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Border Wars & The New Texas Navy: International Treaties, Waterways, And State Sovereignty After Arizona v. United States

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BORDER WARS & THE NEW TEXAS NAVY: INTERNATIONAL TREATIES, WATERWAYS, AND STATE SOVEREIGNTY AFTER ARIZONA V. UNITED STATES

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"Texas has yet to learn submission to any oppression, come from what source it may."

—Sam Houston[1]

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1. Samuel Houston, of Texas, In reference to the Military Occupation of Santa Fe and in Defence of Texas and the Texan Volunteers in the Mexican War, Address Before the Senate (June 29, 1850), *in* DAILY NATIONAL INTELLIGENCER (Washington, D.C.), Oct. 18, 1950, at 1. The background of Houston's comment involves the aftermath of the conclusion of the Mexican-American War in 1848 by the Treaty of Guadalupe Hidalgo. Note 33 *infra*. A dispute arose between Texas and the inhabitants of what would become New Mexico, as to the border between those entities. The controversy nearly led to a shootout between Federal troops stationed in New Mexico, and armed forces of the State of Texas. *Millard Fillmore and the Fall of the Omnibus*, Freedman's Patrol Blog (Jan. 29, 2013) http://freedmenspatrol.wordpress.com/2013/01/29/millard-fillmore-and-the-fall-of-the-omnibus/. Some of the background of this conflict can be seen in the original papers and maps in the Fillmore Collection in the library of the State University of New York, Oswego. The Collection includes, for example, the original draft of the a letter from the U.S. Secretary of State to the Governor of Texas, clearly expressing the view of the U.S. government in this regard: " . . . if an attempt is made by force, to subject them (the inhabitants of New Mexico). . . to such jurisdiction (of the State of Texas) . . . it will become the duty of the Executive to protect them from such violence . . . and repel force by force . . . however painful . . . to the extent of all the necessary means which the Constitution and laws have placed at the disposal of the Executive." Letter dated "1850" (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*). On August 6, 1850, President Millard Fillmore recommended that Texas be paid to abandon her claims to part of New Mexico. *Millard Fillmore*, THEWHITEHOUSE.GOV, http://www.whitehouse.gov/about/presidents/millardfillmore/. On September 20, 1850, he signed into law a bill granting territorial status to New Mexico. *Id.* That legislation also resolved the controversy over the boundary between Texas and New Mexico. *Millard Fillmore House*, NATIONAL PARK SERVICE, http://www.cr.nps.gov/nr/travel/presidents/millard_fillmore_house.html.

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I. INTRODUCTION

Armed incursions, shootings, and killings are becoming alarmingly frequent across the Texas-Mexico Border. In response, Texas launched the "New Texas Navy."[2] It is not completely clear whether the main mission of these heavily armed gunboats will be limited to law enforcement, or if it will also include elements of military deterrence and engagement. As this Navy begins patrolling the muddy waters of the Rio Grande, it is also sailing into murky legal waters involving state, federal, and international relations. Among the many issues raised is whether states may operate paramilitary components separate from their national guards. What will be the results if the New Texas Navy turns machine guns on foreign law enforcement or military officials? What impact will these patrols have on the lives of people along both sides of the border, and the movement of people across that border? This article explores these and related issues. It is important, first, to understand the concerns that led to the creation of the New Texas Navy.

II. BULLETS ACROSS THE BORDER

In a 2010 letter to President Obama, Governor Perry of Texas announced stray bullets fired in Ciudad Juárez had hit El Paso City Hall and

2. The official and formal name is the Texas Department of Public Safety Tactical Marine Unit.

also revealed another similar incident when a building at The University of Texas at Brownsville was struck.[3] Since the governor's letter, stray bullets have hit a high school building in El Paso, a building at The University of Texas at El Paso, and an El Paso pedestrian.[4]

The governor's letter also mentioned attacks by Mexican pirates on Texas fishing boats on the international border lake, Falcon reservoir.[5] Mexican pirates, armed with automatic weapons, have been reported to board American fishing boats demanding cash or booty.[6] So far, the pirates, believed to be members of the Zetas cartel, have limited their raids to the Mexican side of the reservoir, although still within full view of the American shoreline.[7]

Perhaps the best-known Falcon Lake incident was the 2010 shooting death, presumed to be the work of Mexican pirates or drug traffickers, of David Hartley as he was riding jet skis on the lake with his wife.[8] In May 2011, Mexican marines killed twelve Zetas gunmen in a gunfight when the marines discovered the Zetas drug camp on an island in the Mexican side of the reservoir.[9] Along the border, Mexican military and police offi-

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3. Letter from Rick Perry, Tex. Governor, to Barack Obama, U.S. President, 2 (Aug. 9, 2010), *available at* http://governor.state.tx.us/files/press-office/080910_PerryObamaletter.pdf. Governor Perry addresses President Obama to reiterate the "dire threat amassing on our southern border" due to international drug cartels and international gangs. *Id.* at 1. In addition, Governor Perry requests, once again, "federal resources to combat the increasing violence." *Id.* at 1.

