S.C. § 379 (1988).

\(^{224}\) From April 1981 to October 1988, Navy assistance made possible 106 Coast Guard narcotics interdictions. This assistance led to some 531 arrests and the seizure of more than 1.8 million pounds of marijuana, more than a ton of cocaine and 94 smuggling vessels. *GENERAL LAW ENFORCEMENT DIGEST*, supra note 172, at 15-17.

\(^{225}\) See *supra* note 172. The procedures the Navy follows in performing work in the field guarantee that its role will be more than passive. Indeed, despite the presence of Coast Guard personnel aboard the Navy ships, Navy servicemen do much of the detecting and tracking of suspects, Navy ships transport the boarding team to its destination, carry the Coast Guardsmen to the vessel to be boarded in a Navy launch, provide vital communications services and "back-up" security during the boarding, and—if a seizure or arrest is made—Navy ships transport, guard and care for the prisoners, and tow or escort the seized vessel and evidence to a United States port for later prosecution. See generally United States Coast Guard, *ATLANTIC AREA INSTRUCTION M16240.1, LEDET MANUAL* (1988) (providing procedures for and responsibilities of Coast Guard and Navy personnel during law enforcement activity). Not only has this "assistance" gone as far as firing warning or disabling shots, Moore, *supra* note 172, but, on one occasion, the latter activity resulted in the wounding of a civilian smuggling suspect aboard the vessel being interdicted. *GENERAL LAW ENFORCEMENT DIGEST*, *supra* note 172, at 18. One way that the Navy's activity falls short of direct enforcement of United States law is that Coast Guardsmen alone board the vessel in question and make any arrests or seizures attendant to that boarding. Additionally, the
vided certain procedural safeguards are employed,\textsuperscript{226} no compelling reason precludes the Navy from moving from “assistance” to engaging directly in the enforcement of United States law on the high seas.

Utilizing the Navy to augment the Coast Guard in high seas law enforcement will become an economic and practical imperative in the foreseeable future. Both the domestic and international scenarios awaiting the United States will demand that the Navy take a more active role in enforcing American law at sea.\textsuperscript{227} Unfortunately, this impending requirement for vastly increased American maritime law enforcement will arrive at a time when fiscal austerity is the governmental rule.\textsuperscript{228} The nation’s massive federal debt will have to be dealt with. Regardless of when and how this is done, the government will necessarily have to make hard choices regarding the limited amount of money available for its law enforcement activities and programs. The United States’ small Coast Guard is already grossly overworked and perennially underfunded, and the future portends more of the same.\textsuperscript{229} Consequently, the na-

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\textsuperscript{226} See infra notes 233-36 and accompanying text.

\textsuperscript{227} See supra notes 1-9 and accompanying text.


\textsuperscript{229} Since World War II, the Coast Guard’s size has remained fixed at approximately 37,000 personnel despite substantial growth in domestic and international activity at sea and a population increase in the United States of more than 100 million. Even during the halcyon defense spending days of the Reagan Administration, the Coast Guard’s annual budgets declined nearly $500 million from 1982 to 1988. \textit{Budget in Brief, Commandant’s Bulletin}, 7 U.S. Coast Guard (Feb. 25, 1988). The prospect for more favorable fiscal treatment is extremely remote. \textit{Shrinking, Commandant’s Bulletin}, 1 U.S. Coast Guard (Jan. 22, 1988). Recently, because of an inability to carry out some missions, the Coast Guard was forced to close 30 units in an effort to redirect its human and material resources to only the most critical institutional tasks. \textit{Id.} Even then, a budgetary shortfall necessitated releasing
tion cannot afford to deny itself the expanded use of its Navy in the lean but demanding days ahead. More ships, planes and people must be found to deal with the high seas enforcement challenge of tomorrow. The Navy possesses each in abundance.  

RECOMMENDATIONS

The legal status of the Navy's authority for high seas law enforcement is unnecessarily ambiguous. On the one hand, no constitutional, statutory, or public policy concern bars assigning the Navy direct law enforcement duties at sea. On the other hand, a history of Navy institutional reluctance to become involved in law enforcement has created an aura of presumed impropriety surrounding the undertaking. The prevailing judicial interpretation of the 1981 Posse Comitatus Act amendments has given this presumed impropriety quasi-legal status. However, no Supreme Court ruling is on point, and the circuits are not unanimous on the issue. As a consequence, the Navy's exclusion from the restrictions contained in the 1981 legislation appears to be limited only by the terms of executive fiat. The matter needs clarification.

