Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot

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I. INTRODUCTION

It has been observed that "[p]erhaps no management problem looms larger to conservationists and fishermen than that of enforcement."

This comment is certainly true of the Fishery Conservation and Management Act of 1976. The enforceability, or lack thereof, of the aptly-numbered House Bill 200 was one of the chief issues raised in the debates preceding passage of the Act. Enforcement difficulties also were noted in President Ford's statement upon signing the bill—a statement that many observers thought sounded more like a veto message. Despite extensive discussion of these matters, which really spoke to the question whether any 200-mile law was workable, rather little detailed attention was given, on the public record, to the enforcement mechanisms established by the Act. A number of important legal
issues appear to have been overlooked or finessed during the legislative process. These issues will presumably be confronted and, one hopes, resolved as the federal government organizes and implements its program under the new law.

The purposes of this article are to analyze the enforcement provisions of the FCMA, to compare them with the terms of prior United States fisheries legislation, and to consider the probable shape of the enforcement program under the new law. Where appropriate, consideration will be given to parallel foreign developments as well as the possible interaction with the Revised Single Negotiating Text distributed at the end of the New York session of the Third United Nations Conference on the Law of the Sea in May 1976. In several instances, the need for corrective legislation, which is apparently being addressed within the Executive Branch, will be noted.

II. BASIC PROHIBITIONS AND REACH

A. Prohibited Conduct

The FCMA weaves a web of prohibitions potentially far more complex than existed under the Bartlett Act. The basic source for the prohibitions is section 307, which makes it unlawful to violate any provision of the Act, any regulation or permit thereunder, or any Governing International Fishery Agreement (GIFA) or implementing regulation. The Act also outlaws the use of a fishing vessel whose permit has been revoked or suspended, and makes it unlawful to refuse to permit an authorized boarding, to “forcibly assault, resist, oppose, impede, intimidate, or interfere with” enforcement personnel, to resist a proper arrest, to traffic in illegal fish, or “to inter-

7. See Statement by President Ford, supra note 4.
fere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by” section 307.15 These prohibitions apply to “any person,” a term defined in the Act to include “any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.”16 Accordingly, the prohibitions of section 307(1) apply not only to masters of vessels, who were the only parties directly subject to the Bartlett Act,17 but to crewmembers as well.

Section 307(2) carries forward, with important changes, the prohibitions of the Bartlett Act by making it unlawful for vessels other than vessels of the United States,18 and for the owners or operators of such vessels, to engage in fishing either “within the boundaries of any State,”19 or, unless pursuant to a permit under section 204(b) or (c), within the fishery conservation zone, or for United States anadromous species, or for Continental Shelf fishery resources.20 Aside from the novelty of the assertion of broadened jurisdiction over anadromous fishes, section 307(2) departs from the Bartlett Act model by substituting “owner or operator” for the phrase “master or other person in charge,” thereby raising the spectre of criminal prosecution of owners under section 309(a)(2). The difficulties of obtaining personal jurisdiction over a non-resident owner of a foreign vessel for purposes of such a prosecution suggest that practice will continue to be as it was

16. Id. § 3(19), 16 U.S.C.A. § 1802(19).
18. The Bartlett Act did not itself define this term, although regulations on foreign harvesting of Continental Shelf fishery resources were issued to apply to “any foreign flag vessel.” 50 C.F.R. § 295.3(d) (1976). The FCMA defines the term “vessel of the United States” as “any vessel documented under the laws of the United States or registered under the laws of any State.” FCMA § 3(25), 16 U.S.C.A. § 1802(25) (West Supp. 1977). This is consistent with the interpretation placed on the Bartlett Act by the Treasury. T.D. 56382(6). 100 Treas. Dec. 145 (1965), and no difference in coverage appears to have been intended by the drafters. The Act defines “foreign fishing” as “fishing by a vessel other than a vessel of the United States.” FCMA § 3(12). 16 U.S.C.A. § 1802(12) (West Supp. 1977), a definition the Senate Commerce Committee explained by noting that “[t]he determinant is the flag of the vessel. If the vessel flies the flag of, i.e., is registered in, a foreign nation, it is included in the term.” S. REP. No. 94-416, 94th Cong., 1st Sess. 20 (1975), reprinted in LEGISLATIVE HISTORY, supra note 4, at 653, 676. But see note 37 infra.
under the prior statutory scheme: namely, criminal prosecution of the master, if anyone.\footnote{21}

The FCMA goes considerably beyond the Bartlett Act in providing definitions of prohibited conduct. For example, where the Bartlett Act used the concept of "activities in support of a foreign fishery fleet" separately from "engaging in the fisheries,"\footnote{22} the FCMA treats support as a type of fishing. Thus, "operations at sea in support of, or in preparation for" fishing are meshed with the more conventional notions of fishing as actual or attempted catching, taking, or harvesting of fish, or "any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish."\footnote{23} This definition of support activities is little more enlightening than the bald words of the Bartlett Act prohibition, but considerable further light is shed on the matter by a portion of the definition of "fishing vessel," which refers to vessels "used for, equipped to be used for, or of a type which is normally used for . . . aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing."\footnote{24} In the author's view, the two provisions just quoted must

\footnote{21. In only one Bartlett Act case was a person other than a master prosecuted. United States v. Artemov, Crim. No. A–21–72 (D. Alas., filed Feb. 4, 1972) (fleet commander), \textit{discussed in Bartlett Act Status Report, supra} note 8, at 723 n.109. Section 307(2) includes any "operator" of an offending vessel. Whether one who was not the master still had effective control over a vessel's activities so as to be deemed an operator would be a question of fact. Where a person other than the master is prosecuted on such a theory, the propriety of punishing the master as well may be questioned. \textit{Cf. Fishing News Int'l}, Nov. 1976, at 19 (acquittal of sleeping master of West German trawler by Norwegian court where mate on watch was convicted). Canadian regulations exclude pilots from the category of persons having command or charge of a vessel. Coastal Fisheries Protection Regulations, § 2, 110 Can. Gaz. 3318 (1976).}


\footnote{24. FCMA § 3(11), 16 U.S.C.A. § 1802(11) (West Supp. 1977).}
be read together in order to make sense of the entire statutory scheme. Moreover, this listing surprisingly fails to cover all the forms of support activity that were previously identified in agency guidelines, for example, transfer of personnel, or repairs. Happily, the power of the Secretary of Commerce to issue regulations has been used to state more precisely the types of conduct that are within the reach of this portion of the prohibition.

Even the ban on fishing proper is not without problems of interpretation. For one thing, the FCMA fails to provide a completely satisfactory answer to the question whether recreational fishing is prohibited, although the balance tips in favor of inclusion of such fishing. The unadorned words of the statute are broad enough to cover recreational angling, and regulations issued under other federal legislation support the common sense notion that angling—the use of a hand-held rod and reel to take fish for sport—includes "the taking or the attempted taking of fish." Plainly, however, such fishing was not the chief evil the FCMA was intended to eradicate, and one may safely


27. 50 C.F.R. § 611.2(n)(2), 42 Fed. Reg. 8815 (1977); cf. Bartlett Act Status Report, supra note 8, at 723 & n.109 (suggesting issuance of explanatory regulations to define "support activity").


29. See 50 C.F.R. § 285.1 (1976). The FCMA, it may be added, specifically includes attempted catching of fish as a subtype of fishing. FCMA § 3(10)(B), 16 U.S.C.A. § 1802(10)(B) (West Supp. 1977). A similar dichotomy found in British legislation has been properly condemned as "otiose," with additional comment as follows:
assume that, at worst, isolated incidents of foreign angling in waters covered by the Act would lead to issuance of a citation under section 311(c).30

With regard to fishery research, the FCMA provides a clearer answer than did the Bartlett Act, although it was possible to infer from the latter's provision for permits for international organizations' research activities31 that such activities were, in the absence of a permit, illegal. The FCMA takes a different approach and affirmatively excludes from the definition of "fishing" "any scientific research activity which is conducted by a scientific research vessel."32 Thus, the limitation of this exemption to vessels owned or operated by an international organization of which the United States is a member, which the

Perhaps the offence of attempting to fish may be committed when the crew are trying unsuccessfully to cast their nets outboard but that is not a very satisfactory proposition. Once the nets are in the water, fishing has clearly commenced and there can be no question of the defendant being guilty of an attempt. It is thought that fishing continues until the net or line is returned inboard, since until that moment the fish have a chance to escape.

R. STURT, FISHERY PROTECTION AND FOREIGN SEA-FISHING BOATS 15-16 (1972). See also Moiser, FISHERY PROTECTION, 141 JUST. P. 337 (1977). The observations seem entirely applicable to the FCMA and its prohibitions.

30. See generally text accompanying notes 268-87 infra.
32. FCMA § 3(10), 16 U.S.C.A. § 1802(10) (West Supp. 1977). See also 42 Fed. Reg. 8813, 8815 (1977) (to be codified in 50 C.F.R. § 611.2). The Polish GIFA subtly and, one expects, inadvertently distorts the structure of this section of the Act by showing the research exception as a proviso only to the support activities clause of the definition of "fishing." The GIFA also deviates from the Act by its exclusion of "other legitimate uses of the high seas," only one of which is research activities. See Agreement Concerning Fisheries Off the Coast of the United States, Aug. 2, 1976, United States-Poland, art. II(5)(d), reprinted in H. R. Doc. No. 94-613, 94th Cong., 2d Sess. 6 (1976), discussed in Congressional Research Service, Library of Congress, Memorandum to House Comm. on Merchant Marine and Fisheries, Sept. 27, 1976, reprinted in 1976 House Oversight Hearings, supra note 28, at 58 (1976). The apparent purpose of the latter change was to underscore the United States commitment to unimpeded free transit through the fishery conservation zone. See id. at 62 (testimony of Rozanne L. Ridgway, Deputy Ass't Sec'y of State for Oceans and Fisheries Affairs). Other variances between the FCMA and the GIFA with Poland relating to support activities seem not to reflect materially on the scope or meaning of the Act. See id. at 58, 63 (discussing FCMA §§ 3(10)(D), 3(11)(B)). In contrast with FCMA § 3(9), Canadian regulations require that foreign vessels have a permit even when "fishing for purposes of scientific research." Coastal Fisheries Protection Regulations, § 5(9)(a), 110 Can. Gaz. 3318, 3319 (1976).

The policy of the FCMA was applied even before the Act took effect. In December 1976, the French research ship Crysos was found to have retained nearly 300 pounds of lobster, but the only sanction imposed was a seizure of the lobster, which—alas—was later destroyed by the National Marine Fisheries Service. See Nat'l Fisherman, Apr. 1977, § A at 28, cols. 4-5.
House bill had sought to perpetuate,33 did not survive. Instead, the Conference Committee merely noted that it “does not consider the conducting of tests of fishing gear to be scientific research within the meaning of the bill.”34 Presumably, this congressional gloss on the exemption for research is intended to permit such “pure” fishery research as is involved, for example, in the search for new species, or in the assessment of impact of various conditions upon fish stocks. The limitation to activities conducted by a research vessel, however, should be elaborated in regulations to provide, at a minimum, for prior notification to the United States of the name of the vessel, the duration of its stay in controlled waters, and the nature of its research program.

Another issue to be faced is when is a vessel a vessel of the United States? To what country does a given vessel belong for purposes of the FCMA? The use of flags-of-convenience and charter parties may make it more difficult than one might have imagined to resolve such questions.35 The Senate Commerce Committee’s report on Senate bill 961 appeared to make short shrift of the first of these questions by noting, in explanation of the definition of “foreign fishing,” that “[t]he determinant is the flag of the vessel. If the vessel flies the flag of, i.e., is registered in, a foreign nation, it is included in the term.”36 Passing over the potentially troublesome matter of permissible foreign investment in domestic fishing ventures,37 this language may be helpful


34. S. REP. NO. 94-711, 94th Cong., 2d Sess. 43 (1976), reprinted in LEGISLATIVE HISTORY, supra note 4, at 37, 79. The Department of State has somewhat clarified the meaning of the “research” clause by announcing that “fishing carried out for the purpose of training fishermen” would not be deemed research exempt from the permit requirements of the Act. “Fisheries research which assists in the conservation and management of the stocks, and the identification of the fishery resources of the fisheries conservation zone is encouraged. . . . [a]nd when undertaken in full cooperation with the United States, shall not be deemed to be fishing within the meaning of the Act.” U.S. Dept. of State, Policy Guidelines: Scientific Research in the Fishery Conservation Zone, Feb. 22, 1977.

35. For a helpful summary of the phenomenon of “pseudoforeign” vessels used to evade Scottish fishery regulations at the turn of the century, see D. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES 327 n.18 (1965) (quoting T. FULTON, THE SOVEREIGNTY OF THE SEA 729 n.1 (1911)).

36. S. REP. NO. 94-416, 94th Cong., 1st Sess. 20 (1975), reprinted in LEGISLATIVE HISTORY, supra note 4, at 653, 676. This view has been accepted by the State Department. 1976 House Oversight Hearings, supra note 28, at 145, 158 (testimony of Rozanne L. Ridgway, Deputy Ass’t Sec’y of State for Oceans and Fisheries Affairs).

in showing when a vessel is a foreign vessel, but it does not really address the situation in which a vessel is owned or operated by citizens of one foreign nation and flies the flag of another. Such arrangements may cause no particular enforcement difficulties, but if an enterprise in a foreign country that has approval for its vessels to fish or conduct other generally prohibited activities in coastal waters in turn charters a vessel of another foreign nation either for "true" fishing or for support activities, complex issues of negotiation and interpretation would arise, thereby further complicating the enforcement function.

In either of the described cases a section 204 permit would be required under the FCMA, but the Act refers to the submission of applications by a GIFA country "for a permit for each of its fishing

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40. Id. § 3(10)(D), 16 U.S.C.A. § 1802(10)(D).
vessels," suggesting that only vessels registered in a country may be sponsored by that country for United States fishing permits. Under the Bartlett Act, the United States entered into some bilateral agreements permitting otherwise prohibited support activities by vessels under charter to the countries with which the agreements had been negotiated. True to this approach, the Agreed Minutes to the Polish GIFA allow Poland to apply for section 204 permits "for flag vessels of other countries with which the United States has diplomatic relations, chartered by or under contract to a Polish fishing company," but it is apparently the Administration's policy to issue permits only to ships flying the flag of the GIFA nation seeking those permits, or to factory or other support vessels under charter to that nation, provided those vessels in turn fly the flag of a GIFA country. Such an approach is a reasonable reconciliation of the terms of the Act and the realities of international fishery business arrangements.

In general, no element of wilfulness is involved in the conduct proscribed by section 307 of the FCMA. Section 307(2), the lineal descendant of the Bartlett Act's prohibitions on foreign fishing, applies to all fishing that falls within its terms; there is no requirement that the perpetrator have intentionally violated these prohibitions. This was the construction properly applied to the Bartlett Act and it should be applied to the FCMA as well. Neither statute imposes a moral stigma upon a convicted defendant and the absence of a "moral level" to many fishing offenses has been cited as a reason for creation of the

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42. See Bartlett Act Status Report, supra note 8, at 724 & n.112; Agreement on Certain Fisheries Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean, Mar. 1, 1976, United States-Soviet Union, art. VI(3), T.I.A.S. No. 8349.
46. United States v. Ayo-Gonzalez, 536 F.2d 652 (5th Cir. 1976). cert. denied, 97 S.Ct. 808 (1977). In an earlier case also involving Cuban fishing in the contiguous fisheries zone off Texas, the master and owner had conceded that the Bartlett Act "requires no proof of specific intent to violate the contiguous fisheries zone in order to impose both criminal and civil sanctions." Brief for Appellants at 16. United States v. Sorina. 511 F.2d 1401 (5th Cir. 1975) (mem.).
civil penalty sanction of section 307. Such a rule of strict liability is also consistent with doctrine in other common law jurisdictions and reflects the exigencies of fisheries law enforcement. By the same token, the statute and its legislative history provide no support for a contention that the prosecution must prove negligence in order to secure a conviction or an order forfeiting the vessel. Wilfulness of a violation, however, would certainly be a pertinent consideration in the government’s selection of a particular type of sanction, or in determining the level of a civil penalty under section 308(a) or a forfeiture settlement under section 310(a).

The prohibitions found in section 307(1) also are not qualified by a requirement that the conduct be knowing or wilful, except in the case of the bar on interference with the arrest of another person where the offender must know “that such other person has committed any act prohibited by” section 307. No showing is required that force was used by an offender except with respect to section 307(1)(E), concerning forcible assault of, resistance to, or other interference with enforcement personnel in the course of a search or inspection. As is the case with the criminal code analogue to this provision, the word

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50. An amendment was offered to insert the phrase “knowingly and willingly” in the House, but this did not pass. See 121 Cong. Rec. H9953 (daily ed. Oct. 9, 1975), reprinted in Legislative History, supra note 4, at 930.
51. FCMA § 308(a), 16 U.S.C.A. § 1858(a) (West Supp. 1977). One of the § 308(a) criteria is “the degree of culpability.” See generally text accompanying notes 179–89 infra.
"forcibly" should be considered to modify not only the verb "assault," but in addition the other succeeding verbs. The amount of force that must be displayed in order to violate this portion of the FCMA should also be viewed as similar to that required by the general statute on interference with a federal official. From the structure and levels of criminal punishment set forth in section 309(b), it may be inferred that forcible resistance may occur without the use of a dangerous weapon, conduct causing bodily injury, or even putting an enforcement officer "in fear of imminent bodily injury." The presence of these circumstances merely serves to increase the penalties to higher levels.

One episode in the legislative history dealt with the issue of refusals to permit a boarding under section 307(1)(D). In the House debates, Representative Eckhardt offered an amendment that would have excluded from that provision any refusal "pursuant to a right protected by international law." This amendment, justified by a desire to prevent hostile confrontations "to protect a bunch of haddock," was, surprisingly, accepted by the floor manager and agreed to by the House. Fortunately, at the suggestion of the Departments of Transportation and Justice the amendment was quietly deleted in the Conference; if it had survived, it would have created an intolerable degree of uncertainty in this important section, and would have compelled the district courts to address delicate law of the sea issues in any case brought under the boarding provisions of section 307(1)(D). This would, in all likelihood, have served to encourage rather than to reduce obstructionism by, and conflict with, regulated foreign fishermen.

58. Id.
The Policeman’s Lot

B. Geographical Scope

A central question for enforcement purposes is the geographical scope of the FCMA. This may be analyzed from two perspectives: (1) What waters was the Act intended to cover (largely a question of definitions) and, more practically, (2) what are the metes and bounds of the waters covered by the Act? These two issues will be addressed in this section of the article.

1. Waters subject to the Act

The Act has a different geographical reach for different purposes. Thus, the FCMA asserts "exclusive fishery management authority" over anadromous species throughout their migratory range, but not "during the time [such species] are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States." Here, the jurisdiction follows the fish species of interest.

As to Continental Shelf fishery resources, the United States asserts jurisdiction "beyond the fishery conservation zone," as well as, by implication, shoreward of the 200-mile limit. In a sense, the extent of jurisdiction here is also defined by the species, because the Act, consonant with the 1958 Convention on the Continental Shelf and the Bartlett Act, defines the shelf to include "submarine areas adjacent to the coast, but outside the area of the territorial sea, of the United States, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of natural resources of such areas." The list of shelf species developed under the Bartlett Act has been retained under the new law.

61. Id. § 102(3), 16 U.S.C.A. § 1812(3).
66. FCMA § 3(4), 16 U.S.C.A. § 1802(4) (West Supp. 1977). Three additional species, the California spiny lobster, white abalone, and giant red sea urchin, have been suggested by California authorities, Letter from Cal. Dep't of Fish & Game to Robert W. Schoning, Director, Nat'l Marine Fisheries Service (May 25, 1976), but action on the recommendation has been deferred. 41 Fed. Reg. 26,019 (1976).
But principally, the FCMA asserts management jurisdiction over a fishery conservation zone, defined as “a zone contiguous to the territorial sea of the United States [the inner boundary of which] is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.” Thus, with the present three-mile limit of the territorial sea, the fishery conservation zone is in practical effect a 197-nautical-mile contiguous fisheries zone. The FCMA also includes protection against foreign fishing “within the boundaries of any State,” and grants the federal government limited management powers within state waters (other than internal waters).