4. *El Paso Woman hit by Stray Bullet from Mexico*, CBS NEWS (Feb. 21, 2012), *available at* http://www.cbsnews.com/8301-201_162-57382328/el-paso-woman-hit-by-stray-bullet-from-mexico/.

5. Letter from Rick Perry, *supra* note 3. "Drug-trafficking organizations have established connections with transnational gangs through Texas and use them to traffic in drugs and humans, providing the cartels with willing soldiers who operate on both sides of the border and in our communities." *Id.* at 2.

6. William Booth, *Mexican Pirates Attack Texas Fishermen on Falcon Lake, which Straddles Border*, WASH. POST (May 30, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/29/AR2010052903707.html.

7. *Id.*

8. Barry Leibowitz, *Falcon Lake Shooting Update: Tiffany Hartley Urges Obama Admin. to Find Dead Husband*, CBS NEWS (Mar. 31, 2011), *available at* http://www.cbsnews.com/8301-504083_162-20048893-504083.html. To date, Hartley's body has not been recovered. *See* Jason Buch, *Mexico Makes Arrest in Killing of U.S. Tourist on Falcon Lake*, SAN ANTONIO EXPRESS NEWS (Oct. 9, 2012), *available at* http://www.mysanantonio.com/news/local_news/article/Mexico-makes-arrest-in-killing-of-U-S-tourist-on-3928519.php (stating that a man who allegedly participated in some of the Zeta killings, including Hartley's, was arrested).

9. Camille Mann, *13 Killed in Clash on Falcon Lake at U.S.—Mexico Border*, CBS NEWS (May 10, 2011), *available at* http://www.cbsnews.com/8301-504083_162-20061463-504083.html. One Mexican marine was also killed in the gun battle. *Id.*

cials have located a number of mass graves containing hundreds of bodies of victims of the drug cartels.[10]

The Mexican military has not limited itself to its side of the international border. Reported incursions by Mexican military, including firing upon American federal agents, have been reported to since 2000.[11] In 2008, a United States Border Patrol agent "was held at gunpoint . . . by members of the Mexican military who had crossed the border into Arizona."[12] In a statement that has since been removed from their website, Local 2544 of the National Border Patrol Council, the largest union of Border Patrol agents with membership in Arizona, Hawaii, Nevada, and California, alleged that such incursions have been "going on for years."[13] From 2001 through 2005, Border Patrol documented 144 incursions by Mexican military into the United States.[14]

Texas has suffered similar military incursions. The Mexican Navy has flown helicopters across the Rio Grande and into American territory numerous times, initiating complaints from citizens and law enforcement.[15] Congressman Ted Poe from the Texas Second United States Congressional District reported many such incidents from the floor of the House of Representatives.[16]

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10. *Mexican Drug Violence: Zetas Gang Suspect Leads Navy to Mass Graves with 10 Bodies*, HUFFINGTON POST (Feb. 8, 2012), *available at* http://www.huffingtonpost.com/2012/02/08/mexican-drug-violence-zetas-mass-graves-veracruz_n_1262720.html.

11. *Border Incursions: Hearing on H.R. 98 and H.R. 4044 Before H. Comm. on House Homeland Security Subcomm. on Investigations*, 109th Cong., (Feb. 7, 2006) (statements of T.J. Bonner, Pres., Nat'l Border Patrol Council; Leo Samaniego, Vice-Chair, Tex. Border Sheriff's Coalition).

12. Jerry Seper, *Border patrol agent held at gunpoint*, WASH. TIMES, Aug. 6, 2008, *available at* http://www.washingtontimes.com/news/2008/aug/06/soldiers-cross-into-us-hold-guns-to-agent/?page=all.

13. LOCAL 2544: NATIONAL BORDER PATROL COUNCIL TUCSON, ARIZ., *available at* http://www.local2544.org/home.asp (last visited May 10, 2012). The union's website is decidedly of a particular viewpoint, and stated: "09-03-11 We don't know if the allegations of Mexican troops stealing items from American hunters is true, but the allegation is out there. We do know for a fact that we have had our share of run-ins with the Mexican military here." *Id.*

14. *Border Incursions*, *supra* note 11 (statement of David Aguilar, Chief, U.S. Border Patrol, U.S. Dep't of Homeland Security).

15. Sergio Chapa, *Photos Released From Second Mexican Helicopter Incursion*, KGBT CHANNEL 4 VALLEYCENTRAL.COM, Mar. 30, 2010 11:47AM, http://www.valleycentral.com/news/story.aspx?id=436846.