The Secretary of the Navy's authorization of naval units to engage in direct law enforcement activity on the high seas is one way to rectify the confused legal situation. The Navy could then wait for the inevitable legal challenge to confirm or deny the propriety of the executive action. This approach has the advantage of being easy to implement; initially, it involves action by the executive branch alone. Moreover, the approach comports with the legal analysis of courts addressing the issue in several leading cases. Instead of worrying about such tangential questions as whether the
Secretary's authorization to his field units restricts Pacific fleet warships from providing "indirect" assistance to the Coast Guard, the relevant inquiry under the proposed approach would be whether the Secretary can authorize all naval units anywhere on the high seas to engage in direct enforcement of United States federal law on civilian suspects.

Implementing the course of action outlined above has a number of disadvantages. One principal shortcoming is that the federal judicial system's nature is such that the action's legal status would likely remain uncertain even after any initial challenges. Federal district and appellate courts would probably vary in their legal analyses of the issue, particularly given the absence of any statutory guidance. Nationwide uniformity on the matter would not be assured. Moreover, considerable time would probably elapse before the issue reached the Supreme Court; only then would the Navy have a definitive review of the issue. The Supreme Court may not even agree to hear a case implicating the issue.

The characteristics of the American judiciary aside, another and even more compelling reason exists to avoid forcing the issue by unilateral executive action: Such an action almost certainly would be counterproductive. The leading concern regarding the use of military force for civilian law enforcement is the potential for military usurpation of power. A military department head's unilateral grant of authority to intrude in civilian life would necessarily create that image. Unilateral action is, therefore, likely to backfire.

Congressional amendments to the Posse Comitatus Act specifically exempting law enforcement by naval units on the high seas would be a preferable way to clarify the situation. Such amendments would put any legal questions surrounding Navy law enforcement to a well-deserved rest. The amendments need not be complicated, but should be unambiguous. For policy reasons, one amendment should include a clause mandating that any Navy enforcement activity must be carried out under the direction of competent civilian authority. Similarly, another clause should require that only service members appropriately designated under a scheme promulgated by the Secretary of the Navy shall be authorized to conduct searches, seizures and arrests pursuant to the en-

232. See, e.g., Roberts, 779 F.2d at 565.
forcement of civilian law. Such a requirement would overcome concerns regarding law enforcement by poorly trained Navy personnel.

The language of this new legislation might take the following form:

10 U.S.C. section 381:

(a) The forgoing provisions of this or any other chapter of United States law notwithstanding, designated personnel of the Navy and the Marine Corps are authorized to enforce United States civilian law on, under or over the high seas.

(b) No law enforcement activity may be undertaken in accordance with subsection (a) unless that activity is carried out under the operational control of competent civilian authority.

(c) Definitions: For purposes of this section—

(1) "designated personnel" shall refer to those commissioned and noncommissioned officers of the Navy and Marine Corps identified in writing by the Secretary of the Navy as possessing the training, temperament, experience and judgment necessary to enforce United States law on civilian suspects in a competent and professional manner. These individuals may be identified either by name, by relevant class (e.g., commanding officers, masters-at-arms, etc.) or by a combination of both.

(2) "enforce" shall encompass the full range of actions relevant to the investigation and apprehension of individuals who violate United States law, including, but not limited to, interdiction of suspect vessels and aircraft, searches, seizures, detentions and arrests.

(3) "competent civilian authority" shall refer to Coast Guard or nonmilitary federal law enforcement officials designated in writing by the Attorney General as being authorized to direct specific instances of civilian law enforcement activity carried out by Navy and Marine Corps personnel on, under or over the high seas. These officials may be identified either by name, by relevant class (e.g., commanders of Coast Guard districts, Assistant United States Attorneys, etc.) or by a combination of both.