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69. The contiguous fisheries zone under the Bartlett Act was measured from the three-mile limit, whereas the fisheries conservation zone is measured from “the baseline from which the territorial sea is measured.” Hence if the territorial sea had been expanded under the Bartlett Act, the contiguous fisheries zone would have moved seaward; expansion of the territorial sea under the FCMA would merely serve to shrink the fishery conservation zone. H.R. REP. No. 94-445, 94th Cong., 1st Sess. 50 (1975), reprinted in LEGISLATIVE HISTORY, supra note 4, at 1051, 1101.
71. Id. § 306(b)(1)(B), 16 U.S.C.A. § 1856(b)(1)(B). The term “internal waters” is not defined in the FCMA, see 121 CONG. REC. H9920-21 (daily ed. Oct. 9, 1975) (remarks of Rep. Leggett), although an effort was made to define such waters shoreward of the outer limits of the territorial sea of the United States. Id. at H9953 (remarks of Rep. Heckler). Such a definition would have deviated materially from the meaning ascribed in article 5(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. That article defines internal waters as the “[w]aters on the landward side of the baseline of the territorial sea.” To the extent that the seaward boundaries of Texas and the Gulf Coast of Florida are nine nautical miles from shore rather than three, United States v. Louisiana, 363 U.S. 1 (1960), the area subject to the management authority of the Regional Council would be reduced commensurately. This anomaly was defended by the Commerce Committee on the ground that “it preserves the domestic breakdown of management authority between the States and the Federal Government which has prevailed since the founding of the republic.” S. REP. No. 94-416, 94th Cong., 1st Sess. 22 (1975), reprinted in LEGISLATIVE HISTORY, supra note 4, at 653, 678. Other events may upset this view because these two states have been sued by the United States, in the original jurisdiction of the Supreme Court, for a declaration that they are without jurisdiction over fishing beyond the three-mile limit. United States v. Florida, No. 54 (orig.). On February 23, 1977, the Court, on grounds of sovereign immunity, denied their motion for leave to file a counterclaim for a declaration that they have jurisdiction over such fishing within that limit. 97 S. Ct. 1166 (1977).

under extraordinary circumstances to protect a fishery that is predominantly engaged within and beyond the fishery conservation zone.

The present issue is one of determining those land masses around which the various jurisdictional areas created or recognized by the FCMA are found. The Act is less than pellucid on this point, defining "State" to mean "each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States," but noting further that "[t]he term 'United States,' when used in a geographical context, means all the States thereof.

Nevertheless, some of the uncertainty may be resolved fairly readily. For example, section 307(2)(A) bars foreign fishing "within the boundaries of any State." This would apply not only to the marginal sea but to internal waters as well, including the United States portion of the Great Lakes. The legislative history includes a sponsor's statement that all states are covered by the FCMA, even though no provision is made for a Great Lakes Regional Fishery Management Council. Omission of the Great Lakes from the Regional Council program may be explained by the fact that no fishery conservation

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72. For a similar inquiry with respect to the reach of the former law see Bartlett Act Status Report, supra note 8, at 713-15, 716-18.
74. Id. § 3(24), 16 U.S.C.A. § 1802(24).
75. Passing over the FCMA's several special references to Alaska, FCMA §§ 2(a)(7), 2(b)(6), 302(c)(2), 16 U.S.C.A. §§ 1801(a)(7), 1801(b)(6), 1852(c)(2) (West Supp. 1977), Senator Magnuson, in the floor debates, stated: "This is not just a bill for Alaska. This is a bill for all the other States." 122 CONG. REC. S121 (daily ed. Jan. 19, 1976) (remarks of Sen. Magnuson), reprinted in LEGISLATIVE HISTORY, supra note 4, at 470. But cf. 120 CONG. REC. S21,080 (daily ed. Dec. 11, 1974) (remarks of Sen. Magnuson) ("This applies to both coasts, the Pacific and the Atlantic, and to the gulf"). The hearings that led to passage of the FCMA were focused virtually exclusively on coastal problems, with very few references of any kind to the Great Lakes. See 1975 House Merchant Marine Hearings, supra note 1, at 187 (testimony of Howard W. Pollock, Deputy Adm'r, NOAA). Congressional leaders were, however, aware of Great Lakes fishery problems at the time the FCMA was under consideration. See Letter from Rep. Leonor K. Sullivan, Chairperson, House Comm. on Merchant Marine and Fisheries, to Elmer B. Staats, Comptroller General (Nov. 19, 1975), in 1 COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, No. B-177024, REPORT TO THE CONGRESS: THE U.S. FISHING INDUSTRY-PRESENT CONDITION AND FUTURE OF MARINE FISHERIES 124, 129 (Dec. 23, 1976). Specific evidence of fishing problems on Lake Erie was brought to the attention of the 94th Congress after the FCMA had been passed. See 122 CONG. REC. H3967 (daily ed. May 5, 1976) (remarks of Rep. Pritchard).
76. Two of the Great Lakes states, New York and Pennsylvania, are included in the Mid-Atlantic Council, but § 302(a)(2), 16 U.S.C.A. § 1852(a)(2) (West Supp. 1977), makes it plain that such membership pertains only to "the fisheries in the Atlantic Ocean seaward of such States."
zone can exist on the Lakes in view of the legal status of the United States portion of the Lakes as internal waters. Under the Submerged Lands Act the seaward boundary of Great Lakes states is the international boundary. It follows that under the new law, as under the old, it will be a violation for Canadian vessels to fish on the United States side of the Lakes' boundary, just as it would be for any foreign vessel to fish within the territorial waters of a coastal state that borders on the ocean waters. Any other interpretation would compel a conclusion that Congress had overruled the administrative gloss placed on the Bartlett Act, a proposition for which no support has been found.

Rather, the most that can be said is merely that the management authority vested by the Act in the federal government—as distinguished from the bald prohibition on foreign fishing found in section 307(2)(A)—does not extend to the Great Lakes.

The provisions concerning composition of the Regional Councils accurately reflect, albeit only by implication, the fact that no part of the FCMA governs the Trust Territory of the Pacific Islands. The Senate had sought to include the Trust Territory, but the House did


78. 43 U.S.C. § 1312 (1970). The Conference Report states that “[t]he term 'seaward boundary' when used in reference to a coastal state has the same meaning as is given to such term in the Submerged Lands Act of 1953.” S. Rep. No. 94–711, 94th Cong., 2d Sess. 42 (1976), reprinted in LEGISLATIVE HISTORY, supra note 4, at 37, 78. Use of the term “coastal” here appears to have been surplusage. In any event, it is worth noting that the Coastal Zone Management Act of 1972 defines “coastal state” to include, inter alia, “a state . . . bordering on . . . one or more of the Great Lakes.” 16 U.S.C. § 1453(c) (Supp. V 1975). The exclusion of Great Lakes states from the definition “coastal State” in the Deepwater Port Act of 1974, 33 U.S.C. § 1502(7) (Supp. V 1975), does not argue against their inclusion under the FCMA, because the principal purpose of the Deepwater Port Act was to provide a legal framework for activities beyond territorial waters, a situation that cannot arise on the Great Lakes. See text accompanying note 77 supra.

79. In fact, in the five years since the federal government decided that the Bartlett Act applied to the Great Lakes, see Bartlett Act Status Report, supra note 8, at 716–17, no Canadian fishing vessels have been seized by the Coast Guard, although that agency has seized fishing gear believed to have been set by Canadian fishing tugs on the United States side of the boundary in Lake Erie. Cleveland Plain Dealer, Oct. 23, 1975, § A, at 16, col. 3; Toledo, Ohio, Blade, Oct. 23, 1975, at 4, col. 1.

80. Indeed, the Conference Report specifically indicates that the Bartlett Act prohibitions are preserved to the extent not modified by the FCMA. S. Rep. No. 94–711, 94th Cong., 2d Sess. 56 (1976), reprinted in LEGISLATIVE HISTORY, supra note 4, at 37, 92. The Bartlett Act is formally repealed by § 402 of the FCMA.
not. The latter prevailed in conference.81 In light of the reasoning set forth above concerning the Great Lakes, it would have been tidier to accomplish this result by appropriately adjusting the definitions rather than the Regional Council composition section of the law. In any event, exclusion of these islands from the FCMA’s coverage is consistent with the construction applied administratively to the Bartlett Act.82 Presumably, once the new Commonwealth of the Northern Mariana Islands83 comes into being, the Act will be held to apply to them; at that time, those islands should be afforded full membership on the Western Pacific Council.84

The usual miscellaneous geographical questions still linger under the new law. For one thing, apparently in the interests of not further exacerbating relations with Panama,85 the Canal Zone is not mentioned by name, either among the definitions or in the listing of Caribbean Council members. Also in the Caribbean, the status of Quita

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Legislation has been introduced in the Congress of Micronesia to create a Marine Space Jurisdiction that would have the effect of regulating foreign fishing within 200 miles of the Trust Territory’s islands. H.B. 7–92, 7th Cong. of Micronesia, 1st Reg. Sess. (1977).


84. Pending such action, the Northern Marianas have been afforded non-voting observer status by the Western Pacific Council.

Sueno, Roncador, and Serrana continues to be an open question. A treaty settling matters, and renouncing all United States claims to sovereignty, was signed by the United States and Colombia on September 8, 1972, but still has not been ratified by the Senate.\textsuperscript{86} Article 2 of the treaty states:

In recognition of the fact that nationals and vessels of Colombia and the United States are at the present time engaged in fishing in the waters adjacent to Quita Sueno, both governments agree that in the future there shall be no interference by either government or by its nationals or vessels with the fishing activities of the other in this area.\textsuperscript{87}

The succeeding article deals with fishing in the Roncador and Serrana area, and an exchange of notes executed at the same time set forth a scheme to protect American fishing from discriminatory regulation by Colombia. In the absence of American ratification, the two nations are cast back on the 1928 \textit{modus vivendi} under which "the Government of the United States will refrain from objecting to the utilization, by Colombian nationals, of the waters appurtenant to the Islands for the purpose of fishing."\textsuperscript{88} Because the principal matter of this \textit{modus vivendi} deals with conflicting claims to sovereignty, rather than fisheries, it is doubtful that a renegotiation would be required under section 202(b) of the FCMA.\textsuperscript{89}

Before turning to the question of delimitation of the fishery conser-


\textsuperscript{88} Agreement Respecting the Status of Serrana and Quita Sueno Banks and Roncador Cay, Apr. 10, 1928, United States-Colombia, T.S. 760\frac{1}{2}. 6 C. Bevans, \textsc{Treaties and Other International Agreements of the United States of America} 1776-1949, at 904 (1971). \textit{See also} 2 M. Whiteman, \textsc{Digest of International Law} 1322 (1963).

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vation zone, mention may be made of the status of Canton and Enderbury Islands in the South Pacific, which are administered jointly by the United States and Great Britain under an agreement that expires on April 6, 1989. The delicate balance by which each nation agreed not to impair the claim of the other would suggest, at the very least, that extreme circumspection be exercised in the application of the FCMA to the waters of these obscure islands.

Similarly, the United States has asserted claims to certain atolls in the Tokilau and Northern Cook Islands administered by New Zealand. Presumably, it was with all these islands in mind that the Department of State observed that "[e]stablishment of the fishery conservation zone as set forth in this notice is without prejudice to claims regarding the sovereignty of disputed islands."

2. Metes and bounds

It has been noted correctly that "[e]nforcement of the 200-mile zone . . . depends in large part on the knowledge of the boundaries of that zone." For this reason, the drafters of the FCMA gave express attention to the problems of boundary delineation. Such boundaries are of four types under the Act: first, the international borders with our neighbors on the North American continent; second, international borders with each of the nations whose fisheries zones would conflict with the fishery conservation zone (FCZ) created by the Act; third, the precise outer limit where the FCZ meets waters not subject to any nation's jurisdiction; and fourth, the marine boundaries separating the waters subject to the eight Regional Fishery Management Councils.


91. It may be anticipated that still other territorial jurisdiction questions will arise under the Act. For example, the Western Pacific Council has passed a resolution to have that region include Wake, Howland, Baker, Jarvis, Johnston, Palmyra, and Midway Islands, and Kingman Reef. 2 MARINE FISH MANAGEMENT, Nov. 1976, at 4. It was also suggested in the press, apparently spuriously, that the United States and Japan were each waiting to lay claim to a possible new volcanic island 200 miles from Iwo Jima, in order to obtain the 200-mile economic or fishery zone that would come with ownership. Washington Post, Sept. 20, 1976, at A17, col. 3.


With respect to the first two of these four categories, section 202(d) of the FCMA provides that "[t]he Secretary of State, in cooperation with the Secretary [of Commerce], may initiate and conduct negotiations with any adjacent or opposite foreign nation to establish the boundaries of the fishery conservation zone of the United States in relation to any such nation." Although the definition of the fishery conservation zone makes no reference to adjustments of the 200-nautical-mile zonal boundary, the clear implication is that a section 202(d) agreement would represent a pro tanto alteration of the FCZ.

As such, the scheme is similar to that of the Contiguous Fisheries Zone Act of 1966, which provided: "Whenever the President determines that a portion of the fisheries zone conflicts with the territorial waters or fisheries zone of another country, he may establish a seaward boundary for such portion of the zone in substitution for the seaward boundary described in section 1092 of this title." Indeed, the House bill had included an almost identical provision. The FCMA as enacted, however, is subtly different, in that the "in relation to any such nation" clause of section 202(d) is sufficiently vague to permit the negotiation of agreements that do less than draw lines between fishing zones; that is, the words of the statute would seemingly permit an agreement that resolved the boundary question only as between the neighbor country and the United States, leaving each country's zone intact as to vessels of a third country. Such a resolution is highly desirable as an interim measure where, as in the Georges Bank area off New England, the United States and Canada are unable at present to conclude a permanent maritime border agreement.

Efforts to negotiate the extended maritime boundaries with Canada and Mexico have been given priority, and in the case of Mexico have already borne fruit. In an exchange of notes accompanying the signing of a fisheries agreement at Mexico City on November 26, 1976, the United States and Mexico established provisional maritime

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95. Id. § 101, 16 U.S.C.A. § 1811.
98. H.R. 200, 94th Cong., 1st Sess. § 103 (1975), reprinted in Legislative History, supra note 4, at 753, 763.
boundaries to be used until necessary technical work and the ratification processes of each nation can be completed.100

Talks with Canada have been slower and more difficult with respect to boundary issues, even though discussions on fishery management issues have made considerable progress.101 On November 1, 1976, the Canadian government issued a proposed Order in Council that would define the extent of Canadian jurisdiction over a 200-mile fishing zone.102 Because the proposed Order stated boundary claims that were inconsistent with United States positions, the Department of State promptly published a notice in the Federal Register stating the coordination of the boundaries of the Gulf of Maine, the Strait of Juan de Fuca, Dixon Entrance and the Beaufort Sea.103 In footnotes to the notice, the Department commented:

In view of the fact that the claimed boundaries published by the United States and Canada would leave an unclaimed area within the Gulf of Maine, the United States will exercise its fisheries management jurisdiction to the Canadian-claimed line where that line is situated eastward of the United States-claimed line, until such time as a permanent maritime boundary with Canada is established in the Gulf of Maine.104

As to the Continental Shelf, the Department added: "Where the continental shelf extends beyond 200 miles the claimed continental shelf boundary of the United States will extend to the seaward limit of the continental shelf in accordance with international law and in a direc-

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tion determined by application of the principles by which the described segment is determined.”\textsuperscript{105}

Enforcement under such circumstances, of course, is rendered more difficult, if not impossible. In recent decades, however, Canada and the United States have adopted conciliatory policies regarding fishing by vessels of the other.\textsuperscript{106} In keeping with this history, the two countries have arrived at an interim program of enforcement. Thus, in the Reciprocal Fisheries Agreement signed on February 23, 1977, the United States and Canada agreed as follows:

In the boundary regions, the following principles shall be applied as interim measures of mutual restraint pending the resolution of questions pertaining to the delimitation of areas subject to the respective fishery jurisdiction of each party:

1. As between the parties, enforcement shall be conducted by the flag State.
2. Neither party shall authorize fishing by vessels of third parties in the boundary regions.
3. Either party may enforce against third parties in the boundary regions.\textsuperscript{107}

As to enforcement against third-country vessels in areas claimed by the United States, the district courts should defer to the position stated by the Executive Branch.\textsuperscript{108} Existence of overlapping claims for any appreciable period, to be sure, would be subversive of the national resource management objectives to which each country adheres.

Boundary negotiations with “opposite” rather than “adjacent”

\textsuperscript{105} 41 Fed. Reg. 48,620 n.2 (1976).
\textsuperscript{106} See Bartlett Act Status Report, supra note 8, at 734 nn. 173–74, 742 n.226; Fidell. The Case of the Incidental Lobster: United States Regulation of Foreign Harvesting of Continental Shelf Fishery Resources, 10 INT’L LAW. 135, 141 (1976) [hereinafter cited as Shelf Enforcement] (citing 1975 House Merchant Marine Hearings, supra note 1, at 112–13 (testimony of Thomas A. Clingan, Jr., Deputy Ass’t Sec’y of State for Oceans and Fisheries Affairs)); 1976 House Oversight Hearings, supra note 28, at 95 (testimony of Rozanne L. Ridgway, Deputy Ass’t Sec’y of State for Oceans and Fisheries Affairs). But see Address by Thomas O. Enders, U.S. Ambassador to Canada. Before the Canadian Club, Ottawa (Mar. 23, 1976) at 3 (“In the future we will not negotiate together on the basis of exceptional dispensations and conversions, but as we do with other countries”).
\textsuperscript{108} See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 152, Reporter’s Note (b) (1965) (citing, inter alia, Jones v. United States, 137 U.S. 202, 212–14 (1890)).
neighbor countries are also required, with particular emphasis on those with the Soviet Union, Cuba (with which United States fishery relations have been poor since the beginning of the Castro regime), and other Caribbean countries. It appears that in the press of activity in preparation for the March 1, 1977, effective date of the FCMA, these negotiations have been given somewhat lower priority than other tasks facing the responsible agencies.

It is not likely that there will be many violations of the FCMA in the immediate vicinity of the seaward limit of the fishery conservation zone because the "known active fishing areas" are generally considerably inside the zone. Nevertheless, it is imperative that the precise limits of that zone be known to the regulated fishermen and domestic enforcement agencies. To this end, the National Ocean Survey of NOAA will be conducting a program to survey and fix the baseline from which the 200-mile limit is drawn. This program entails the establishment of forty-four long-term tidal observation stations, computation of mean low water tidal data from those stations, determination of precise geographical positions along the mean low water line, and the computation and publication of geographical coordinates for plotting on nautical charts. At the end of October 1976, the federal government's Committee on the United States Baseline began work with a view to identification of geographical coordinates for the zone


110. See S. Rep. No. 94–711, 94th Cong., 2d Sess. 46 (1976), reprinted in Legislative History, supra note 4, at 37, 82; H.R. Rep. No. 94–445, 94th Cong., 1st Sess. 50 (1975), reprinted in Legislative History, supra note 4, at 1051, 1102. According to a State Department release issued the day the FCMA took effect, the Act: creates maritime boundaries with Canada, Mexico, the Soviet Union, the Bahamas, Cuba, the Dominican Republic, the Netherlands Antilles, Venezuela, the British Virgin Islands, Tonga, Western Samoa, the Trust Territory of the Pacific Islands, and various islands in the Pacific Ocean which are under the jurisdiction of the United Kingdom or New Zealand.

limits and the publication of charts showing those limits. The State Department has published a partial list of the geographical coordinates of the FCZ, and new navigation charts will be made available to foreign interests as were the set of nautical charts prepared with respect to the twelve-mile limit in effect from 1966 to 1977.

Because the management plans of the various regions will impose differing requirements, it becomes as important to define the boundaries between the regions as to define the international boundaries. The Act recognizes this by providing that the Secretary of Commerce "shall establish the boundaries between the geographical areas of authority of adjacent Councils." The existence of occasional marine border disputes between neighboring states, and the inclusion of some states in more than one region, makes this provision potentially controversial.