Regardless of the approach taken in resolving the Navy's law enforcement status, several procedural safeguards should be implemented. First, written policy guidelines should specify that enforcing the law on the high seas is not the Navy's primary mission. Maintaining a state of true combat readiness is and should remain
the Navy's principal focus. Accordingly, Navy law enforcement operations should be undertaken only on an “as needed” and a “not to interfere” basis. Primary responsibility for federal law enforcement on the high seas should remain vested in the United States Coast Guard. Second, the Navy’s key command and control personnel and all of its “hands-on” enforcement people should receive detailed training before they are permitted to engage in any law enforcement duties. Third, a comprehensive scheme of judicial and administrative remedies should be implemented to punish any abuse of suspects’ rights and to deter such transgressions from taking place. Fourth and finally, a strict rule should be established to the effect that no Navy law enforcement shall be undertaken unless conducted under the supervision of an appropriate Coast Guard or civilian law enforcement official. The official need not be present at the scene of the enforcement activity, but should be apprised of the situation as it develops, monitor its progress, and intervene whenever appropriate. All of this supervision can be accomplished through a reliable “real time” communications


234. The Navy already provides extensive legal training to its senior supervisory personnel and a more practically oriented curriculum to its shipboard “policemen,” sailors assigned to the master-at-arms rating. Telephone interview with Lieutenant Evans, Instructor, Procedure Division, Naval Justice School, United States Navy (Nov. 27, 1989); Telephone interview with Master Chief Petty Officer Allen, Master-at-Arms Detailer, Navy Military Personnel Command, United States Navy (Nov. 27, 1989). The Navy could easily expand this existing scheme, which provides instruction in military justice procedures and principles, to include those differences involving law enforcement on civilian suspects. Both the Navy and the Coast Guard currently operate resident and mobile training programs addressing these topics. Telephone interview with Lieutenant Evans, supra. Therefore, providing added training to key decisionmaking and operational personnel merely represents an incremental change to an existing scheme.

235. At the service level, a number of administrative mechanisms hold in check potential abuse of civilians' rights. For relatively minor breaches, sanctions involving promotion, reassignment, education and reenlistment opportunities for the personnel involved should prove adequate. The Navy can achieve most of those outcomes through the existing system of regular officer and enlisted personnel performance evaluations. More serious transgressions can and should be dealt with through either military nonjudicial punishment proceedings or courts-martial under the Uniform Code of Military Justice. Trial in a federal civilian court is also possible. Finally, a liberal application of the federal exclusionary rule to any evidence illegally obtained should have the same deterrent effect in a military setting that it has in civilian law enforcement operations.
If such a link cannot be established in a given case, then the law enforcement action contemplated should be forsaken until one can be made.

CONCLUSION

Although the need for the United States Navy's participation in American law enforcement activity at sea will be increasingly necessary, the Navy's legal authority to enforce civilian law is far from clear today. This ambiguity must be resolved. At present, no constitutional, statutory or public policy limitation prevents the Navy from engaging in law enforcement operations at sea. Indeed, those few legal obstacles potentially capable of frustrating such a course of action are almost all of the Navy's own making. All are, therefore, susceptible to removal by the Navy.

The Navy ultimately exists to serve and protect the interests of the American people. Discharging that duty requires that nothing unreasonably hinder the Navy in its ability to enforce United States law at sea. The Posse Comitatus Act of 1878 never has represented and should not now represent that kind of constraint on the Navy's authority to enforce civilian laws at sea. However vital the statute's proscriptive effect may be on land, it simply does not translate to the unique law enforcement environment that exists on the high seas. The Posse Comitatus Act of 1878 is and will remain an otherwise serviceable statute that is unfit for duty with the United States Navy at sea.

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236. Technology has long since brought us to the point at which close supervision and control of activity anywhere in the world is possible. During the April 1988 naval battles in the Persian Gulf, for example, the President of the United States personally authorized American military pilots to engage Iranian speed boats threatening U.S. citizens in the area. See O'Rourke, Gulf Ops., 1036 U.S. NAVAL INST. PROC. 47 (1989). Similarly, when American aircraft shot down two Libyan fighters over the Gulf of Sidra in 1981, the White House was informed of the incident and was already preparing a diplomatic response before the Libyan Government even knew what had taken place off its own coast—and that was using communications technology now nearly a decade old. Rechtin, The Technology of Command, NAVAL WAR C. REV., Mar.-Apr. 1984, at 5, 7. Given this capability, law enforcement operations by the Navy can be effectively subjected to supervision by knowledgeable civilian enforcement authorities ashore.