The manner in which the Secretary of Commerce exercises power under section 304(f)(2) should be consistent with the exercise of power to establish lateral seaward boundaries between the states under the Coastal Zone Management Act Amendments of 1976, which govern the distribution of grants as part of the Coastal Energy Impact Program. The criteria there stated require initial reliance upon the principles of pre-existing interstate compacts, agreements, or judicial decisions that clearly define or fix such boundaries, and

116. FCMA § 304(f)(2), 16 U.S.C.A. § 1854(f)(2) (West Supp. 1977). This clause was inspired by a Coast Guard suggestion that also called upon the Commerce Department to consult with the Coast Guard in fixing regional boundaries. As enacted, the section omits the consultation requirement. Interim intercouncil boundaries for the East Coast were published on July 18, 1977, 42 Fed. Reg. 36,980 (1977) (to be codified as 50 C.F.R. § 601.12).
120. Id. § 1456a.
121. Id. § 1456a (b)(3)(B)(i).
then upon "the applicable principles of law, including the principles of
the Convention on the Territorial Sea and the Contiguous Zone."\textsuperscript{122} It is hoped that in wielding its power to fix interregional boundaries
under section 304(f)(2) of the FCMA, the Commerce Department
will follow the principle stated in its proposed Coastal Energy Impact
Program regulations allowing the concerned states a period of one
year in which to resolve their differences before having a boundary
imposed upon them.\textsuperscript{123}

\section*{III. SANCTIONS}

The FCMA incorporates a complex web of sanctions that may be
invoked in the event of violations by fishing vessels. Some, as will be
seen, apply only to foreign fishing vessels, but most apply to both
domestic and foreign craft. The sanctions may be divided into direct
and indirect measures. The direct sanctions are those prescribed in
sections 308, 309 and 310,\textsuperscript{124} calling respectively for civil penalties
assessed by the Commerce Department; criminal prosecutions leading
to fines, imprisonment, or both; and forfeitures of offenders’ fishing
vessels and illegal catch. Arguably, the direct sanctions category in-
cludes the citation procedure of section 311(c),\textsuperscript{125} which is an alternative
to both the formal enforcement steps of arrest, boarding, search
and seizure of section 311(b), and the forfeiture sanction set forth in
section 310.\textsuperscript{126}

In addition to these direct sanctions, a variety of indirect sanctions
may be invoked in response to offenses under the Act, regulations,
GIFA’s, or fishing permits. These indirect sanctions include criminal or
administrative punishment by the flag state of a foreign vessel, which
both the Act and GIFA’s contemplate;\textsuperscript{127} reduction of the catch quota
of the vessel’s flag state;\textsuperscript{128} and the revocation, suspension, or further
conditioning of a permit to fish.\textsuperscript{129} Although not specifically referred

\textsuperscript{122} Id. § 1456a (b)(3)(B)(ii).
\textsuperscript{125} Id. § 1861(c).
\textsuperscript{126} See text accompanying notes 268–87 infra.
\textsuperscript{127} See text accompanying notes 229–39 infra.
accompanying notes 210–28 infra (direct sanctions against a vessel’s permit).
\textsuperscript{129} FCMA § 204(b)(12), 16 U.S.C.A. § 1824(b)(12) (West Supp. 1977). See
text accompanying notes 210–28 infra.
to in the Act, violations of applicable requirements would be an appropriate ground upon which to refuse renewal of a permit for a particular foreign fishing vessel,\textsuperscript{130} or to deny port call privileges to a particular vessel or to vessels of a particular country.\textsuperscript{131} The latter is a sanction of questionable utility where alternative provisioning or liberty arrangements may be made, or their need reduced through at-sea-fleet support and transfer activities.\textsuperscript{132} For masters of United States vessels who violate the Act, regulations, or a management plan, the possibility also exists that the Coast Guard will take administrative action affecting their federal licenses,\textsuperscript{133} as has occasionally been done with respect to violations of the Tuna Conventions Act of 1950.\textsuperscript{134} This section will address the direct sanctions noted above, and the indirect sanctions of flag state punishment and administrative action with respect to permits for foreign fishing.

A. Forfeiture Proceedings

Vessel forfeiture was the chief sanction available to the government

\textsuperscript{130} For example, FCMA § 204(b)(6), 16 U.S.C.A. § 1824(b)(6) (West Supp. 1977), allows the Secretary of Commerce to approve an application for a permit for foreign fishing "if he determines that the fishing described in the application will meet the requirements of [the] Act." This text is broad enough to include an assessment of prior conduct by a vessel as an indication of likely future conduct.


\textsuperscript{132} Presumably it was this fact, as well as the cumbersome entry regulations, see MAR. FISH. REV., June 1976, at 29, 30, that has led the Soviet Union not to avail itself of the port call privileges extended to it under the mid-Atlantic bilateral fishing agreement. See Agreement on Certain Fisheries Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean, Mar. 1, 1976, United States-Soviet Union, art. VIII, T.I.A.S. No. 8349. It has also been suggested that concern over possible attachment of fishing vessels in civil litigation over gear conflicts may explain Soviet reluctance to exercise port call privileges. See Kieninger & Reifsnyder, supra note 131, at 138.


\textsuperscript{134} 16 U.S.C. §§ 951–961 (1970). See, e.g., United States v. License No. 87816 (Cox), No. 11–0056–HJG–75 (11th Coast Guard Dist. Nov. 4, 1975) (charge of misconduct based upon harassment of seal in violation of Marine Mammal Protection Act); United States v. License No. 438175 (Conners), No. 11–044–HJG–74 (11th Coast Guard Dist. Oct. 22, 1974). In a related development, the Chief Counsel of the Coast Guard has recently opined that proceedings under Rev. Stat. § 4450, 46 U.S.C. § 239 (1970), will not lie simply because a vessel's master has been assessed a civil penalty under the Marine Mammal Protection Act; there must be evidence of incompetency, misconduct, or violation of Title 52 of the Revised Statutes. 415 COAST GUARD L. BULL. 7 (1976).
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under the Bartlett Act, but that penalty was rarely carried through to its conclusion.\footnote{135} Faced with the possibility of a judicial forfeiture of the vessel itself, as well as its illegal catch (helped along by a rebuttable presumption that fish on board were taken or retained illegally),\footnote{136} it was not surprising that foreign fishing vessel owners almost invariably were willing to settle Bartlett Act cases.\footnote{137} With settlements running as high as $700,000 for a single violation,\footnote{138} it was quite accurate for the Senate Commerce Committee to suggest that the forfeiture sanction "proved to be a valuable deterrent to fishing violations."\footnote{139}

The FCMA provides for a similar forfeiture sanction, although the existence of more flexible remedies, such as the civil penalty, suggests that forfeiture may be reserved for unusual cases such as repeated offenses or offenses by vessels of non-GIFA countries.\footnote{140} Section 310(a) of the FCMA provides:

Any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish taken or retained, in any manner in connection with or as a result of the commission of any act prohibited by section 307 (other than any act for which the issuance of a citation under section 311(c) is sufficient sanction) shall be subject to forfeiture to the United States. All or part of such vessel may, and all such fish shall, be forfeited to the United States pursuant to a civil proceeding under this section.\footnote{141}

This section departs in some respects from its Bartlett Act counter-
part. The definition of what may be forfeited varies slightly but inconsequentially from the terms of the 1964 legislation. More importantly, the provision for administrative or summary forfeitures, which were very rarely used under the Bartlett Act, is missing entirely from section 310(a). Hence, all forfeitures, even those involving minimal amounts of catch or unattended, illegal fishing gear, will require judicial intervention.

In several important respects, the FCMA preserves the forfeiture scheme of the Bartlett Act. First, the Act requires the forfeiture of all illegally taken or retained fish, although this forfeiture is not enforced if for any reason the Justice Department declines to invoke the jurisdiction of the district courts. The vessel itself continues to be merely "subject to forfeiture." The discretion thus created, however, is expanded over that available to the district courts under the Bartlett Act, in that the first clause of the second sentence of section 310(a) permits forfeiture of "[a]ll or part" of an offending vessel. Ways had been found to evade the apparent all-or-nothing forfeiture provision of the Bartlett Act even when a case was litigated, but the new law gives welcome express recognition to the possibility that forfeiture of more than the illegal catch but less than the entire vessel might be warranted.


144. But see note 428 infra.

145. Such gear was seized by the Coast Guard three times under the Bartlett Act; twice off Alaska. See, e.g., United States v. 4,109 Crab Pots, Civil No. 146-73 (D. Alas., filed Sept. 20, 1973), and once on Lake Erie in 1975, see note 79 supra.

146. For this reason the Commerce Department's broad statement that 19 U.S.C. §§ 1604-1618 (1970) are applicable to FCMA forfeitures, 42 Fed. Reg. 12,026 (1977), is in error to the extent that it includes the summary forfeiture provisions of 19 U.S.C. § 1609.


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The rebuttable presumption that fish were taken or retained illegally is carried forward in section 310(e).149 Retention of the presumption in this form would appear to dispose of the suggestion that it be made conclusive.150 Difficulties in proof that might otherwise be experienced151 make this presumption a potentially useful tool.

The presumption in the FCMA may, however, be overbroad in the sense that it could apply to fish aboard a ship that was found to be taking Continental Shelf fishery resources or anadromous species beyond the fisheries conservation zone in violation of the FCMA. As the Justice Department noted in an unsuccessful effort to restrict the presumption, “[s]ince the vessel was seized outside the 200-mile fishery zone, there is no basis in fact that these other fish [i.e., fish that were not anadromous or creatures of the Continental Shelf] were caught within that zone.”152 Such fish found aboard a vessel should not be deemed to be subject to the rebuttable presumption; they may, however, still be forfeited, as may be seen below.

The meaning of the statutory terms is generally uncontroversial, but in one recent case a dispute arose over whether a quantity of fish on board a seized South Korean ship was “cargo,” which would merely be subject to forfeiture, or “fish” as to which the statutory presumption of illegal catching or retention would apply and which therefore would be mandatorily forfeited. The ship, the Dong Won 707, was seized for taking king crab, a Continental Shelf fishery resource, beyond the Contiguous Fisheries Zone.153 A search revealed that the vessel had frozen black cod and other fish species aboard, forfeiture of which was sought by the government. In an ingenious argument, the shipowners asserted that the black cod was neither cargo

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150. See S. 1365, 93d Cong., 1st Sess. (1973) (Sen. Stevens), noted in Note, Recent Developments in the Law of the Sea: A Synopsis, 11 SAN DIEGO L. REV. 691, 697 (1974). Curiously, the Commerce Department appears to have been willing at one time to give up the presumption entirely, a deficiency that was noted in the House hearings. See 1975 House Merchant Marine Hearings, supra note 1, at 656–57 (colloquy between William C. Brewer, General Counsel, NOAA, and Ned P. Everett, Counsel, Subcomm. on Fisheries and Wildlife Conservation and the Environment).
151. See, e.g., FISHING NEWS INT’L, Nov. 1976, at 24; id. at 29 (refusal of British court to order forfeiture of catch of seized Soviet trawler Dzukiya in absence of proof catch was taken within fishery limits).
nor fish illegally caught or retained, and hence was neither mandato-
riply forfeited nor subject to discretionary forfeiture with the rest of the 
vessel. The owners argued that legal catch should not be forfeited “be-
cause it is neither an offending instrument nor an illegal fruit.” As 
has happened with some regularity, the Dong Won 707 case was set-
tled before the legal issue could be decided. Thus, there is no defini-
tive resolution of the question, although it is not unlikely to recur 
under the new law.

Forfeiture of catch, however, is not always a critical sanction under 
the Act. Sometimes the illegal catch will be so small that forfeiture is 
not a substantial penalty. Alternatively, the catch may spoil, be con-
taminated, or be unmarketable due to domestic fish preferences. Par-
ticularly in the Aleutian Islands, obtaining an order forfeiting illegal 
fish may only burden the government. For such reasons, one 
United States attorney has explained that, rather than seeking for-
feiture of catch, as seemingly mandated by the Bartlett Act, “the effort 
has been to try to obtain the same impact of economic loss through 
the government’s monetary demand in settlement of its claims against 
the vessel, cargo and ship’s master.” Plainly, then, the provision for 
mandatory forfeiture of illegal catch may be more trouble than it is 
worth, leading only to evasion of this rigid feature of the statute by 
those responsible for its administration.

More or Less, of Frozen Black Cod and Various Other Bottom Fish at 7. United 
States v. South Korean Vessel Dong Won 707, Civil No. A76–163 (D. Alas., filed 
Sept. 28, 1976). This argument fails to rebut the fact that the definition of cargo is 
broad enough to include fish, it being stated that cargo is the “load or lading of a 
vessel; the goods, merchandise, or whatever is conveyed in a ship or other merchant 
vessel,” BLACK’S LAW DICTIONARY 268 (4th ed. 1951). This view is supported not only 
by the Justice Department’s observation in 1970, in commenting on Bartlett Act 
Chairman. House Comm. on Merchant Marine and Fisheries (Feb. 13, 1970), reprinted 
in H.R. REP. No. 91–1430, 91st Cong., 2d Sess. 13 (1970), but also by a construction 
applied by the Customs Service (then known as the Bureau of Customs) to the Bart-
lett Act shortly after that law took effect. In its initial instructions to the field, the 
Service referred to “the liability to forfeiture of the vessel, its tackle, apparel, furni-
ture, appurtenances, cargo (except fish which it may have taken or retained in violation 
of the statute), and stores,” thus suggesting that fish other than illegal fish could 

of Sen. Stevens).

156. 119 CONG. REC. 9394 (1973).

Stevens (Feb. 16, 1972), reprinted in 118 CONG. REC. 7011 (1972).
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Procedures for judicial forfeitures will continue to be governed by the Supplemental Rules for Certain Admiralty and Maritime Claims and applicable statutes. No jury trial is available in such cases and the forfeiture case may proceed independently of any criminal prosecution arising out of the same violation of the Act. Venue for proceedings under section 310 will be the district in which the vessel is arrested, if it is arrested within the limits of a judicial district, or "any district into which the [vessel] is brought" if the seizure occurs beyond the limit of the territorial sea. In the latter case, the law is unclear whether the seized vessel must be taken to the nearest or most accessible American port, although a degree of discretion has been recognized. Consistent with this discretion, seized craft in several instances have been brought to ports that were not geographically closest to the point of arrest. Abuses of this discretion are not likely to occur, as considerations of economy would strongly impel the government to seek trial in the nearest port in which proper berthing and refrigeration or other fish handling facilities are available.

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160. 5 Moore's Federal Practice ¶¶ 38.12[7], at 135, 38.35[7], at 290 & n.6 (2d ed. 1976), (citing United States v. Steamship Coamo, 267 U.S. 220 (1925) (The Coamo)); P. Sanford Ross, Inc. v. United States, 250 U.S. 269 (1919) (The Scow 6-S; Malagask Fishing Co. v. United States, 63 F.2d 311 (1st Cir. 1933) (The Maskinonge)).


162. 7A Moore's Federal Practice ¶ C.11, at 672 & n.14 (2d ed. 1976) (citing Samuels v. United States, 63 F.2d 638, 639 (5th Cir. 1933) (The Halcon)).


164. See Coast Guard Miscellaneous—Pt. 1: Hearings on Coast Guard Oversight Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Mer-
B. Criminal Sanctions

Among its criminal penalties, the FCMA includes severe prison terms and fines for certain violations. For violations of section 307(1)(D), (E), (F), or (H) there may be six months' imprisonment, a fine of $50,000, or both. If a dangerous weapon is used, or if an enforcement officer suffers or is placed in fear of bodily injury, the punishment may be a $100,000 fine, or ten years' imprisonment, or both. For foreign fishing prohibited by section 307(2), the FCMA retains the Bartlett Act's penalties of a $100,000 fine, or up to one year's imprisonment, or both. In such cases only the owner or operator may be prosecuted, whereas "any person" may violate section 307(1) and hence be subject to the corresponding criminal penalties under section 309(b). Venue for all such prosecutions lies in the "district in which the offender is arrested or is first brought."1

Criminal sanctions have played a secondary role in recent United States fisheries law enforcement and it is expected that this will continue to be the case under the FCMA. Practice under the Bartlett Act rarely involved the imposition of prison sentences; indeed, in only one incident were unsuspended prison terms imposed, and even those were abbreviated in an exchange of prisoners with Cuba in 1971. Fines assessed against masters have never approached the $100,000 limit of the Bartlett Act, the maximum being the $30,000 imposed in several cases. More recently, it has become common for United States attorneys to forego prosecution of masters of foreign vessels, either through a nolle proseque, a deferral of prosecution under local rules, or a complete refusal to bring charges.


\[\text{Section numbers cited refer to:}\] 1. 16 U.S.C.A. § 1857(1)(D), (E), (F), (H) (West Supp. 1977). These sections prohibit, respectively: (D) refusal to permit an authorized boarding; (E) forcible assault of or resistance to an authorized officer; (F) resisting arrest; and (H) interference with apprehension or arrest of a third party.


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This informal move in the direction of decriminalization of fisheries offenses is consistent with the Revised Single Negotiating Text presented at the close of the New York session of the Third United Nations Conference on the Law of the Sea, which provided in article 61(3) of Part II: "Coastal State penalties for violations of fisheries regulations in the exclusive economic zone may not include imprisonment, in the absence of agreement to the contrary by the States concerned, or any other form of corporal punishment." The same document called for prompt release of arrested fishermen "upon the posting of reasonable bond or other security." The FCMA does not, of course, rule out the possibility of criminal punishment of offenders, even where the offense is one of "pure fishing" rather than obstruction of enforcement or some related violation under section 307(1). Nevertheless, the imprisonment and release-upon-bond provisions developed in the Law of the Sea Conference Informal Single Negotiating Text, predecessor of the Revised Single Negotiating Text quoted above, were brought to the attention of Congress, and it should be the enforcement policy not to invoke such sanctions in the absence of aggravating circumstances. This policy has already received expression in several Governing International Fishery Agreements.

175. Id. art. 61(2).
177. Several of the recently negotiated GIFA's have included terms requiring the United States to recommend to the court that any penalty not include imprisonment or other form of corporal punishment. Agreement Concerning Fisheries Off the Coasts of the United States, Nov. 23, 1976, United States-Romania, art. XI(3), reprinted in H.R. Doc. No. 95-34, 95th Cong., 1st Sess. 5 (1977); Agreement Concerning Fisheries Off the Coasts of the United States, Sept. 15, 1976, United States-Republic of China, Agreed Minutes ¶ 2, reprinted in H.R. Doc. No. 95-37, 95th Cong., 1st Sess. 11 (1977).
Unlike the civil penalty and civil forfeiture sanctions found in sections 308 and 310, the criminal sanctions established by section 309 do not apply to every violation of section 307, which lists the conduct proscribed by the Act. In addition to drawing lines between violations that involve dangerous weapons, bodily injury, or the fear of imminent bodily injury, section 309 distinguishes among the various prohibitions of section 307. Thus, the Bartlett Act-type offenses in section 307(2) have a separate, maximum penalty. Indeed, violators of subsections (A), (B), (C), and (G)—dealing, respectively, with violations of the Act or regulations or permits thereunder, fishing with a revoked or suspended permit, violation of a GIFA or a regulation thereunder, and trafficking in fish illegally taken or retained—are entirely excluded from the criminal sanctions of section 309.\(^{178}\) The effect of this exclusion is essentially to insulate domestic fishing and commerce in fish from the criminal sanctions of the FCMA, unless the other, criminally-enforceable terms of the section have been violated. The prohibition of section 307(2)(B) would trigger criminal sanctions for similar foreign conduct violative of section 307(1)(B) and (C), or section 307(1)(A) to the extent that a permit condition had been breached while the vessel was actually fishing.

Considered in this light, the flexibility implicit in the multiplicity of sanctions created by the Act, particularly if coupled with a policy of invoking forfeiture sanctions under section 310(a) only against foreign vessels and assessing civil penalties under section 308(a) only against domestic fishing interests, could become a vehicle for discriminatory enforcement. Such discrimination could subvert the process of obtaining foreign recognition of exclusive United States fishery management rights in the fisheries conservation zone and thereby undermine the effectiveness of the entire statutory scheme.

C. Civil Penalties

Section 308 of the FCMA\(^ {179}\) adds to the arsenal of sanctions the possibility of civil penalties assessed by the Commerce Department, \(^{178}\) FCMA § 309(a)(1), 16 U.S.C.A. § 1859(a)(1) (West Supp. 1977). The House bill had limited the criminal sanctions to cases involving refusals to permit boarding (see text accompanying note 165 supra), forcible assault, resistance, and the like. H.R. 200, 94th Cong., 1st Sess. § 311(a) (1975), reprinted in LEGISLATIVE HISTORY, supra note 4, at 811.\(^ {179}\) 16 U.S.C.A. § 1858 (West Supp. 1977).
subject to limited judicial review. These penalties may be assessed in amounts up to $25,000 per violation against "any person" who violates section 307.\textsuperscript{180} with each day of continuing violations being a separate offense.\textsuperscript{181} Significantly, the Act does not limit the civil penalty procedure to domestic vessels, despite a suggestion by the National Marine Fisheries Service that NOAA be given a civil penalty power "for violations of Federal fishing regulations by domestic fishermen," with the federal courts and United States attorneys retaining basic responsibility for prosecuting foreign offenders.\textsuperscript{182}

The Act goes on to set out the criteria by which the Commerce Department is to fix penalty levels: "In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."\textsuperscript{183} Significantly, the above provision does not govern the decision to commence a penalty action; the criteria speak instead to the level of penalty to be assessed. It is unquestionably difficult to generate a simple formula to guide the exercise of prosecutorial discretion,\textsuperscript{184} but the criteria of section 308(a) are broad enough to cover the customary considerations in fishing law enforcement.\textsuperscript{185} For example, the "degree of culpability" criterion would include the matter of intent, even though that is generally not an element of FCMA offenses.\textsuperscript{186} The criteria are also of interest in their requirement that the

\textsuperscript{180} 16 U.S.C.A. § 1857 (West Supp. 1977). Such persons include any person with respect to § 307(1) offenses, and any owner or operator of a foreign fishing vessel with respect to § 307(2) offenses.
\textsuperscript{181} FCMA § 308(a), 16 U.S.C.A. § 1858(a) (West Supp. 1977).
\textsuperscript{182} U.S. DEPT OF COMMERCE, A MARINE FISHERIES PROGRAM FOR THE NATION 31 (1976). In hearings before the House Merchant Marine and Fisheries Committee, NOAA witnesses remarked that the civil penalty could be suitable for both domestic and foreign offenders. See 1975 House Merchant Marine Hearings, supra note 1, at 654, 659 (testimony of William C. Brewer, Gen. Counsel, NOAA).
\textsuperscript{183} FCMA § 308(a), 16 U.S.C.A. § 1858(a) (West Supp. 1977).
\textsuperscript{185} For a summary of the considerations that have been applied see id. at 167–68; Letter from Adm. Chester R. Bender, Commandant, U.S. Coast Guard, to Rep. Thomas M. Pelly (Jan. 19, 1972), quoted in Bartlett Act Status Report, supra note 8, at 735 & n.177.
last four items be considered "with respect to the violator." Here the
issue is one of defining "the violator." In some circumstances the re-
spondent's liability may be entirely vicarious, as in the case of an
owner under section 307(2)\textsuperscript{187} who is liable for acts of the master.
Hence, if the respondent were a fleet owner, prior offenses by other
vessels in the fleet could be considered under section 308(a).\textsuperscript{188} Of-
fenses by another fleet's craft should not be considered, however, even
if that other fleet flies the same flag. National patterns of noncom-
pliance with the Act or a GIFA may be responded to by other more
appropriate means under section 201(e).\textsuperscript{189}

The respondent in a civil penalty case is entitled to a hearing before
the agency and may thereafter seek review "in the appropriate court
of the United States" on the sole ground that the penalty is unsup-
ported by substantial evidence.\textsuperscript{190} The undefined term "appropriate
court of the United States" could be read to mean a district court, in
light of the unqualified jurisdictional grant to those courts in section
311(d)\textsuperscript{191} and the use of the term "appropriate court" in that section.
Section 308 could also be read as a grant of jurisdiction—however in-
artful—to the United States courts of appeals, because it uses the term
"notice of appeal," which is generally associated with the courts of ap-
peals,\textsuperscript{192} and refers to procedures for filing the record on review set

\textsuperscript{188.} Id. § 1858(a).
\textsuperscript{189.} Id. § 1821(e) (West Supp. 1977). See text accompanying note 128 supra
(allocation of allowable levels of catch). But see text accompanying notes 210–28
infra (sanctions against GIFA permits under FCMA § 204(b)(12)(C), 16 U.S.C.A.
§ 1824(b)(12)(C) (West Supp. 1977)).

It may be assumed that records of citations issued under § 311(c), 16 U.S.C.A. § 1861(c) (West Supp. 1977), would be used by the Commerce Department as a basis for determining the respondent's "history of prior offenses."

\textsuperscript{192.} See Fed. R. App. P. 3(a). The term "appropriate court" appears, without
the words "of the United States," in § 305(d) of the FCMA, 16 U.S.C.A. § 1855(d)
(West Supp. 1977), concerning judicial review of regulations. Use of the "petition
for . . . review" formula in that section is also reminiscent of appellate practice. see Fed. R. App. P. 15(a), but that section of the FCMA lacks other indications that
direct review in the courts of appeals was intended. Rule 15 is not itself a grant of
jurisdiction. Noland v. Civil Service Comm'n, 544 F.2d 334 (8th Cir. 1976) (per
curiam). In the absence of a statutory grant of jurisdiction, those courts would be
without power to review regulations or any other action under the FCMA other than
on appeal from the district courts. See, e.g., AFL v. NLRB, 308 U.S. 401, 404 (1940);
Turkel v. FDA, 334 F.2d 844, 846 (6th Cir. 1964), cert. denied, 379 U.S. 990 (1965).
If the FCMA were read as calling for district court review of regulations and court
forth in a section of the Judicial Code that by its own terms has no application to the district courts.\textsuperscript{193} The legislative history on the point is conflicting,\textsuperscript{194} although the plain meaning of the "exclusive jurisdiction" clause would probably be given effect. The statute should be clarified in this regard.

In the event an assessed civil penalty is not timely paid, or has not been paid following an unsuccessful judicial review action, the Justice Department may sue to recover the penalty, with interest, "in any appropriate district court of the United States,"\textsuperscript{195} venue being in the district where the penalty accrues or the defendant is found.\textsuperscript{196} In such a case, the defendant may not collaterally attack the "validity and appropriateness" of the penalty,\textsuperscript{197} but might possibly be entitled to jury consideration of any remaining factual issues.\textsuperscript{198} The FCMA does not impose a statutory lien on offending vessels for unpaid civil penalties,\textsuperscript{199} but such vessels could always be attached in an in personam proceeding against the owners.\textsuperscript{200} Moreover, nonpayment of an assessed civil penalty that has become final compels the


\textsuperscript{194} The House bill, from which § 308(b) was drawn, see S. REP. No. 94–711, 94th Cong., 2d Sess. 56 (1976), reprinted in LEGISLATIVE HISTORY, supra note 4, at 37, 92, used the "appropriate court" language. H.R. 200, 94th Cong., 1st Sess. § 311(b) (1975), reprinted in LEGISLATIVE HISTORY, supra note 4, at 812. The House Report called for review in a United States court of appeals. H.R. REP. No. 94–445, 94th Cong., 1st Sess. 74 (1975), reprinted in LEGISLATIVE HISTORY, supra note 4, at 1051, 1127, although in floor debate Representative Leggett explained that "any person against whom a penalty has been assessed would be able to have his case reviewed by an appropriate U.S. district court if he is dissatisfied with the final decision of the Secretary [of Commerce]." 121 CONG. REC. H9921 (daily ed. Oct. 9, 1975) (remarks of Rep. Leggett), reprinted in LEGISLATIVE HISTORY, supra note 4, at 845. It is also pertinent to note, although it is not dispositive, that none of the statutory schemes relied on as precedents for § 308, see note 206 infra, provide for court of appeals review.

\textsuperscript{195} FCMA § 308(c), 16 U.S.C.A. § 1858(c) (West Supp. 1977).


\textsuperscript{197} FCMA § 308(c), 16 U.S.C.A. § 1858(c) (West Supp. 1977).


\textsuperscript{200} See Fed. R. Civ. P. B(1).
Commerce Department to impose sanctions on the offending vessel's section 204 permit, if it has one.\textsuperscript{201}

Was the civil penalty sanction necessary? The Bartlett Act had no such procedure, even though the civil forfeiture sanction had an in terrorem effect not dissimilar in operation to the civil penalty program.\textsuperscript{202} The Justice Department, with infrequent exceptions,\textsuperscript{203} had initiated the necessary civil and criminal proceedings under that law,\textsuperscript{204} leading one perhaps to question the need for the section 309 sanction. In explanation, NOAA witnesses argued that an expansion of the federal fisheries caseload, particularly as to relatively minor offenses, could lead prosecutors to give fishing cases less priority than hitherto.\textsuperscript{205} Civil penalty sanctions in several other fisheries and wildlife laws were noted as precedents.\textsuperscript{206}

The civil penalty technique may be seen as an appropriate means of ensuring uniform national penalty levels\textsuperscript{207} and recognizing the absence of a moral dimension in most fishery offenses.\textsuperscript{208} It is likely that the civil penalty mechanism will come to provide an important new element of flexibility in the primary FCMA armamentarium that also includes forfeitures, criminal prosecutions, and section 311(c) citations.

\textbf{D. Sanctions Against a GIFA Permit}

\end{document}
Section 204(b)(12) of the FCMA creates a framework for administrative action against permits for foreign fishing issued to vessels of nations with which the United States has a Governing International Fishery Agreement under section 201(c). This section authorizes the Commerce Department to order the revocation, suspension, or further conditioning of such permits, and points out that a revocation may be "with or without prejudice to the right of the foreign nation involved to obtain a permit for such vessel in any subsequent year." It further provides that such action shall be taken if a section 308 civil penalty or a section 309 criminal fine "has not been paid and is overdue," and may be taken if a vessel holding a GIFA permit "has been used in the commission of any act prohibited by section 307." Where one of the sanctions has been imposed mandatorily for non-payment of a civil penalty under section 308, the statute provides for automatic reinstatement upon payment of the amount due, with interest. No analogous provision applies to late payment of section 309(b) fines.

Two fundamental issues lurk in this indirect sanction. First, the provision under which the Commerce Department is to "impose additional conditions and restrictions on the approved application of the foreign nation involved and on any permit issued under such application" may be questioned as a retaliatory measure that punishes one person for the wrongs of another with whom he may or may not be in privity—it being the clear legislative intent that such additional restrictions could govern "all of the permits issued to the nation under whose flag that vessel operates." Even acknowledging the power of

210. 16 U.S.C.A. § 1821(c) (West Supp. 1977). This portion of the statute refers only to "a permit issued pursuant to this subsection," thus excluding "registration permits" issued under § 204(c). A combined permit sanction program applicable not only to GIFA permits, but to § 204(c) registration permits and § 303(b)(1) domestic fishing licenses as well, has been established by regulation under the general rulemaking power conferred on the Secretary of Commerce by FCMA § 305(g), 16 U.S.C.A. § 1855(g) (West Supp. 1977). 42 Fed. Reg., 12,026, 12,030–31 (1977) (to be codified as 50 C.F.R. § 621.51).
212. Id. § 204(b)(12), 16 U.S.C.A. § 1824(b)(12).
213. S. REP. No. 94–711, 94th Cong., 2d Sess. 49 (1976), reprinted in LEGISLATIVE HISTORY, supra note 4, at 37, 85. See also W. Burke, R. Legatski & W. Woodhead, NATIONAL AND INTERNATIONAL LAW ENFORCEMENT IN THE OCEAN 43 (1975) (suggesting exclusion of an entire foreign fishing fleet in case of repeated violations or a pattern of violations evidencing "flag state 'collision' ").
Congress to discriminate among various categories of nonresident aliens for purposes of the immigration laws,\textsuperscript{214} or to reserve natural resources for exploitation by nationals or those aliens eligible for citizenship,\textsuperscript{215} it is not difficult to fashion an argument that the alteration of issued permits in this sweeping manner would offend deep-seated notions of due process and equal protection.\textsuperscript{216} No reason is apparent why such nonresident aliens should be exempted from the equal protection dimension of fifth amendment due process or the Administrative Procedure Act (APA)—if, indeed, they may be viewed as nonresidents at all in light of their obligation under the GIFA's to appoint agents for service of process.\textsuperscript{217} A foreign entity should be permitted to raise this argument, because in the FCMA "the United States . . . has in fact imposed the framework of its government process on the non-resident alien," and "is the entity requiring an applicant to follow a prescribed statutory process."\textsuperscript{218}

The second issue, closely tied to the first, is the question of hearing rights under section 204(b)(12). Because GIFA permits are licenses within the meaning of the APA,\textsuperscript{219} they may not be peremptorily revoked without complying with the APA's procedural requirements.\textsuperscript{220} The FCMA does not expressly create a right to a hearing on the record.


\textsuperscript{215} Restatement (Second) of Foreign Relations Law of the United States § 167, Comment b, Illustration 1 (1965).

\textsuperscript{216} Cf. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). Equal protection of the laws, initially guaranteed only as against the states, U.S. Const. amend. XIV, has been held to be a limitation on the powers of the federal government as well through the due process clause of the fifth amendment, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Schneider v. Rusk, 377 U.S. 163 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954), although "the two protections are not always co-extensive." Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).


\textsuperscript{220} Id. § 558(c).
for purposes of the trial-type adjudicatory hearing rights afforded by sections 7 and 8 of the APA,\textsuperscript{221} unless the reference in section 308(b) to "the record upon which such a violation was found or such penalty imposed" is to be read as mandating such a hearing. Nevertheless, it must be concluded that the Conference Committee was mistaken when it observed that the Commerce Department "is not required to give notice or hold any kind of hearing prior to such permit revocation, suspension, or modification since a hearing will already have been held to determine whether the vessel was in fact used in the commission of a prohibited act (or in the assessment of a civil penalty under section 308(a) or the imposition of a criminal penalty under section 309)."\textsuperscript{222} The committee was in error for two reasons. First, the civil penalty or fine may be assessed against a person other than the holder of the permit against whom a sanction is being imposed under section 204(b)(12). In the case of a fine this person will usually be the master,\textsuperscript{223} and in the case of a civil penalty may well be the master rather than the vessel owner or charterer to whom the permit has been issued. Hence, even if an administrative hearing has been held, the real party in interest for section 204(b)(12) purposes may not have been a participant in that hearing. Moreover, the opening clause of section 204(b)(12) on its face permits sanctions to be imposed even where there has been no unpaid civil penalty or criminal fine. In this situation, no hearing of any kind will have been held, and revocation without a hearing flies in the face of the procedural protections of the APA. The interim regulations on permit sanctions take account of this problem.\textsuperscript{224}

A further circumstance not addressed by the conferees involves the possible interaction between section 204(b)(12) and section 311(d), which permits the district courts, in any case or controversy arising under the FCMA, to "(1) enter restraining orders or prohibitions . . . and (4) take other actions as are in the interest of justice." Although the legislative history is silent on the point, it could be argued that these powers extend to orders revoking, suspending, or further conditioning GIFA permits. Even so, the due process clause would stand as a bar to the imposition of permit-oriented sanctions against vessels

\textsuperscript{222} S. REP. No. 94-711, 94th Cong., 2d Sess. 49 (1976), reprinted in LEGISLATIVE HISTORY, supra note 4, at 37, 85.
\textsuperscript{223} See note 21 supra.
\textsuperscript{224} 42 Fed. Reg. 12,026, 12,031 (1977) (to be codified as 50 C.F.R. § 621.55(a)).

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other than those found to have violated the law or, perhaps, other vessels under common ownership. In candor, however, the plain terms of section 204(b)(12), which vests license revocation or suspension power in the Secretary of Commerce rather than the courts, and the absence of clearer authorization to the district courts to take such action,\textsuperscript{225} militate against judicial sanctions against GIFA permits other than upon express application by the Secretary incident to proceedings to collect an unpaid assessment,\textsuperscript{226} punish an FCMA crime,\textsuperscript{227} or condemn a vessel or its catch.\textsuperscript{228}

\section*{E. Flag State Prosecution}

The success of a coastal state’s fisheries regulation scheme depends, at least in part, on cooperation from flag states—that is, the foreign states whose vessels fish the coastal state’s waters. A flag state’s cooperation may involve dissemination of information about the coastal state’s regulatory measures,\textsuperscript{229} or may go further to include punitive programs to ensure compliance with those measures. The flag state may even impose a “buffer zone” of several miles’ depth to prevent its masters from inadvertently violating coastal state regulations.\textsuperscript{230} In some instances such programs include the derating of officers. Measures such as this may be at least as effective as coastal state penalties.\textsuperscript{231}

\textsuperscript{225} In some circumstances this type of power has been explicitly conferred on the courts, although the underlying regulatory scheme is essentially administrative in character. See, e.g., 33 U.S.C. §§ 442-443 (1970).


\textsuperscript{227} Id. § 309, 16 U.S.C.A. § 1859.

\textsuperscript{228} Id. § 310, 16 U.S.C.A. § 1860.

\textsuperscript{229} See W. Burke, Legatski & W. Woodhead, supra note 213, at 44.

\textsuperscript{230} See U.S. Coast Guard, Study of Coast Guard Enforcement of 200-Mile Fishery Conservation Zone II–9 (1976) [hereinafter cited as Coast Guard Study]; Anchorage, Alas., Daily Times, Feb. 26, 1974, at 1, col. 1 (Soviet 10-mile buffer zone beyond 12-mile U.S. exclusive fishing zone); Irish Press (Dublin), Oct. 9, 1976, at 7, col. 3 (Soviet 2-mile buffer zone around Irish 12-mile exclusive fishing zone). Conversely, however, the Coast Guard does not consider that there is a “buffer zone” shoreward of the limit of United States fisheries waters: “foreign vessels choosing to fish near the limit of the [territorial waters or the contiguous fisheries zone] assume the risk of being seized.” U.S. Coast Guard, Commandant Instruction No. 5921.1D, § 4(f)(3) (Mar. 19, 1975).

\textsuperscript{231} For example, it has been suggested that Soviet masters are “more wary of being apprehended and being brought into [a United States] court, because when they go home, one of their punishments is that they lose rank.” Extending Jurisdiction of the United States over Certain Ocean Areas: Hearings on S. 1988 Before the Senate Comm. on Armed Services, 93d Cong., 2d Sess. 103 (1974) (remarks of Sen. Stevens); W. Burke, R. Legatski & W. Woodhead, supra note 213, at 28 & n.192
Moreover, even where derating is not imposed, other penalties may be invoked by the flag state for violation of coastal state laws, including measures such as revocation of the vessel's license to fish for extended periods. The question has been raised, however, whether some distant water fishing nations will actually punish their own fishermen.

The FCMA gives apparent recognition to flag state prosecution as a tool for ensuring compliance by foreign fishing vessels. Under section 201(c)(4)(C), a nation with which the United States has negotiated a Governing International Fishery Agreement agrees to "abide by, and take appropriate steps under its own laws to assure that all . . . owners and operators [licensed to fish under section 204] comply with, section 204(a) and the applicable conditions and restrictions established under section 204(b)(7)."

The cooperative enforcement program is reflected, but not elaborated, in the Polish GIFA, which provides:


232. For example, it was reported that the master and owners of the seized Taiwanese fishing vessel Tong Hong 3, see United States v. Taiwanese Longliner Tong Hong 3, Civil No. A75-199 (D. Alas., filed Sept. 11, 1975); United States v. Chiang-PuHsu, Crim. No. A75-118 (D. Alas., filed Sept. 11, 1975), would be subject to flag state penalties in accordance with the Chinese government's policy to discourage intentional intrusion by Taiwanese vessels into foreign waters. 38 MAR. FISH. REV., Mar. 1976, at 35-36. Similarly, the Japanese government suspended the license of the Mitsu Maru No. 30 for 100 days following that vessel's seizure by the United States for a contiguous fisheries zone violation in 1973. 36 MAR. FISH. REV., Jan. 1974, at 38.

233. 121 CONG. REC. S23,074-75 (daily ed. Dec. 19, 1975) (remarks of Sen. Muskie) (reproducing editorial from Boothbay, Me., Register Dec. 4, 1975). See also id. at H9965 (daily ed. Oct. 9, 1975) (remarks of Mr. Dodd). Flag state prosecution concepts appear to have played some role in the disposition of the first criminal prosecution under the Act. It was reported that the master of the Soviet fishing vessel Taras Shevchenko was not going to be prosecuted by the United States because the Soviet Union would punish him. Boston Herald American, Apr. 20, 1977, at 1, col. 6. Subsequently, however, Captain Gupalov was prosecuted and, after the district court refused to accept a plea of nolo contendere, see N.Y. Times, Apr. 30, 1977, at 8, col. 1, entered a plea of guilty. Id., May 3, 1977, at 20, col. 4. He was fined $10,000 and given a suspended sentence to nine months' imprisonment.

234. Under H.R. 200, 94th Cong., 1st Sess. § 201(k)(4) (1975), as it passed the House on October 9, 1975, 121 CONG. REC. H9984 (daily ed. Oct. 9, 1975), provision was made for the suspension of United States enforcement as to fishing for anadromous species seaward of the 200-mile zone only "if the foreign nation gives written assurance to the Secretary of State that it will regulate such vessels in accordance with United States conditions and restrictions. The exception for flag-state enforcement also applied only if foreign penalties were "equivalent" to those under H.R. 200 and were "stringently" assessed. See H.R. REP. No. 94-445, 94th Cong., 1st Sess. 54-55
The Government of Poland shall take all necessary measures to ensure:

1. that Polish nationals and vessels refrain from fishing for living resources over which the United States exercises fishery management authority except as authorized pursuant to this Agreement [and]

2. that all such vessels so authorized comply with the provisions of permits issued pursuant to this Agreement and applicable laws of the United States. . . .235

Elsewhere, the agreement requires Poland to "take such measure as may be necessary to ensure" that licensed and unlicensed Polish fishing vessels permit boarding, inspection, and other enforcement action by American law enforcement personnel.236 While these provisions do not in terms so provide, they do tend to suggest that enforcement measures by the Polish government against Polish vessels violating the FCMA are a part of the agreement between the two countries. Similar provisions, though even more ambiguous, are found in Bartlett Act-vintage bilateral fisheries agreements, which commonly referred to the duty of the distant water fishing country to "take necessary measures to ensure" that its nationals complied with the substantive terms of the accords.237

The efficacy of such foreign enforcement measures is, at this writing, necessarily uncertain, and it would be unwise to assume that domestic enforcement efforts should be curtailed in the slightest degree in reliance on the possibility of punishment by the flag state. Lack of available witnesses for trial in the courts of the flag state, and the inevitable predisposition of a nation to drag its heels when prose-

(1975), reprinted in LEGISLATIVE HISTORY, supra note 4, at 1051, 1106-07. This provision did not survive in conference.

235. Agreement Concerning Fisheries Off the Coast of the United States, Aug. 2, 1976, United States-Poland, art. V(1)-(2), reprinted in H.R. Doc. No. 94-613, 94th Cong., 2d Sess. 7-8 (1976). Messrs. Burke, Legatski, and Woodhead suggest that the "all necessary steps" formula should be made more specific, for example, by requiring that all vessels in an area have on board a copy of the pertinent regulations. W. BURKE, R. LEGATSKI, & W. WOODHEAD, supra note 213, at 16.


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cuting its own citizens in such circumstances militate against excessive expectations in this regard. In such cases, as Robert M. Goldberg has properly observed, where “trial is not held in the country responsible for the limits and arrest . . . [it] becomes an important test of the participating country’s willingness to abide by the rules of the regulating authority.”

This test would be applicable, in the nature of things, chiefly to fishing offenses by permitless vessels of GIFA nations, where such vessels are not successfully apprehended and the only available form of punishment would be at the hands of the flag state. It may be expected that this will be a miniscule category of cases.

For these and related reasons, the Coast Guard reached the following conclusion after an analysis of flag state enforcement under the International Convention on the Northwest Atlantic Fisheries:

From this record in the Atlantic, and recognizing that, with the possible exception of the USSR and Japan, the flag states exert less control over their fleets in the Pacific, the ability and willingness of flag states to enforce must be seriously and objectively questioned. It is clear that, historically, they have not self-policed themselves; the only meaningful enforcement has been by the United States.

It is the Coast Guard’s conclusion that flag nation enforcement is not reliable enough to meet U.S. objectives for fisheries management.

IV. SCHEME OF ENFORCEMENT

From the standpoint of law enforcement, the FCMA represents an important advance over prior United States fisheries programs. Earlier statutes and international agreements had created by degrees a hodgepodge of programs for enforcement, particularly against foreign vessels. In addition to the prohibitions of the Bartlett Act, to be applied ultimately by the federal courts, the enforcement agencies were called upon to implement international detention schemes such as those of the North Pacific fisheries and Pacific halibut fisheries, the man-
The FCMA presents a far simpler charter for enforcement personnel, because its premise—with the exception of highly migratory species—is to make fisheries enforcement essentially a matter of coastal state competence. This simplification of the institutional framework for enforcement does not mean that the task of enforcement itself becomes any easier, for the measures to be taken to conserve and allocate stocks—and to detect fishermen who disregard such measures—are likely to be more complex than those being supplanted. Hence, the enforcement task may be simplified in the sense that only one set of basic sanctions and law enforcement powers will apply, but the content of the regulatory or management scheme will itself not be made less complex or onerous. This part of the article will discuss the powers conferred by the FCMA upon enforcement personnel and summarize how these powers are likely to be applied.

A. Powers of Enforcement

Section 311(b) of the FCMA sets forth the powers conferred on enforcement personnel. On the whole, these powers do not vary materially from those exercised under the former legislative scheme. There are differences, however, that should be noted.

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The Act continues to authorize boarding and search or inspection of vessels, although it changes the Bartlett Act’s undefined “any vessel”\textsuperscript{244} to “any fishing vessel [as defined in section 3(11)] which is subject to the provisions” of the FCMA.\textsuperscript{245} Vessels may be seized, as before, if it “reasonably appears” the law has been broken,\textsuperscript{246} and arrest of a person is authorized if there exists “reasonable cause to believe that such person has committed an act prohibited by section 307.”\textsuperscript{247} Fish that have been taken or retained illegally may be seized “wherever found”\textsuperscript{248} (i.e., presumably on land as well as at sea); the Bartlett Act’s apparently superfluous “whenever”\textsuperscript{249} having been deleted. Consonant with the Supreme Court’s rejection of the “mere evidence” rule in \textit{Warden v. Hayden},\textsuperscript{250} the FCMA expressly permits seizure of “any other evidence related to any violation.”\textsuperscript{251} This provision did not appear in the repealed legislation although navigational charts and logbooks were commonly seized for use at trial under the Bartlett Act. All of these powers may be exercised with or without a warrant.\textsuperscript{252} Enforcement officers are also authorized to execute any process that the district courts, which have exclusive jurisdiction over cases arising under the Act,\textsuperscript{253} may issue.\textsuperscript{254}

Perhaps the most obscure provision in the Act is the clause permitting enforcement agents to “exercise any other lawful authority.”\textsuperscript{255} Whatever the intent of the drafters, the language is broad enough to include exercise of the right of hot pursuit.\textsuperscript{256} Beyond this, the clause

\begin{itemize}
\item \textsuperscript{248} Id. § 311(b)(1)(D), 16 U.S.C.A. § 1861(b)(1)(D).
\item \textsuperscript{250} 387 U.S. 294 (1967), noted in \textit{The Supreme Court, 1966 Term}, 81 HARV. L. REV. 69, 112–14 (1967).
\item \textsuperscript{252} Id. § 311(b)(1), 16 U.S.C.A. § 1861(b)(1).
\item \textsuperscript{253} Id. § 311(d), 16 U.S.C.A. § 1861(d); but see id. § 308(b), 16 U.S.C.A. § 1858(b), discussed in text accompanying notes 190–95 supra. As a consequence of the terms of § 311(d), even cases initiated by state enforcement agents designated under § 311(a), 16 U.S.C.A. § 1861(a), must be brought before the federal district courts. See also 18 U.S.C. § 3231 (1970) (district courts’ original jurisdiction, exclusive of state courts, of offenses against laws of United States); 28 U.S.C. § 1355 (1970) (district courts’ original jurisdiction, exclusive of state courts, of actions for fines, penalties and forfeitures incurred under federal laws).
\item \textsuperscript{255} Id. § 311(b)(3), 16 U.S.C.A. § 1861(b)(3). Runner-up for this distinction is the mystifying definition in § 311(e), 16 U.S.C.A. § 1861(e).
\item \textsuperscript{256} See text accompanying notes 299–306 infra.
\end{itemize}
could be relied on as a basis for such related enforcement powers as the use of force in making arrests.\textsuperscript{257}

Lurking behind this catalog of enforcement powers is the question of probable cause, which is usually required for a constitutional search or arrest.\textsuperscript{258} The legislative history does not explain the relationship of the term "reasonable cause" to the constitutional standard, but at least as to United States vessels, broad powers of Coast Guard inspection have been recognized by some courts,\textsuperscript{259} and an analogy to border searches\textsuperscript{260} may provide some basis for random inspection of foreign vessels entering territorial waters. Certainly it is no more "practical to set up checkpoints at the outer perimeter" of the 200-mile fishery conservation zone\textsuperscript{261} than it is at the limit of territorial waters. Beyond the three-mile limit, however, and a fortiori in enforcement against foreign vessels fishing for anadromous species beyond the fishery conservation zone, this rationale would be unavailing. The Government will then have to rely, presumably, on an analogy to the warrantless administrative inspections upheld in \textit{Colonnade Catering Corp. v. United States}\textsuperscript{262} and \textit{United States v. Biswell}.\textsuperscript{263} Because it will never be feasible to obtain a warrant on the high seas,\textsuperscript{264}

\textsuperscript{257} Questions might be raised as to the use of deadly force, see 14 U.S.C. § 637(a) (1970), to stop fleeing vessels. Recent domestic developments restricting the use of such force in cases where no violence has been used by a felon, see Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976) (en banc) (4-3), vacated sub nom. Ashcroft v. Mattis, 97 S. Ct. 1739 (1977), could, if applied to fishing cases, compel a wholesale rethinking of enforcement methodologies, which have historically relied on the availability of deadly force as an important and, globally, surprisingly frequently-invoked power. The unavailability of extradition, however, serves to distinguish foreign fishing offenses from the usual fleeing offender situation. See, e.g., Treaty on Extradition, Dec. 3, 1971, United States-Canada, T.I.A.S. No. 8237 (amending Treaty on Extradition, Oct. 26, 1951, United States-Canada, [1952] 3 U.S.T. 2826. T.I.A.S. No. 2454).

\textsuperscript{258} U.S. CONST. amend. IV.

\textsuperscript{259} See, e.g., United States v. One 43 Foot Sailing Vessel "Winds Will," 538 F.2d 694 (5th Cir. 1976) (per curiam) (upholding constitutionality of 14 U.S.C. § 89(a) (1970)); but see United States v. Warren, 550 F.2d 219 (5th Cir. 1977), wherein the court stated that "this Court is also casting doubt on the authority of the Coast Guard under [14 U.S.C. § 89(a)] to stop a vessel for any reason other than safety or documentary purposes absent a showing of probable cause that a crime has been or is being committed." \textit{Id.} at 225.

\textsuperscript{260} See, e.g., United States v. Stanley, 545 F.2d 661 (9th Cir. 1976).

\textsuperscript{261} See United States v. Tilton, 534 F.2d 1363, 1365 (9th Cir. 1976) (error for trial court to sustain legality of search of ocean-going vessel without probable cause in absence of finding that customs officers had "articulable facts to support a reasonably certain conclusion" that vessel had crossed border).

\textsuperscript{262} 397 U.S. 72 (1970).


\textsuperscript{264} Moreover, even if a warrant were issued, service beyond the three-mile limit would exceed the territorial constraints imposed by the Federal Rules. see \textit{Fed. R.}
the exigencies of enforcement could be viewed as compelling a departure from shoreside practices.

Furthermore, with respect to foreign vessels the Act requires that GIFA's include an agreement to permit boarding, search, or inspection "at any time," apparently without regard to the presence of probable or reasonable cause. The Polish GIFA does not include an explicit agreement to this effect; instead, a more general undertaking to "allow and assist the boarding and inspection" is stated. Assuming this portion of the GIFA meets the standards of section 201(c)(2) of the FCMA, and assuming further that the constitutional tests are applicable to FCMA searches, one may wonder whether a foreign government may, in this fashion, waive the rights of its citizens. This article does not debate the rights of nonresident aliens under the Constitution, but it is safe to say that issues of probable cause are quite likely to be litigated under the FCMA.

Discussion thus far has centered on the basic powers conferred by section 311(b) on enforcement personnel. It will now turn to (1) the innovative "citation" alternative provided in section 311(c) and (2) the matter of hot pursuit, which has been a key tool in Bartlett Act enforcement.

B. Citation Procedure

A novel provision in the FCMA is found in section 311(c), which reads:

[Enforcement personnel] may, in accordance with regulations issued jointly by the Secretary [of Commerce] and the Secretary of the department in which the Coast Guard is operating, issue a citation to the owner or operator of [an offending] vessel in lieu of [making an arrest or seizure or taking other action] under subsection (b).

Crim. P. 4(c), 41(a), Fed. R. Civ. P. E(3)(a), unless FCMA § 311(b) is to be viewed as a pro tanto modification of those rules. Such a reading could be difficult to reconcile with the United States position that creation of the FCZ is not an expansion of the area over which plenary sovereign rights are claimed.


For another constitutional issue under the FCMA regarding treatment of foreign fishermen, see text accompanying notes 213-16 supra.

The Act goes on to recite that any such citation must be noted on the vessel's permit, together with the reason for the citation. The Commerce Department is to keep records of all citations.269

This procedure, which was put to use on the first day of FCMA enforcement,270 was seemingly inspired by traffic offense models271 and perhaps the minor violations section of the Sockeye Salmon or Pink Salmon Fishing Act of 1947.272 It adds an important and needed element of flexibility for "technical or minor violations"273 to what otherwise might be a rather cumbersome system of enforcement measures and sanctions. In the past, minor or technical violations were either never presented to the Department of Justice for prosecution,274 nolle prossed,275 or made the subject of informal warnings and diplomatic protest.276

Joint Department of Commerce-Coast Guard interim regulations have been issued, but they are so terse as to provide little real guidance

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269. Id.

270. See Boston Herald American, Mar. 2, 1977, at 1, col. 6 & 5, col. 3 (issuance of citations to Soviet trawlers by Coast Guard cutters Sherman and Dallas). See also N.Y. Times, Mar. 2, 1977, at D14, col. 2. For the first 72 hours of FCMA enforcement it appears to have been the policy to issue violations, in view of the possibility of confusion among foreign fishermen. Boston Herald American, Mar. 2, 1977, at 5, col. 3.

271. H.R. REP. No. 94–445, 94th Cong., 1st Sess. 52 (1975), reprinted in LEGISLATIVE HISTORY, supra note 4, at 1051, 1105; see also Boston Herald American, Mar. 2, 1977, at 5, col. 5 (citation described by Coast Guard spokesman as "just like a waterborne traffic ticket").

272. 16 U.S.C. § 776c(d) (1970). Unlike the FCMA, however, the salmon legislation uses the citation as a summons to further formal proceedings, rather than as a warning.

273. See S. REP. No. 94–711, 94th Cong., 2d Sess. 58 (1976), reprinted in LEGISLATIVE HISTORY, supra note 4, at 37, 94.


275. See, e.g., Shelf Enforcement, supra note 106, at 151 & nn. 82–83 (seizure and release of Cuban trawler Playa de Varadero).

as to how section 311 will be administered. A number of observations may nevertheless be offered based upon the language of the Act and the legislative history. First, it is to be noted that this provision, read in isolation, purports merely to present an alternative to enforcement powers enumerated in section 311(b) (arrest, boarding, search, seizure, etc.), but in actuality the procedure for citations stands as an alternative to at least one of the three principal sanctions in the Act, i.e., forfeiture of the vessel, its gear, cargo, and illegal catch of fish. Section 311(c) cases are expressly exempted from the forfeiture provisions of section 310. Presumably the intent of this exception was that civil forfeiture would not lie where a citation had actually been issued, and this is the interpretation that should be adopted.

Nevertheless, the bare words of section 311(c) suggest that the legislative goal was to exclude only those cases where a citation was properly issued. Thus, shoreside authorities might have an opportunity to second-guess citation judgments of at-sea enforcement personnel. Setting to one side the question of estoppel to prosecute based on the field agent's issuance of a citation, the uncertainties inherent in this construction are apparent and it has little to recommend it. For a similar reason the converse reading—that it is a defense to a forfeiture action

277. Under § 310(a) forfeiture is authorized (but not required, see text accompanying note 147 supra) for "[a] ny fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by section 307 (other than any act for which the issuance of a citation under section 311(c) is sufficient sanction)."


279. The Conference Report states that "[f] orfeiture does not lie . . . if the relevant prohibited act was one for which the issuance of a citation under section 311(c) is sufficient sanction." S. Rep. No. 94–711, 94th Cong., 2d Sess. 57 (1976), reprinted in LEGISLATIVE HISTORY, supra note 4, at 37, 93. This language does not dispose of the question whether the citation must actually have been issued, or whether, if issued, such issuance was proper. The Conference Report statement that a citation is issued "for a violation of § 308(a)," id. at 58, LEGISLATIVE HISTORY, supra note 4, at 94, seems to have been in error, as § 308(a) does not define prohibited conduct but merely creates the mechanism and criteria for imposition of civil penalties. The Conference Report also refers to citations being given to vessel masters, id., whereas the statute permits issuance of citations to "the owner or operator." FCMA § 311(c), 16 U.S.C.A. § 1861 (West Supp. 1977). Issuance to the owner rather than the master would be appropriate only where practical considerations such as the weather or diversions of the patrol prevented boarding and issuance and notation of the warning at the time of the offense.

280. The general rule has been that estoppel could not be based on representations by a subordinate government official. See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.01 (1958). Recent decisions in the courts of appeals, however, cast doubt upon the continuing validity of this rule. See K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 17.01 (1976).
that a citation should have been issued under the joint regulations—must be rejected, lest the federal courts be deprived of their condemnation jurisdiction based on an after-the-fact review of the alleged propriety of a citation that was not issued. The legislative history of the section holds no support for such a reading; similarly, the provision should not be construed to grant district courts review power with respect to the correctness of administrative decisions to issue or not to issue a citation.281

The statute does not incorporate an analogous express exception for the imposition of civil penalties under section 308 or criminal penalties under section 309. Hence, issuance of a citation under section 311(c) would not be a bar to either of these types of proceedings, although the legislative history views the citation as a "warning," i.e., an alternative to the actual imposition of a penalty.282 Issuance of a citation is, after all, a rather clear indication that an offense is minor, if not trivial, and it is highly unlikely that a criminal prosecution would be initiated respecting a violation for which a citation had been issued. The same is not necessarily true of section 308 civil penalties, however, for it is quite possible to imagine a violation of the Act that merits imposition of a civil penalty but does not dictate the bodily arrest and seizure remedies available under section 311(b). Where this is the case, one might have thought a citation could be issued and thereafter—for example, upon review of the offender's record—a civil penalty might also be assessed. The legislative history does not support this view.

It should be mentioned that the citation procedure is not limited to vessels that hold permits; obviously, however, only if a vessel holds a

281. Consider, however, the cases cited in note 140, supra. In each of the cases, the complaint affirmatively pleaded that a citation was not sufficient sanction for the violation in question. Amended Complaint at 4, United States v. Russian F/V Taras Shevchenko, Civil No. 77–1086–M (D. Mass., filed Apr. 21, 1977); Complaint at 2, United States v. 17.56 Metric Tons, More or Less, of Fish, Civil No. 77–1086–M (D. Mass., filed Apr. 21, 1977). Corrective legislation to cure this difficulty has already been suggested. Letter from the author to Senator Warren G. Magnuson, Chairman, Sen. Comm. on Commerce (Jan. 18, 1977), reprinted in Implementation of the Fishery Conservation and Management Act: Hearings on Oversight into Implementation of the Fishery Conservation and Management Act Before the Senate Comm. on Commerce, 95th Cong., 1st Sess., ser. 95–6, at 95, 96 (1977).

permit may the citation be noted on it.\textsuperscript{283} This excludes (a) foreign vessels that either (1) pertain to countries with which no GIFA or other international fishery agreement exists, or (2) fly the colors of a country that does have such an agreement, but do not themselves hold a permit, and (b) domestic vessels lacking a license required under section 303(b)(1). In the former category of foreign vessels, the absence of enforcement tools not involving personal arrest or vessel seizure compels the conclusion that citations would be inappropriate, and the harsher powers conferred by section 311(b) would have to be exercised. The interim joint regulations are rather thin in this regard\textsuperscript{284} and it is hoped that there will be further articulation of not only the standards for citation issuance, but also the categories of vessels to which the procedure will apply and the interaction with the exercise of administrative discretion under section 308.\textsuperscript{285}

How far the government should go in committing itself to a particular sanction may be debated at length. Bearing in mind the hazards of predicting future enforcement approaches,\textsuperscript{286} at least some rough rules of thumb may be suggested. For example, it can safely be said that no intentional violation should lead to issuance of a citation. Similarly, impeding an enforcement officer—including necessitating hot pursuit, transmitting fraudulent check-in or check-out reports, tampering with transponders or other enforcement-related equipment, or attempting to transfer a foreign fishing permit to another vessel—should be treated as a serious offense beyond the ambit of section 311(c). Conversely, unintentional first offenses, such as recreational fishing by crew members (assuming this is a violation of the Act),\textsuperscript{287} failure to accord proper accommodations to observers, good faith reliance on erroneous navigational charts, or failure to display a fishing permit in the required manner, could properly be treated as citable under section 311(c). This list, of course, leaves a complex gray area

\textsuperscript{283} Such a permit may be issued either under § 204(b), 16 U.S.C.A. § 1824(b) (West Supp. 1977) for vessels of countries with which a GIFA exists under § 201(c), 16 U.S.C.A. § 1821(c); under § 204(c), 16 U.S.C.A. § 1824(c), for vessels of countries with which there is an existing international fishery agreement under § 201(b), 16 U.S.C.A. § 1821(b); or under § 303(b)(1), 16 U.S.C.A. § 1853, for fishing vessels of the United States.


\textsuperscript{285} See generally text accompanying notes 184–87 supra.

\textsuperscript{286} Compare Bartlett Act Status Report, supra note 8, at 729 & n.145 with Shelf Enforcement, supra note 106, at 145–51.

\textsuperscript{287} See text accompanying notes 28–30 supra.
impossible to clarify without further experience under the FCMA. Certainly, however, the enforcement agencies should put more flesh on the statutory bones if section 311(c) is to be more than a cover for unfettered enforcement discretion.

C. Hot Pursuit

A key element in maritime law enforcement is the right of hot pursuit, which allows a coastal state to give chase to and arrest beyond waters subject to its jurisdiction a foreign vessel violating the coastal state’s laws or regulations. Fishing zones were not one of the types of contiguous zones for which hot pursuit was authorized under the Convention on the High Seas or the Convention on the Territorial Sea and the Contiguous Zone. In a case involving a violation of the Contiguous Fisheries Zone by a Japanese trawler, however, it was held that the failure of the United Nations Law of the Sea Conference in 1958 to include fishing within the express purposes for which a contiguous zone may be established (customs, fiscal, immigration, and sanitary regulation) does not compel a conclusion that no such zone may be created or that the right of hot pursuit may not be exercised with respect to violations of such a zone.

Under the Bartlett Act, extensive use was made of the right of hot pursuit, although never with respect to a prosecuted violation of the prohibition on foreign harvesting of Continental Shelf fishery re-

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sources. This exercise of the right of hot pursuit was based principally on the provision of that Act that made the laws relating to customs seizures applicable to fisheries violations. Pursuit is also contemplated by the law permitting the use of gunfire in the event a vessel subject to seizure or examination disobeys a "heave to" order received from a Coast Guard cutter or aircraft.

The FCMA probably removes one rationale for the exercise of hot pursuit. In place of the Bartlett Act's sweeping incorporation of the customs enforcement laws, section 310(c) incorporates only those portions of the customs laws relating to disposition and proceeds from the sale of forfeited property, remission or mitigation of forfeitures, and compromise of claims. Hence, reliance can no longer be placed upon the authorization to pursue found in the Tariff Act of 1930.

This deficiency is by no means critical, however, in view of the other


293. Bartlett Act Status Report, supra note 8, at 740 & n. 212; Shelf Enforcement, supra note 106, at 152 n. 84. The probable reason for this is that many of the Continental Shelf cases began with the United States enforcement agents' discovery of illegal catches during inspections. With fishing operations not in progress and a boarding party already aboard, attempts to escape become more difficult and grave, although this has happened in several fisheries cases. See, e.g., Bartlett Act Status Report, supra note 8, at 740 n. 211; Fidell, The Law and Fishery Enforcement on the High Seas, 101 U.S. NAVAL INSTITUTE PROC., July 1975, at 95, 96 (abduction of Ohio fish and wildlife agent by Canadian fishing vessel Cliffside); cf. Nat'l Fisherman, Nov. 1976, at 19–A (escape of U.S. fishing vessel from Canadian custody with Canadian agent aboard). Enforcement guidelines issued in 1974 for protection of Continental Shelf fishery resources appear to contemplate that hot pursuit will be exercised in shelf cases. See Enforcement of United States Law Prohibiting Foreign Taking of Continental Shelf Fishery Resources (CSFR) of the United States ¶ 5, in 1975 House Merchant Marine Hearings, supra note 1, at 155, 157. The United States has also cosponsored draft treaty articles at the Third U.N. Law of the Sea Conference (Caracas session) authorizing hot pursuit in shelf cases. See note 301 infra.

294. 16 U.S.C. § 1082(c) (1970) (repealed 1976) provided:

All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of a vessel ... for violation of the customs laws, the disposition of such vessel, ... or the proceeds from the sale thereof, and the remission or mitigation of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provision of this chapter .... See generally Hot Pursuit, supra note 256, at 98.


296. See note 294 supra.


available authority. Moreover, it seems entirely appropriate to read
the authorization of enforcement officers to "exercise any other lawful
authority" as broad enough to include the right of hot pursuit. In
view of the evidence placed before the Congress with respect to the
exercise of this right, including the fact that the United States had
co-sponsored draft articles providing for hot pursuit from the eco-
nomic zone as well as the Continental Shelf at the Caracas session of
the Third United Nations Law of the Sea Conference, it would be
absurd to consider that the express repeal of the Bartlett Act was
also intended to be an implied repeal of an important enforcement
device, the use of which had been expressly upheld only the year be-
fore in the Taiyo Maru No. 28 case.

If, however, reliance is to be placed upon the "other lawful authority"
clause of section 311(b), it must be borne in mind that in interna-
tional law the power to conduct hot pursuit inheres in the patrol vessel
or aircraft and not in the individual law enforcement officer. Ex-
cept for warships and military aircraft, which are automatically au-

303. See note 291 and accompanying text supra.
304. See Convention on the High Seas, supra note 289, art. 23(4). Indeed it has been suggested that no specific statutory basis is necessary for the exercise of hot pursuit. See 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 683 (1965), citing The Ship "North" v. The King, 37 Can. S. Ct. 385 (1906).
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Authorized to conduct hot pursuit, only "ships or aircraft on government service specially authorized to that effect"\textsuperscript{305} may be used for this purpose. Hence, it is important from the standpoint of international law that the status of all enforcement vessels and aircraft be clear. To resolve any doubts in this connection, enforcement regulations should be promulgated under section 305(g) to indicate precisely which agencies' or states' vessels and aircraft will be authorized to conduct hot pursuit.\textsuperscript{306}

One further point should be noted with regard to the new law. Evasive action requiring the exercise of hot pursuit can constitute an offense separate from the fishing violation, as well as being admissible as evidence of guilt.\textsuperscript{307} Thus, the criminal sanctions of section 309(b) apply to refusals by "any person" to permit an authorized officer to conduct a boarding.\textsuperscript{308} In addition, third persons may be criminally

\begin{itemize}
\item \textsuperscript{305} Convention on the High Seas, \textit{supra} note 289, art. 23(4).
\item \textsuperscript{306} In the drug enforcement area, a Coast Guard instruction provides for hot pursuit by vessels and aircraft of the Coast Guard, the Department of Defense, the Customs Service, and the Drug Enforcement Administration. U.S. Coast Guard, Commandant Instruction No. 5920.6 ¶3(b) (Apr. 15, 1976) (cancelled Apr. 13, 1977). The analogous fishery instruction should provide for involvement of other agencies in hot pursuit. Such arrangements should also be given due publicity through publication in the \textit{Federal Register}, and, to reach foreign interests that might not otherwise receive notice, see \textit{Shelf Enforcement, supra} note 106, at 148 n. 62, through diplomatic correspondence. It may be added that NOAA has chartered aircraft to supplement Coast Guard patrol efforts. \textit{Depts of State, Justice and Commerce, the Judiciary and Related Agencies Appropriations for 1977: Hearings Before a Subcomm. of the House Comm. on Appropriations}, 94th Cong., 2d Sess., pt. 3, at 726 (1976).
\item \textsuperscript{307} If such aircraft are to be used for more than mere surveillance, the Revised Single Negotiating Text indicates that they should not be authorized to conduct hot pursuit unless they have distinctive markings. Revised Single Negotiating Text art. 34, 5 Third U.N. Conf., \textit{supra} note 6, at 173, 179, U.N. Doc. A/CONF. 62/WP.8/Rev. 1/Pt. III at 19 (1976). The Convention on the High Seas, \textit{done} Apr. 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, does not include this requirement.
\item \textsuperscript{308} See 2 J. WIGMORE, EVIDENCE § 276, at 111 n.2 (3d ed. 1940).
\end{itemize}
prosecuted for interfering with, delaying, or preventing "by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by" section 307. Each of these provisions could form the basis for prosecution of crew members who help prevent a boarding or inspection, or who aid an escaping vessel, provided that in the latter case the necessary element of knowledge is present. Civil penalties can also be assessed and vessels are subject to forfeiture for refusal to permit boarding or interference with an apprehension. Hence, penalties for flight are substantial and it may be assumed that under the new law's civil penalty criteria, the need to conduct hot pursuit will continue to be a key element in shaping the government's response to a violation by a foreign fishing vessel. The need to chase a domestic offender, although not involving the doctrine of hot pursuit, would presumably also be pertinent to the penalty level imposed.

As a practical matter, the right of hot pursuit may well be less important under the FCMA than before, since it is likely that most illegal fishing will occur at fishing grounds close to shore rather than in the immediate vicinity of the 200-mile limit. This circumstance,
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together with the availability of the civil penalty procedure for which no seizure is necessary,\textsuperscript{315} makes it somewhat less critical to have the pursuit power, although the epic chases that have occasionally occurred off Alaska and elsewhere\textsuperscript{316} tend to suggest that even a deep incursion into the fisheries conservation zone does not guarantee that a poacher will be stopped before he reaches the limit of the zone.

The extension of fisheries jurisdiction to 200 miles by the United States, Canada, and Mexico also adds a new dimension to the problem of escape and hot pursuit across international boundaries. Under the Convention on the High Seas, the right to conduct hot pursuit ends when a vessel enters the territorial sea of its flag state or a third state.\textsuperscript{317} In accordance with this concept, there have been occasional border escapes by Canadian and Mexican fishing vessels.\textsuperscript{318} This safe haven was historically available and likely to be used only if a vessel was operating quite near the United States shore. Now, with the expansion of the fishing zones, it is likely that some fishing vessels operating illegally in the 200-mile zone may seek refuge in Canadian or Mexican fishing waters (or those of other nations whose fishing zones abut the fisheries conservation zone). In these circumstances, hot pursuit by United States enforcement craft would be lawful, but likely to give rise to international friction, especially if the adjacent

\textsuperscript{315} FCMA § 308(a), 16 U.S.C.A. § 1858(a) (West Supp. 1977); see also id. § 201(c)(2)(F), 16 U.S.C.A. § 1821(c)(2)(F) (appointment of agents in the United States for receipt of process). The service-of-process arrangement does not remove all need for hot pursuit, because it would have no bearing on fishing offenses by vessels of countries with which the United States has no § 202 agreement, or to foreign vessels of GIFA countries where the particular vessel has no license (i.e., a fishing vessel that is not fishing "pursuant to" a GIFA). Id. § 201(c)(2), 16 U.S.C.A. § 1821(c)(2).

\textsuperscript{316} For example, the Eikyu Maru No. 35 pursuit lasted 14 hours, that of the Eikyu Maru No. 33 over six hours, Note, Recent Developments in the Law of the Sea: A Synopsis, 13 SAN DIEGO L. REV. 628, 641 & n.63 (1976) (citing 121 CONG. REC. S7155 (daily ed. Apr. 30, 1975) (remarks of Sen. Stevens)), and the pursuit of the Taiyo Maru No. 28 covered over 50 miles, United States v. Fishing Vessel Taiyo Maru No. 28, 395 F. Supp. 413 (D.Me. 1975). See also Bartlett Act Status Report, supra note 8, at 740 n.211.


\textsuperscript{318} See, e.g., Brownsville, Tex., Herald, Aug. 12, 1976, at 1, col. 1 (escape of Mexican fishing vessels); see also Nat'l Fisherman, Nov. 1976, at A–16, col. 1. For an illustration of a Canadian vessel's unsuccessful attempt to flee to Canadian waters see 118 CONG. REC. 27239 (1972) (remarks of Sen. Stevens) (arrest of Canadian fishing vessel Karen West three-fourths of a mile inside Alaskan waters by state agents).
state does not consent to the pursuit (for example, if the pursued vessel flies the adjacent state’s own flag). Arrangements should therefore be made and understandings reached in advance concerning the exercise of the right in foreign fisheries zones. Conversely, the United States and domestic fishing interests would have to recognize the possibility that Mexican, Canadian, or other foreign law enforcement vessels and aircraft might properly have occasion to pursue a malefactor—even one flying United States colors—into the fisheries conservation zone.

With respect to foreign vessels fishing for United States anadromous species, hot pursuit may also play an important role. Pursuit in these circumstances, however, is unusual in that “there is not a geographical ‘area’ within which hot pursuit is unnecessary to preserve jurisdiction.” Because there is no jurisdictional area corresponding to the FCZ for such species, the Coast Guard has taken the position that hot pursuit in anadromous fishing cases must be “established and maintained immediately upon discovery of an on-going violation in order to preserve jurisdiction over the fleeing vessel.”

D. Enforcement Philosophies

One of the hardest tasks facing the agencies responsible for enforcement of the FCMA is that of deciding upon an enforcement philosophy. How much enforcement is enough? At what point do the expenditures for enforcement overtake the advantages? These are issues that have received considerable attention, and it is inevitable that present approaches will be adjusted as experience grows under the new law. As the Commandant of the Coast Guard has pointed out, the true nature of the enforcement program cannot be known until management regulations have been issued.

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320. Id.
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It has been estimated that perhaps one offender in ten was apprehended under the Bartlett Act.\textsuperscript{322} Such figures are of doubtful utility, however, because, as the Department of Commerce has observed in an analysis of fishing cases in the period from 1968 to 1975: "There appears to be no direct correlation between the level of surveillance efforts and the number of vessels seized."\textsuperscript{323}

The Coast Guard's response to the new law has been to opt for a program combining concentrated surveillance of known fishing grounds with occasional patrols and overflights of the entire fisheries conservation zone.\textsuperscript{324} The primary thrust will be to patrol known active commercial fishing areas within 200 miles of the coast, together with "less frequent and less intensive random patrols to the limit of domestic jurisdiction . . . for the purpose of detecting changes in fishing fleet operations, illicit fisheries support activity, etc. Together these two concepts comprise the 200-mile 'Planned Approach.'"\textsuperscript{325} It is not known what enforcement efforts will be directed at foreign anadromous fishing beyond the 200-mile zone. Operating instructions call for Coast Guard boarding and inspection of foreign fishing vessels operating within the migratory range of anadromous species that spawn in the United States if such ships are found fishing "in a manner which may result in removal of such anadromous species from the sea."\textsuperscript{326} To the extent that the Continental Shelf exceeds the zone, some patrols will presumably be


\textsuperscript{326} U.S. Coast Guard, Commandant Instruction No. 16214.1A, III-1 (Feb. 25, 1977). Conversely, foreign vessels conducting a directed fishery for highly migratory species are not subject to boarding and inspection in the FCZ. Id.
undertaken there as well. This general approach is prudent, because an effort to provide saturation coverage of the entire fisheries conservation zone—a zone that has been estimated to cover 2,222,000 square nautical miles (an addition of 1,676,600 square nautical miles over the combined area of the territorial sea and former contiguous fisheries zone)\textsuperscript{327}—would be exorbitantly expensive and might needlessly involve elements of the Defense Department.\textsuperscript{328} The decision not to apply a picket-line enforcement philosophy—one of the approaches the Coast Guard had studied and rejected on grounds of expense\textsuperscript{329}—has received apparent Congressional approval.\textsuperscript{330}

Even with this refined patrol concept, the United States, like other nations moving to expand their jurisdiction over fisheries, is faced with a need for additional vessels, aircraft, and personnel.\textsuperscript{331} In the past year the Coast Guard and NOAA have been seeking to fill the perceived gaps.

Simply adding ships and planes, however, is not the answer to the enforcement problem. The FCMA contemplates that more sophisticated methods be used than merely increasing the number of policemen on “the beat.” Thus, section 201(c)(2)(C) requires that any GIFA include a provision that the foreign nation and its fishing vessels “abide by the requirement that . . . transponders, or such other appropriate position-fixing and identification equipment as the Secretary of the department in which the Coast Guard is operating determines.


\textsuperscript{328} This author has previously suggested that such reliance on the Defense Department could be viewed abroad as a hostile action and would divert such forces from their primary mission. See Naval Enforcement, supra note 308, at 354 & n.12, 366.


\textsuperscript{331} Problems posed by the need for language skills may be reduced in view of the requirement that by January 1978 all foreign vessels fishing with a permit “have available . . . at all times a person who can converse in English and who can serve as an interpreter.” 42 Fed. Reg. 8813, 8817 (1977) (to be codified as 50 C.F.R. § 611.6(d)).
to be appropriate, be installed and maintained in working order.\textsuperscript{332} The Act also calls for foreign consent to the stationing of United States observers or "ship riders" aboard licensed foreign fishing vessels.\textsuperscript{333}

Already in limited use in Alaskan waters\textsuperscript{334} and in the tuna fleet,\textsuperscript{335} ship riders could ensure compliance with gear and closed area restrictions, as well as record catch data and conduct biological sampling.\textsuperscript{336} Presumably such ship riders could be clothed with official status as enforcement agents under section 311, in order to guarantee their personal safety\textsuperscript{337} and to provide them, if desired, with specific law enforcement powers. Absent a special designation, however, such observers would not be duly authorized enforcement officers under section 311(b).\textsuperscript{338}

The wisdom of vesting full enforcement authority in a single individual aboard a foreign vessel may be questioned. It is not likely that an isolated law enforcement agent could single-handedly alter an illegal course of conduct or make an arrest or vessel seizure.\textsuperscript{339} The

\begin{thebibliography}{9}
\item \textsuperscript{332} FCMA § 201(c)(2)(C), 16 U.S.C.A. § 1821(c)(2)(C) (West Supp. 1977).
\item \textsuperscript{333} Id. § 201(c)(2)(D), 16 U.S.C.A. § 1821(c)(2)(D).
\item \textsuperscript{335} \textit{1975 House Merchant Marine Hearings, supra} note 1, at 184 (testimony of Howard W. Pollock, Deputy Adm't, NOAA); see also \textit{Fish and Wildlife Briefings: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries}, 94th Cong., 1st Sess., ser. 94–2, at 151–54 (1975) (testimony of Thomas A. Clingan, Jr., Deputy Ass't Sec'y of State for Oceans and Fisheries Affairs); see also \textit{Save the Dolphins v. United States Dep't of Commerce}, 404 F. Supp. 407, 412 (N.D. Cal. 1975).
\item \textsuperscript{336} \textit{Coast Guard Study, supra} note 230, at IV–5.
\item \textsuperscript{337} Regulations published in February 1977 fail to include observers within the protected category of authorized officers, although nonrated Coast Guard personnel are within that category and hence protected by § 307(1)(E) if they are "accompanying and acting under the direction of" any listed authorized officer. 42 Fed. Reg. 8813, 8815 (1977) (to be codified as 50 C.F.R. § 611.2(c)(4)). (Ordinarily only Coast Guard commissioned, warrant, and petty officers possess law enforcement powers. 14 U.S.C. § 89(a) (1970)). Because of the omission of observers from the class of authorized officers it is not a crime under the F.C.M.A. to assault or impede them, although it would be a regulatory offense, punishable by civil penalty or forfeiture. 42 Fed. Reg. 8817 (1977) (to be codified as 50 C.F.R. § 611.7(a)(4)(ii)).
\item \textsuperscript{338} \textit{1976 House Oversight Hearings, supra} note 23, at 68 (testimony of Rozanne L. Ridgeway, Deputy Ass't Sec'y of State for Oceans and Fisheries Affairs). But see \textit{Office of Technology Assessment, U.S. CONGRESS, ESTABLISHING A 200-MILE FISHERIES ZONE III–29 to III–31 (suggesting that observers could be empowered to collect fines).
\item \textsuperscript{339} The Coast Guard recognized as much in noting as a drawback of shiprider programs "the fact that observers cannot perform the apprehension element without specific support from ships." \textit{Coast Guard Study, supra} note 230, at IV–19.
\end{thebibliography}
frequency of instances in which a show of force has been necessary,\textsuperscript{340} or in which individual enforcement agents have been stymied,\textsuperscript{341} rules out such an expectation. Instead, the shiprider should be viewed as a source of information, or at most, a permanent witness on whose reports civil penalties could be based or other action taken if need be. The Foreign Fishing Regulations published on February 11, 1977, do not resolve these questions. Those regulations note that observers are assigned "[f]or the purposes of collecting scientific data and carrying out such other management and enforcement activities as [the Director of the National Marine Fisheries Service] may authorize."\textsuperscript{342}

Beyond this, a detailed evaluation has been performed by the Coast Guard in consultation with other concerned federal agencies\textsuperscript{343} on a variety of novel enforcement possibilities.\textsuperscript{344} Some of the possibilities are well known, such as the use of licensing schemes, which is required for foreign vessels by the FCMA. Others involve new concepts and new technology, such as the use of satellites and underwater sensors.\textsuperscript{345} In addition, attention was given to programs for vessel posi-


\textsuperscript{341} See note 293 supra.

\textsuperscript{342} 42 Fed. Reg. 8813, 8817 (1977) (to be codified as 50 C.F.R. § 611.8); 42 Fed. Reg. 22,589 (1977) (corrections to original regulations). The Commerce Department has summarized the functions of observers, in part, as follows:

- Observers will record any violations of regulations and the terms of vessel permits and will determine the accuracy of foreign vessel reporting. The observers will not have direct enforcement responsibilities. However, their presence may serve as a deterrent to violations of U.S. regulations. The observers' records may be used in subsequent enforcement actions and in planning for deployment of observers and agents in future years.

- 42 Fed. Reg. 17,895 (1977). Unless observers are to be authorized to issue citations, it is unclear how their records can be "used in subsequent enforcement actions." Certainly any adverse information gathered by such observers should be brought to the attention of the affected fishing company or master before it forms the basis for imposition of a sanction.

\textsuperscript{343} The other agencies involved were the Departments of State, Defense, Commerce, Treasury and Justice, see Emergency Marine Fisheries Protection Act of 1975: Hearing on S. 961 Before the Senate Comm. on Commerce, 94th Cong., 1st Sess., ser. 94–27, at 44 (1975) (testimony of Adm. O. W. Siler, Commandant, U.S. Coast Guard); the National Aeronautics and Space Administration, see Coast Guard Authorizations: Hearing on S. 2924, Before the Subcomm. on Merchant Marine of the Senate Comm. on Commerce, 94th Cong., 2d Sess., ser. 94–54, at 11 (1976) (testimony of Adm. Siler); and the intelligence community, see 1975 House Merchant Marine Hearings, supra note 1, at 210 (testimony of Adm. Siler).


\textsuperscript{345} See generally COAST GUARD STUDY, supra note 230, at IV–5; Emergency
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tion and activity reporting, currently provided for under the Tuna
Conventions Act of 1950.346

The results of the evaluation of enforcement techniques indicate
that for the near term, none of the more sophisticated enforcement
concepts "can provide the credibility of the on-scene vehicle for direct
enforcement."347 Because enforcement credibility is a sine qua non for
deterrence, such concepts cannot properly be relied on for the present,
although they are continuing to receive attention for subsequent
phases of extended jurisdiction enforcement.348

E. Rewards

One feature of the Bartlett Act program that did not find its way
into the new law was the provision for rewards for information
leading to "any penalty or forfeiture incurred for violation" of the old
law.349 This provision, added to the law in 1970, had not been
used,350 and it is likely that the drafters felt that its retention would
only have encouraged vigilantism—a phenomenon that could lead to
hostility and perhaps dangerous confrontations between American and

O.W. Siler, Commandant, U.S. Coast Guard); Department of Transportation and Re-
lated Agencies Appropriations for 1978: Hearings Before the Subcomm. on the De-
partment of Transportation and Related Agencies Appropriations of the House Comm.
O.W. Siler). Joint tests have also been performed by the Coast Guard, NMFS, and
NASA on the use of synthetic aperture radar as an enforcement device. 1976 House
Oversight Hearings, supra note 28, at 49 (testimony of Capt. Richard J. Knapp, Chief,
Ocean Operations Div., U.S. Coast Guard).

346. 16 U.S.C. §§ 951–961 (1970); 50 C.F.R. § 280.7(c)–(d)(1)(1976); see
also Marine Mammal Protection Act of 1972, § 111(d), 16 U.S.C. § 1381(d) (Supp.
FCMA regulations call for 24-hour prior notice of commencement and termination
be codified as 50 C.F.R. § 611.4).

347. COAST GUARD STUDY, supra note 230, at VI–1.

348. Examples of new enforcement equipment concepts being evaluated include
"high performance watercraft, lighter than aircraft [sic] and possibly remotely con-
trolled aircraft." Emergency Marine Fisheries Protection Act of 1975: Hearing on
S. 961 Before the Senate Comm. on Commerce, 94th Cong., 1st Sess., ser. 94–27, at 45
(1976) (testimony of Adm. O.W. Siler, Commandant, U.S. Coast Guard). See also
S. REP. No. 865, 94th Cong., 2d Sess. 5 (1976) (hydrofoils); Nat’l Fisherman,

91–514, § 6, 84 Stat 1297 (repealed 1976).

350. See Bartlett Act Status Report, supra note 8, at 733 & n.170.
foreign fishermen.\textsuperscript{351} In any event it is clear from the legislative history that the omission of rewards was a conscious decision.\textsuperscript{352} Even if other omnibus fisheries and wildlife enforcement legislation calling for rewards should be enacted,\textsuperscript{353} the dangers and shortcomings of excessive private involvement in the law enforcement process—for example, inconvenience to fishing vessels, potential harassment, untimely reports, and the possibility of “false alarms”\textsuperscript{354}—counsel against an increased reliance on such involvement.

V. ENFORCEMENT ORGANIZATION

A. National Oceanic and Atmospheric Administration (NOAA)

No agency’s task is affected more by the FCMA than that of the National Oceanic and Atmospheric Administration. NOAA, as the


\textsuperscript{353} Such legislation was passed by the House of Representatives in 1976. H.R. 5523, 94th Cong., 1st Sess. § 201(a)(5) (1975), passed by House, 122 CONG. REC. H3828 (daily ed. May 3, 1976). Under this bill, which was originally intended to cover only the Fish and Wildlife Service of the Interior Department, but was later expanded to include the Department of Commerce (of which the National Marine Fisheries Service is a part), see H.R. REP. NO. 94–1053, 94th Cong., 2d Sess. 6 (1976), rewards may be offered and paid “for services or information which may lead to the apprehension of violators of” federal fish and wildlife laws. To the extent that these rewards need not be for information actually leading to a conviction, forfeiture or civil penalty, the reward scheme is broader than the one under the 1970 Bartlett Act amendments. The bill does not set a ceiling on the rewards, but the legislative history indicates that the program would be generally administered by a senior official, such as a regional director, subject to established policies. Field agents’ discretion concerning the amount of rewards would be narrowly confined. See Fish and Wildlife Miscellaneous—Part 3: Hearing on Administration of Fish and Wildlife Programs, H.R. 5523, Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess., ser. 94–20, at 173 (1976) (testimony of Lynn A. Greenwalt, Director, U.S. Fish and Wildlife Service). The bill has been reintroduced this session as H.R. 2329, 95th Cong., 1st Sess. (1977).

\textsuperscript{354} See W. BURKE, R. LEGATSKI & W. WOODHEAD, supra note 213, at 46.
designee of the Secretary of Commerce,\textsuperscript{355} is entrusted with broad management responsibilities. Not the least important part of NOAA's expanding role is in the area of enforcement.

There are several consultative provisions in the Act that call for the Commerce Department to be involved in enforcement-related decisions. Under section 201(e)(3), enforcement experience is one of the factors to be considered by the Departments of State and Commerce in allocating total catch levels among foreign nations, and under section 204(b)(6), the Commerce Department must consult with the Coast Guard "with respect to enforcement" in deciding on applications for foreign fishing permits. Moreover, enforcement costs are made a pertinent consideration in imposing license fees on foreign fishing vessels.\textsuperscript{356} In addition, exercise of the Commerce Department's cooperative role in international boundary negotiations\textsuperscript{357} and of its sole power to "establish the boundaries between the geographical areas of authority of adjacent Councils"\textsuperscript{358} is very likely to have important enforcement implications.

These, however, are relatively peripheral to the enforcement function, for the new Act makes it plain that the Commerce Department is to share enforcement responsibility with the department in which the Coast Guard is operating. Both agencies are named in section 311(a), and both (as well as "the head of any Federal or State agency which has entered into an [enforcement] agreement")\textsuperscript{359} may authorize their personnel to exercise the arrest, boarding, search, seizure, and service


\textsuperscript{359.} FCMA § 311(b), 16 U.S.C.A. § 1861(b) (West Supp. 1977).
of process powers noted in section 311(b). Also, both share the task of developing criteria for issuance of "citations" under section 311(c).\footnote{360} The precise shape of the enforcement arrangements has yet to be determined, but it is safe to predict that National Marine Fisheries Service (NMFS) personnel—who are expected to accompany eighty-five per cent of the Coast Guard enforcement patrols and flights\footnote{361}—will be available to:

[advise the unit commander, accompany boarding parties inspecting domestic and foreign fishing vessels for compliance with Federal laws and international agreements relating to living marine resources, and assist in training Coast Guard personnel in technical matters related to fisheries enforcement and observation.\footnote{362}]

In this fashion, the expertise of the NMFS agents can help provide continuity to overcome the effects of Coast Guard policies on regular rotation of military personnel.\footnote{363} NMFS personnel are also likely to be relied on as ship riders or observers.\footnote{364}

Beyond this, the Commerce Department has responsibility for the disposition of forfeited property, succeeding generally, with respect to the Act, to the role of the Commissioner of Customs under the customs laws.\footnote{365} Perhaps most important of all, the power to impose,\footnote{366} compromise, modify, or remit civil penalties—\footnote{367}—a novelty under the FCMA—\footnote{368}—is vested in the Commerce Department. Judicious use of this sanction, and of the related duty to revoke, suspend, or condition

\footnote{360. See generally text accompanying notes 268–87 supra.}
\footnote{364. See 1975 House Merchant Marine Hearings, supra note 1, at 183–84 (testimony of Howard W. Pollock, Deputy Adm'r, NOAA); id. at 210 (testimony of Adm. O.W. Siler, Commandant, U.S. Coast Guard).}
\footnote{365. FCMA § 310(c), 16 U.S.C.A. § 1860(c) (West Supp. 1977).}
\footnote{366. Id. § 308(a), 16 U.S.C.A. § 1858(a).}
\footnote{367. Id. § 308(d), 16 U.S.C.A. § 1858(d).}
\footnote{368. The Bartlett Act did not provide for civil penalties; other fisheries legislation, however, did. See text accompanying notes 202–06 supra.}
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a permit for nonpayment of a civil penalty or fine, will be as critical to the success of the enforcement program as supplying necessary ships and aircraft for patrols.

Lastly, mention should be made of the general rulemaking power conferred upon the Secretary of Commerce "to carry out . . . [the] provisions of" the Act. This power, lineal descendant of one originally shared with the Treasury Department, could be used in a variety of ways to aid in the enforcement program, for example, in requiring various forms of cooperation during vessel boardings, in giving notice of procedures for hot pursuit, or perhaps in elaborating various of the definitions given in the Act.

B. United States Coast Guard

For obvious reasons, the FCMA vests in the Coast Guard a major share of responsibility for protection of United States fishery resources. As the nation's basic maritime law enforcement agency, it possesses the surface and airborne equipment and trained personnel necessary to conduct surveillance and boardings of foreign and domestic vessels subject to the fishery management authority of the United States. Under the Bartlett Act, the Coast Guard had "the primary enforcement responsibility," and for this reason the views of the Commandant concerning that law were singled out for attention.

Despite an isolated suggestion that NOAA's fisheries enforcement and surveillance program be transferred to the Coast Guard, the FCMA makes it plain that the enforcement function is to be shared

369. FCMA § 204(b)(12), 16 U.S.C.A. § 1824(b)(12) (West Supp. 1977). The Commerce Department also has discretion to impose such sanctions even in the absence of an unpaid fine or civil penalty. Id. See pp. 550, 553 supra.

370. FCMA § 305(g), 16 U.S.C.A. § 1855(g) (West Supp. 1977).


372. See, e.g., 42 Fed. Reg. 8813, 8817 (1977) (to be codified as 50 C.F.R. § 611.6); see also 50 C.F.R. § 295.6 (1976) (enforcement procedures for protection of Continental Shelf fisheries resources).

373. For example, the definitions of "scientific research activity" and of operations at sea in support of fishing as used in FCMA § 3(10)(D), 16 U.S.C.A. § 1802(10)(D) (West Supp. 1977).


between the Coast Guard and the Department of Commerce, with the
assistance of such other federal agencies and states as can be negoti-
ated.\footnote{FCMA § 311(a), 16 U.S.C.A. § 1861(a) (West Supp. 1977). The Act does not require that agreements for the use of state and other federal agencies in enforcement be negotiated jointly by the Coast Guard and the Department of Commerce, but such an approach makes obvious good sense in view of the shared ultimate responsibility for enforcement.} The new law gives important additional recognition to the
Coast Guard's role beyond that found in the Bartlett Act. Thus, the
regulations concerning the issuance of citations to offenders are to be
issued jointly by the Secretary of Commerce and the Secretary of the
department in which the Coast Guard is operating.\footnote{Id. § 311(c), 16 U.S.C.A. § 1861(c); 42 Fed. Reg. 11,839 (1977) (to be codified as 50 C.F.R. Pt. 620). See generally text accompanying notes 268–87 supra.}

The Coast Guard is represented on each Regional Fishery Manage-
ment Council by a non-voting member\footnote{FCMA § 302(c)(1)(B), 16 U.S.C.A. § 1852(c)(1)(B) (West Supp. 1977).} and is empowered to deter-
mine the types of position-fixing and identification equipment that
shall be required of GIFA-nation vessels.\footnote{Id. § 201(c)(2)(C), 16 U.S.C.A. § 1861(c)(2)(C).} Consistent with the role of the Coast Guard in the documentation and admeasurement of
domestic vessels,\footnote{Id. § 204(b)(4)(B), 16 U.S.C.A. § 1824(b)(4)(B).} the Act also calls upon the Secretary of Com-
merce to consult with both the Coast Guard and the Department of
State in prescribing "the forms for permit applications submitted
under [section 204(b)] and for permits issued pursuant to any such
application."\footnote{Id. § 204(b)(4)(C), 16 U.S.C.A. § 1824(b)(4)(C).} Similarly, the Secretary of State must consult the
Coast Guard and the Commerce Department in establishing applica-
tion procedures and forms with respect to registration permits for
fishing under existing international fishery agreements.\footnote{Id. § 204(b)(4)(A), 16 U.S.C.A. § 1824(b)(4)(A).}

Applications for fishing permits from foreign fishermen must be
transmitted by the State Department to the Coast Guard as well as
the appropriate Regional Fishery Management Council,\footnote{Id. § 204(b)(4)(A), 16 U.S.C.A. § 1824(b)(4)(A).} the
Department of Commerce,\footnote{Id. § 204(b)(4)(B), 16 U.S.C.A. § 1824(b)(4)(B).} and responsible congressional commit-
tees.\footnote{Id. § 204(b)(4)(C), 16 U.S.C.A. § 1824(b)(4)(C).} No application may be granted until the Department of Com-
merce has consulted with the Coast Guard "with respect to enforce-

\footnote{377. FCMA § 311(a), 16 U.S.C.A. § 1861(a) (West Supp. 1977). The Act does not require that agreements for the use of state and other federal agencies in enforcement be negotiated jointly by the Coast Guard and the Department of Commerce, but such an approach makes obvious good sense in view of the shared ultimate responsibility for enforcement.}
\footnote{378. Id. § 311(c), 16 U.S.C.A. § 1861(c); 42 Fed. Reg. 11,839 (1977) (to be codified as 50 C.F.R. Pt. 620). See generally text accompanying notes 268–87 supra. The Secretary's functions under the Act have been delegated to the Commandant of the Coast Guard. 42 Fed. Reg. 12,176 (1977) (to be codified as 49 C.F.R. § 1.46(v)).}
\footnote{379. FCMA § 302(c)(1)(B), 16 U.S.C.A. § 1852(c)(1)(B) (West Supp. 1977).}
\footnote{380. Id. § 201(c)(2)(C), 16 U.S.C.A. § 1861(c)(2)(C).}
\footnote{381. See 46 C.F.R. Pt. 67 (1976).}
\footnote{382. FCMA § 204(b)(2), 16 U.S.C.A. § 1825(b)(2) (West Supp. 1977).}
\footnote{383. Id. § 204(c), 16 U.S.C.A. § 1824(c).}
\footnote{384. Id. § 204(b)(4)(B), 16 U.S.C.A. § 1824(b)(4)(B).}
\footnote{385. Id. § 204(b)(4)(A), 16 U.S.C.A. § 1824(b)(4)(A).}
\footnote{386. Id. § 204(b)(4)(C), 16 U.S.C.A. § 1824(b)(4)(C).}
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and the Coast Guard must be informed as to the approval of any section 204 permit application by the Commerce Department. Finally, the Secretary of Commerce must consult with the Coast Guard "with respect to enforcement at sea" when reviewing any fishery management plan or amendment to such a plan.

Under the FCMA, control of vessels that have been seized will continue to rest with the United States Marshals Service as agents of the district courts, once the jurisdiction of those courts has attached by means of the commencement of a civil forfeiture action. In accordance with the Supplemental Rules for Certain Admiralty and Maritime Claims, the marshal must “take into his possession for safe custody” any tangible attached or arrested property. This power brings other agencies into the process, because the Supplemental Rules and Customs Regulations provide for withholding from clearance seized vessels that have not been ordered released. Moreover, it is common for the Marshals Service to appoint a “keeper” for a seized vessel, although the Coast Guard ordinarily will not relieve the marshal of overall responsibility. When involved as a keeper, the Coast Guard acts as an arm of the court and not as a law enforcement agency.

Because local hostility may manifest itself in connection with seizures of vessels of particular countries, such vessels and their crews may have to be protected from the local public. Also, in the case of vessels of socialist countries, special precautions appear to have been deemed necessary, since the practice has grown up under the Bartlett Act of creating a security zone around such ships during the pendency of judicial proceedings. The same practice has been adopted occa-

387. Id. § 204(b)(6), 16 U.S.C.A. § 1824(b)(6).
388. Id. § 204(b)(8)(B), 16 U.S.C.A. § 1824(b)(8)(B).
390. Id. § 310(b), 16 U.S.C.A. § 1860(b). Where only the civil penalty provision of § 308(a) is invoked, there would be no district court jurisdiction in rem, and hence no occasion for involvement by the marshals.
392. Id.
395. U.S. Coast Guard Commandant Instruction No. 16214.1A, at 8 (Feb. 25, 1977).
sionally even where vessels of non-socialist nations are in custody. The need for such extraordinary measures is open to question, and it is to be hoped that the power will be used more sparingly as fisheries law enforcement comes increasingly to be divorced from considerations of international politics and more completely assimilated with general law enforcement measures.

Manifestly, the Coast Guard’s role under the statute is broad-ranging and quite well-defined, although the law gives the service no direct voice in the assessment of penalties or in the choice of sanctions. The latter is not considered to be a defect, as it is plainly not the office of the policeman, which is the Coast Guard’s basic task, to make such decisions. To the extent that the circumstances of a particular case call for one disposition or another, the criteria in section 308(a) are sufficiently broad to encompass matters which the Coast Guard might wish to have considered, such as the need to conduct hot pursuit. As can be seen, the major role carved out for the Coast Guard by the FCMA extends far beyond the planning and execution of patrol efforts that largely characterized the Coast Guard’s functions under the Bartlett Act, and will help to ensure a coherent regulatory program that gives due attention to the sometimes overlooked exigencies of the enforcement function.

C. Department of Defense

Under the Bartlett Act, the role of the Defense Department was substantial on paper but virtually nonexistent in fact. Even though that law was amended in 1970 to permit the main enforcement agencies to “utilize the equipment (including aircraft and vessels)” of all


400. See Bartlett Act Status Report, supra note 8, at 733.

401. See FCMA § 308(a), 16 U.S.C.A. § 1858(a) (West Supp. 1977); see generally text accompanying notes 288-319 supra.

federal agencies,\textsuperscript{403} including in particular the "regular scheduled" use of Defense Department equipment,\textsuperscript{404} the provision has been essentially a dead letter in the intervening years.\textsuperscript{405}

In the fashioning of the FCMA, however, there were occasional suggestions that the defense establishment, particularly the Navy, might have to be brought into the enforcement program under the new law. Such suggestions were either motivated by a wish to conjure up a "parade of horribles" to forestall passage of the new law,\textsuperscript{406} or, more constructively, to show that other resources could be added to those of the Coast Guard.\textsuperscript{407} Such use of the Navy would, if statu-


\textsuperscript{404} H. R. REP. No. 91–1430, 91st Cong., 2d Sess. 7 (1970).


torily authorized, raise no domestic legal impediments, and would be consistent with international law and practice.

As a consequence, it was no surprise that the FCMA, as finally approved, gave even more express recognition to the use of naval and other defense forces in enforcement than did the Bartlett Act. Thus, not content with the broad language of the 1970 Bartlett Act amendment, Congress, in section 311(a) of the FCMA, authorized the Secretaries of Commerce and Transportation (when the Coast Guard is serving within that department), “to utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal agency, including all elements of the Department of Defense, . . . in the enforcement program.”

To date, the administration has shown no particular inclination to rely on the Defense Department in FCMA enforcement, even though some “Coast Guard and Navy cooperation in law enforcement planning is already a reality.” This posture should certainly be maintained, at least until the Act has received a proper test under actual operating conditions. If a need arises for greater resources in the en-

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408. See Naval Enforcement, supra note 308, at 361–65. The express language of the FCMA serves to exempt enforcement activities under the Act from the otherwise applicable prohibition of the Posse Comitatus Act, 18 U.S.C. § 1385 (1970); see Naval Enforcement, supra note 308, at 363. For an arguable violation of the Posse Comitatus Act in the fishery law context, see the discussion of the use of the Navy for vessel position-fixing by triangulation as a means of enforcing the Tuna Conventions Act in Fish and Wildlife Briefings: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess., ser. 94–2, at 169 (1975) (testimony of Thomas A. Clingan, Jr., Deputy Ass’t Sec’y of State for Oceans and Fisheries Affairs). For its part, the Coast Guard is not subject to the Posse Comitatus Act, but regards that law “as a statement of Federal policy to which the Coast Guard is sensitive when authorizing [Coast Guard] assistance to law enforcement agencies.”

409. Naval Enforcement, supra note 308, at 358–61; see also note 306 supra.


411. The Coast Guard is a specialized service in the Navy in time of war, or as directed by the President. See 14 U.S.C. § 3 (1970); 49 U.S.C. § 1655(b) (1970).


413. 415 Coast Guard L. Bull. 10, 11 (1976); see also 42 Fed. Reg. 17,895–6 (1977) (indicating Navy involvement in the observer program).
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forcement program—for example, if major foreign fleets seek to harvest FCZ resources in the absence of a GIFA, or if such fleets are accompanied by warships, as was the British fleet off Iceland—then and only then should further attention be given to the possibility of using defense forces for FCMA enforcement. Should that time arrive, sensitive interagency issues will have to be resolved. For example, granted that it is the congressional intent that certain naval personnel aboard naval enforcement units would be "deputized" under section 311(a), it may be more prudent to detail Coast Guard personnel or National Marine Fisheries Service agents aboard such vessels, with only those persons empowered to lead boarding parties and make arrests and seizures. Seemingly, adoption of the latter course would go far toward minimizing the harshness in foreign eyes of high seas boardings executed entirely by naval officers.

D. Department of Justice

The Department of Justice will have an important function under the FCMA, but it will be less than that which it enjoyed under the Bartlett Act. The prior law gave the Department a key function in every case referred to it, because the two principal sanctions provided—criminal prosecutions and judicial forfeitures—absolutely required the department's cooperation in bringing the case to trial. At times the power was critical, as when the United States Attorney declined to prosecute. Furthermore, in every case, the United States Attorney essentially had the last word once the other agencies

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414. See Naval Enforcement, supra note 308, at 366; see also Fidell, The Law and Fishery Enforcement on the High Seas, 101 U.S. NAVAL INSTITUTE PROCEEDINGS 1975, at 95, 97.

415. 16 U.S.C.A. § 1861(a) (West Supp. 1977). Such deputization would be authorized by § 311(b), 16 U.S.C.A. § 1861(b), which refers, inter alia, to officers "authorized . . . by . . . the head of any Federal . . . agency which has entered into an agreement with" the Secretaries of Commerce and of the Department in which the Coast Guard is operating. It is to be expected that naval personnel who might be so designated under departmental orders would be commissioned, warrant, or petty officers, to maintain the parallelism with Coast Guard law enforcement powers. See 14 U.S.C. § 89(a) (1970).


417. Id. § 1082(a).

418. Id. § 1082(b).

419. See, e.g., Shelf Enforcement, supra note 106, at 151 & n.83 (release of Cuban vessel Playa de Varadero); MAR. FISH. REV., June 1976, at 27.
involved (the Departments of State and Commerce, and, to a degree, the Coast Guard) had recommended a given disposition.\textsuperscript{420}

The new law both increases and decreases the Justice Department's role. By deleting the provision for summary (or administrative) forfeitures,\textsuperscript{421} the FCMA requires that all forfeiture proceedings be conducted before a federal district judge. At the same time, the provision for administrative hearings and civil penalties, with statutory criteria for their imposition,\textsuperscript{422} will certainly divert at least some of the case load from the courts, leaving the Justice Department with the more secondary role of collecting an assessed penalty\textsuperscript{423} or of defending the Commerce Department in a judicial review proceeding.\textsuperscript{424}

E. United States Customs Service

Another agency whose role has changed under the new law is the Customs Service of the Department of the Treasury. The Bartlett Act provided for enforcement by the Treasury Department, along with the Department of Commerce (as successor to the Department of the Interior) and the department in which the Coast Guard was operating.\textsuperscript{425} Indeed, the Treasury even shared rulemaking power with the Department of Commerce,\textsuperscript{426} although no Treasury regulations were ever issued under the Bartlett Act.\textsuperscript{427}

Under its enforcement authority, the Treasury occasionally aided in

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\textsuperscript{420} See generally Bartlett Act Status Report, supra note 8, at 732–33 & nn.163–65.
\textsuperscript{421} See FCMA § 310(a), 16 U.S.C.A. § 1860(a) (West Supp. 1977).
\textsuperscript{422} Id. § 308(a), 16 U.S.C.A. § 1858(a).
\textsuperscript{423} Id. § 308(c), 16 U.S.C.A. § 1858(c).
\textsuperscript{424} Id. § 305(d), 16 U.S.C.A. § 1855(d) (review of rulemaking); id. § 308(b), 16 U.S.C.A. § 1858(b) (review of civil penalties). The statute requires service of the notice of appeal from a civil penalty only on the Secretary of Commerce. Section 308, however, should not be construed as conferring on the Commerce Department a power to defend a § 308(b) civil penalty review case to the exclusion of the Department of Justice. See 28 U.S.C. § 516 (1970). For a discussion of review of rulemaking, see Comment, Judicial Review of Fishery Management Regulations Under The Fishery Conservation and Management Act, 52 WASH. L. REV. 599 (1977).
\textsuperscript{426} 16 U.S.C. § 1084 (1970) (repealed 1976); see also note 425 supra.
\textsuperscript{427} See Shelf Enforcement, supra note 106, at 137 & n.14.
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implementation of the former law.\textsuperscript{428} In general, however, the customs service enforcement role under the Bartlett Act was peripheral. The FCMA works an important change with respect to the role of the Treasury and the Customs Service in enforcement. Because the Treasury is not referred to in section 311(a), customs officers are not automatically authorized to enforce the new law.\textsuperscript{429} Nevertheless, it would be sensible for the two Secretaries who have basic enforcement responsibility (Commerce and Transportation) to enter into an inter-agency agreement with the Treasury to make use of Customs field personnel and equipment where appropriate. The recent unanticipated seizures off the Texas coast counsel such a course of action, although, as with all cooperation among specially designated agencies, it should be made clear that responsibility for coordinating enforcement and setting enforcement policy rests with the Coast Guard and National Marine Fisheries Service.\textsuperscript{430}

Independent of any special designation, the Treasury does have power under section 205(b) to "take such action as may be necessary and appropriate to prohibit the importation into the United States of" certain fish and fish products when the Secretary of State makes a determination that a foreign nation has failed to grant United States vessels equitable access to regulated fisheries or has taken other actions warranting a retaliatory import prohibition under section 205(a). In this event, the power of the Customs Service would be independently brought into play just as it is in the enforcement of any duty law or


\textsuperscript{429} The omission appears to have been intentional, seemingly reflecting the view that the Treasury's role under the Bartlett Act was an anachronism traceable to the fact that the Coast Guard was a part of the Treasury at the time the Bartlett Act was passed. See 1975 House Merchant Marine Hearings, supra note 1, at 659 (testimony of William C. Brewer, Gen. Counsel, NOAA) (semble). Since the Bartlett Act referred separately to the Treasury and the Department of which the Coast Guard was a part, however, see 16 U.S.C. § 1083(a) (1970) (repealed 1976), it seems more likely that the Treasury was listed because, until 1967, the Customs Service had responsibility for vessel documentation—a critical function in light of the vessel licensing provisions in § 1081 of the Bartlett Act. See generally Bartlett Act Status Report, supra note 8, at 708 n.27, 731 n.155.

\textsuperscript{430} The notion that Customs agents would have to follow enforcement rules set by other agencies is evident from the clause in the petty offense "citations" provision, FCMA § 311(c), 16 U.S.C.A. § 1861(c) (West Supp. 1977), that any enforcement officer may issue a citation "in accordance with regulations issued jointly by the Secretary [of Commerce] and the Secretary of the department in which the Coast Guard is operating." For a converse requirement applicable to Coast Guard law enforcement personnel, see 14 U.S.C. § 89(b)(2) (1970).
import restriction program. Similarly, it would be appropriate for Customs personnel to be involved in shoreside enforcement of the section 307(1)(G) prohibition on importing and exporting of "any fish taken or retained in violation of" the FCMA.

The FCMA, however, contrary to a suggestion that the Customs Service "should continue to be involved in initial confiscation-seizure procedures," merely incorporates by reference those portions of the customs laws in a section authorizing post-judgment seizures by the Attorney General. Indeed, the Act specifically negates any suggestion that Customs may apply Customs remedies. Instead, it provides that the "duties and powers imposed upon the Commissioner of Customs or other persons under such provisions shall, with respect to this Act, be performed by officers or other persons designated for such purpose by the Secretary [of Commerce]." In this fashion, the FCMA serves to clarify the rather obscure allocation of functions for such matters as remission or mitigation of forfeitures and compromise of claims under the Bartlett Act.

F. Department of State

Under the Bartlett Act, the State Department had a major voice in many of the critical enforcement decisions. The precise nature of this voice is classified information, but some details of the Department's responsibility are known. For example, the State Department was among the agencies consulted in setting government negotiating positions in prosecutions under the Act. The Department was also consulted on whether a seizure should be made in individual cases—a
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role that was not received uncritically on Capitol Hill—and was the source of specific instructions to the Coast Guard for enforcement of the prohibition on foreign harvesting of Continental Shelf fishery resources.

On the basis of early evidence, the precise role of the Department of State in enforcement of the FCMA does not appear to have been altered materially from its role under the Bartlett Act. Mechanisms appear to be in place for the expression of State Department and White House views on such matters as which of the available sanctions should be invoked in a given case—consistent with the right to a fair hearing under section 308(a)—if the Department of Commerce decides to assess a civil penalty. Such a mechanism would be an appropriate reflection of the interaction between enforcement with respect to foreign fishing vessels and the conduct of foreign policy. Negotiation of GIFA's under section 201(c) also involves the Department in enforcement decisionmaking, particularly in allocating among foreign nations the total allowable catch under the provisions of section 201(e). Although the question is not addressed in the statute, it seems likely that the Department will also be influential in defining the enforcement program with respect to foreign fishing for anadromous species beyond the fisheries conservation zone, because of the sensitiveness of such enforcement in the absence of international agree-

MEI-520 and MEI-579 following contiguous fisheries zone violation at Laysan Is.). In practical effect, the distinction between approval and lack of objection seems to be illusory.


441. See U.S. DEP'T OF COMMERCE, A MARINE FISHERIES PROGRAM FOR THE NATION § 1.5.4, at 31 (1976).

ment. It is also probable that the Department will consult with the Coast Guard under section 201(c)(2)(C) concerning the types of position-fixing and identification equipment that foreign vessels will have to carry. Finally, a crucial enforcement-related role will be played by the State Department in the conduct of boundary negotiations with adjacent or opposite foreign nations, because such negotiations will determine the territorial extent of the fisheries conservation zone.

G. Regional Fishery Management Councils

Little can be said about the role of the Regional Fishery Management Councils, because the FCMA does not appear to confer direct general enforcement functions on these bodies. The sole exception, aside from a rather vague authorization to “prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery,” is found in the enumeration of discretionary provisions available to the Councils for inclusion in fishery management plans. Under this exception, a management plan, whether prepared by the Council or by the Secretary of Commerce, may “prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, including devices which may be required to facilitate enforcement of the provisions of this Act.” Hence, the powers of the Council under section 303 are analogous to the “appropriate position fixing and identification equipment” requirement for GIFA’s (and, hence, for licensed foreign fishing vessels) found in section 201. Because the Coast Guard, which must designate such equipment, is represented on the Councils and is consulted as to enforcement at sea before a plan is approved by the Commerce Department, it is to be hoped that the two powers would be exercised as consistently as the substance of the various management plans and fishing methods permit.

444. Id. § 202(d), 16 U.S.C.A. § 1822(d). See text accompanying notes 93–99 supra.
446. Id. § 303(b)(4), 16 U.S.C.A. § 1853(b)(4) (emphasis added).
H. State Agencies

Among the statements of policy announced by the Congress in the FCMA is the goal of drawing upon "Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement."450 Clearly some state role in enforcement is contemplated, but it is equally clear that the use of state enforcement agencies to assist in carrying out the FCMA and the regional management plans presents a variety of practical as well as legal problems. First, the new law changes the regime established under the Bartlett Act. Under that legislation, state officers could be designated as federal law enforcement personnel451—a power that was never exercised452—but there was no express provision for the use of state equipment such as aircraft and vessels.453 As a consequence, it could be questioned whether a state patrol vessel or aircraft would have been authorized to exercise the right of hot pursuit, because this right springs not from the identity of the law enforcement officer, but from the character of the vessel or aircraft giving the requisite signal to stop.454 In contrast, the FCMA authorizes the Secretaries of Commerce and of the department in which the Coast Guard is operating, by agreement, to "utilize the personnel, services, equipment (including aircraft and vessels), and facilities . . . of any State agency" in enforcement of the law.455 The Secretaries could properly, and indeed should determine that the states not be given this power in light of the potential international complications that could arise from its exercise.

The legislative history reveals an unmistakable intention that the powers to be exercised by enforcement officials of agreement states be

450. Id. § 2(c)(3), 16 U.S.C.A. § 1801(c)(3).
453. See Bartlett Act Status Report, supra note 8, at 731 n.159.
narrower than those of federal law enforcement personnel. Thus, the House Merchant Marine and Fisheries Committee report on H.R. 200 explained:

[i]n regard to any State agency, such personnel, services, and facilities could be used for purposes of enforcement with respect to domestic vessels wherever such domestic vessels may be found. With respect to foreign vessels, such personnel and services could be used only when such vessels are found within the fisheries conservation and management zone.\textsuperscript{456}

This assertion is unexceptionable in the sense that it shows that the coastal nation may exercise control over vessels flying its own flag anywhere;\textsuperscript{457} however, it also seems to indicate that an agreement state patrol vessel could not undertake enforcement against a foreign vessel illegally harvesting Continental Shelf fishery resources beyond the fisheries conservation zone. The statute itself does not support this distinction, although the limited endurance of state patrol vessels and aircraft may counsel it as a practical matter.\textsuperscript{468} Moreover, psychological considerations could play a role, as perhaps suggested by Representative Leggett's observation in the hearings that "[i]t would be pretty difficult to have a State fish and game warden to come nose to nose with a Soviet ship."\textsuperscript{459} The Commerce Department's response to this was a qualified assent: "We would not anticipate that that would be primarily the situation."\textsuperscript{460}

At the same hearings another administration witness summarized the agreement state enforcement role by saying, "[T]here is provision for enforcement by the States, and it would be with respect to U.S. nationals, and enforcement offshore would be by the Coast Guard."\textsuperscript{461} A slightly different emphasis appeared in the Conference Report, which stated that "it is the understanding of the conferees that State officers will be employed widely in assisting in the enforcement

\textsuperscript{458} \textit{See Bartlett Act Status Report, supra note 8}, at 731 & n.159, 752 & n.285.
\textsuperscript{460} \textit{Id.} (testimony of David Wallace, Associate Adm'r for Marine Resources, NOAA).
\textsuperscript{461} \textit{Id.} at 648 (testimony of William C. Brewer, Gen. Counsel, NOAA).
of this Act; however, in general it is expected that such State officers will be employed primarily in areas proximate to their own States and where Federal personnel are unavailable.\footnote{S. REP. No. 94–711, 94th Cong., 2d Sess. ser. 93–94, 58 (1976) reprinted in LEGISLATIVE HISTORY, supra note 4, at 37, 93–94.}

The best summary of the intent of Congress came not in connection with the FCMA, but in the hearings on a Coast Guard authorization measure\footnote{S. 2924, 94th Cong., 2d Sess. (1976).} that occurred while the FCMA was in conference. According to Senator Stevens, one of the managers on the part of the Senate:

We at one time contemplated an amendment that would require the utilization by the management councils of the enforcement agencies of the States adjacent to the 200-mile zone with regard to domestic fishermen and, on the other hand, would have required them to utilize the Coast Guard in any relationship to any foreign vessel.

We decided not to complicate your life in that regard by putting it directly into law. But that is our intent and it was stated on the floor. The direct day-to-day relationship in terms of management of resources, including enforcement, ought to come from the State fish and game agencies. However, none of those State agencies would have any direct relationship to foreign fishing vessels. In our opinion that should come only through the Coast Guard and not through people who are not trained in international aspects of law enforcement.

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It may be the wrong way to put it, but we don't see any reason why we should make a Federal case out of an isolated fisheries violation that could be handled, in terms of local domestic fishermen, by the local agencies involved.

On the other hand, we don't want local fisheries agencies steaming up and trying to board some foreign vessel.\footnote{Coast Guard Authorizations: Hearing on S. 2924 Before the Subcomm. on Merchant Marine of the Senate Comm. on Commerce, 94th Cong., 2d Sess., ser. 94–54, at 19–20 (1976) (statement of Sen. Stevens).}

One may fault legislators for not clarifying this matter in the statute itself, particularly because the FCMA was still in conference at the time. If the congressional intent was as strong as it appears to have been, then an appropriate amendment should have been made. As it stands, if agreements between state agencies and the federal authorities expressly exclude the power to enforce with respect to foreign craft, a question could arise if an apprehension of a foreign vessel is nonethe-
less made by a state patrol vessel. Another question could arise if a civil penalty were sought to be imposed against a foreign vessel, without a boarding, on the basis of reports from a state patrol. On the former point, any violation of inter-agency regulations should not vitiate the proceedings, on the ground that such limitations are not imposed for the benefit of the foreign fisherman. 465 The latter problem should similarly be dismissed, for the further reason that if no boarding has occurred, the possibility of international confrontation is minimized.

A matter of some importance domestically is whether states should be empowered to enforce a management plan against vessels homeported in other states. Under section 306(a) of the FCMA, "[n]o State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State." 466 It is unclear whether this provision applies to states that are enforcing the FCMA under section 311(a) agreements, or rather to states seeking to enforce their own fisheries legislation. If the former are intended to be covered, then Senator Stevens' remarks appear to have been in error to the extent that they suggest state competence to enforce within the 200-mile zone with respect to domestic fishing. The better view seems to be that section 306(a) only bars states from applying their own legislation against fishing vessels of other states beyond the three-mile limit. 467

Related questions of agreement state enforcement concern the propriety of enforcement by one state in the territorial waters of another, the fact that two neighboring states may not be in the same fisheries

467. See Skiriotes v. Florida, 313 U.S. 69 (1941). The reference in § 306(a) to vessels "registered under the laws of [a] State" must be taken with a grain of salt, because a literal reading would bar any state control over fishing by vessels that have federal documentation, 46 U.S.C. §§ 251, 263 (1970); 46 C.F.R. § 67.03–13 (1976), even as to the state in which such vessels are homeported. The legislative intent is believed to have been to cover all vessels homeported in a state, whether those vessels have federal documentation or are simply numbered under state boating laws. See 46 U.S.C. § 1452(3) (Supp. V 1975). Corrective legislation to clarify this point is desirable. The states, of course, retain the power to impose "reasonable, nondiscriminatory conservation . . . measures." Douglas v. Seacoast Products, Inc., 97 S.Ct. 1740, 1748 (1977); see also State v. Bundrant, 456 P.2d 530 (Alas.). appeal dismissed sub nom. Uri v. Alaska, 97 S.Ct. 40 (1976), although it is conceivable that even measures meeting that test might be ruled invalid on the ground of inconsistency with the FCMA. State landing laws that establish size or weight limits more restrictive than limits fixed under the FCMA might be found to be preempted by the federal legislation and implementing regulations.
management region, and the possible application of the Uniform Act on Close Pursuit\(^468\) to marine chases between states. Because the regional plans may well differ, and authorities of an agreement state in one region may be unfamiliar with the detailed requirements of a neighboring region, a very strong case can be made for limiting agreement state enforcement activities to the particular region of which it is a part. A less strong, but in the author's view, persuasive case can be made for limiting a state's enforcement powers to the segment of the fishery conservation zone that extends seaward from the state's territorial waters, excluding them, except for hot pursuit, from activities in waters of any other state—even in the same region.

A last question relates to how the agreement states will finance their enforcement programs. Aside from any question as to constitutionality,\(^469\) or the suggestion that agreement states should share in any penalties that might be imposed,\(^470\) this problem remains to be solved.

In principle, however, the FCMA should not form the basis for a sweeping federal assumption of responsibility for state enforcement efforts within the territorial waters, unless and until the section 306(b)(1) power to supplant state laws in this zone is used to a significant degree.

VI. CONCLUSION

The Fishery Conservation and Management Act of 1976 creates an elaborate enforcement program calling upon federal and state agencies to cooperate in new and, to a degree, untried ways. The Act's enforcement design is generally consistent with the terms of the Revised Single Negotiating Text of the Third United Nations Conference on the Law of the Sea, although the provisions for imprisonment of

\(^{468}\) See, e.g., N.Y. CRIM. PROC. LAW § 140.55 (McKinney 1971); cf. id. § 140.10 (granting New York law enforcement officers the power to pursue into cooperating states).

\(^{469}\) While the analogy is imperfect, the notion of the police force being compensated on a per-case basis is at least reminiscent of the justice of the peace who shares in the fines he imposes. Connally v. Georgia, 97 S.Ct. 546 (1977); Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

offenders are an important exception. The Act works significant changes in the pattern of enforcement that was developed under prior United States fisheries legislation, including the Bartlett Act. Some perceived weaknesses in the former regulatory scheme have been shored up, but new ones may have been added in their place. Whether the law turns out to be workable will depend, in large measure, not only upon the commitment of adequate resources to the enforcement program, but also on whether acceptable Governing International Fishery Agreements can be negotiated with all foreign nations that have active fisheries off the coasts of the United States. Conclusion of the necessary boundary agreements will also be critical to successful implementation. Failure on any of these counts could be fatal to the new law.

Past enforcement efforts, both within the twelve-mile exclusive fishing zone in effect from 1966 to 1977 and as to protection of Continental Shelf fishery resources beyond that limit, demonstrate that marine fisheries protection measures can be a reality, even over a vast expanse of ocean. Although there is every reason, then, to be optimistic that the salutary objectives of the FCMA can be achieved, this optimism is necessarily guarded, because important factors lie beyond the power of a single country to control.