16. *Administration Missing in Action*, 156 CONG. REC. H4402, (daily ed. June 14, 2010) (statement of Rep. Poe); *Mexican Military Helicopter Incursions*, 156 CONG. REC. H3488, (daily ed. May 18, 2010) (statement of Rep. Poe); *And the Border Violence Continues*, 156 CONG. REC. H2824, (daily ed. Apr. 21, 2010) (statement of Rep. Poe); *Mexican Military Helicopter Incursions into U.S.*, 156 CONG. REC. H2672, (daily ed. Apr. 20, 2010)

In July 2011, Mexico's Ministry of National Defense confirmed that thirty-three Mexican soldiers "mistakenly" crossed the international border on the Rio Grande at an international crossing.[17] Texas Sheriff Arvin West reported that when his deputies went to interdict one drug shipment, they came upon the shipment as it was being escorted across the Rio Grande by "heavily armed soldiers" from the Mexican Military who "flanked the Deputies and [Texas Department of Public Safety, state police] in order to protect the load of marijuana."[18]

In March 2012, the day after federal border agents on American soil returned gunfire after they were fired upon from across the Rio Grande by narcoterrorists, Congressman Poe announced before the United States House of Representatives that Texas would defend herself.[19] The Congressman informed the House that Texas had launched its second gunboat for patrolling the Rio Grande and asked: "Why does Texas have to send its own navy to defend the border of the United States? Because the Federal Government refuses to do its job, and someone has to protect the homeland."[20] Thus, it is obvious that the purpose of the New Texas Navy is more than just domestic law enforcement.

The bullets have flown from the North into the South as well. On September 3, 2012, Border Patrol agents "riding in boats in the shores off Laredo, Texas" shot and killed a Mexican man "grilling fajitas with his family" on the Mexico side of the Rio Grande.[21] Other skirmishes between rock-throwing Mexican citizens and Border Patrol officials received wide attention.[22] However, no large scale, unauthorized incursion by American agents into Mexico has taken place, or if they have, they have gone undetected and unreported.

This current unrest might be better understood against the larger backdrop of the triangular relationships of Texas, Mexico, and the United States.

(statement of Rep. Poe); *Incursion by Mexican Military Helicopter*, 156 CONG. REC. H1362, (daily ed. Mar. 12, 2010) (statement of Rep. Poe).

17. Sergio Chapa, *supra* note 15.

18. *Border Incursions*, *supra* note 11 (statement of Arvin West, Sheriff, Hudspeth County, Texas).

19. *Border Shootout*, 158 CONG. REC. H1144, (daily ed. Mar. 5, 2012) (statement of Rep.Poe), *available at* http://poe.house.gov/index.php?option=com_content&view=article&id=8591:border-shootout&catid=102:speeches (with links to YouTube video).

20. *Id.*

21. *Mexico Questions Rio Grande Shooting*, UPI.COM, Sept. 6, 2012, *available at* http://www.upi.com/Top_News/US/2012/09/06/Mexico-questions-Rio-Grande-shooting/UPI-92431346953144.

22. *Id.*; *Border Patrol Defends Killing Rock Thrower*, UPI.COM, June 11, 2011, *available at* http://www.upi.com/Top_News/US/2011/06/23/Border-Patrol-defends-killing-rock-thrower/UPI-19651308836587/?rel=92431346953144.

III. HISTORICAL PERSPECTIVE

Whether you attribute it to something in Texas drinking water or to Texas mommas, Texans have a fierce independence and a distinct first loyalty to Texas. The feeling was already present when the first western invaders met the land's native populations. America's western expansion brought Anglo settlers in conflict with the native populations as well as the Mexicans who had previously settled the land. In 1836, the Anglos achieved independence from Mexico at the Battle of San Jacinto and set out to form a government similar to that of the United States of America.

A. *Republic to State*

One of the first steps necessary for the new Republic of Texas was to delineate its borders.[23] To that end, in December 1836, the first legislature approved the Republic of Texas Boundary Act, which established Texas's border with Mexico from "the mouth of the Rio Grande, thence up the principal stream of said river to its source."[24] Only days prior to passage of the Boundary Act, Texas passed an act that established the first Texas Navy.[25]

The Republic of Texas convinced the United States of America to annex Texas lands in 1845.[26] Congress stated that "the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new state."[27] Congress laid the following condition on the annexation: "subject to the adjustment by this government of all questions of boundary that may arise with other governments."[28] A second condition for admission required Texas to cede her "navy . . . and all other property and means pertaining to the public defence [sic] belonging to said republic of Texas" to the United States.[29]

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23. An excellent historical review of the story of the Texas borders was set forth at United States v. La., Tex., Miss., Ala. & Fla., 363 U.S. 1, 36–66, (1960) *supplemented sub nom.* United States v. Louisiana, 382 U.S. 288 (1965).

24. Republic of Texas Boundary Act of 1836, 1st Cong., R.S. § 1, 1836 Rep. Tex. Laws 133–34, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1193–94 (Austin, Gammel Book Co. 1898).

25. Act approved Dec. 15, 1836, 1st Cong., R.S. § 1, 1836 Repub. Tex. Laws 86–128, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1146–88 (Austin, Gammel Book Co. 1898).

26. CONG. GLOBE, 28TH CON., 2D SESS. 372 (1845).

27. Annexation of Texas, J. Res. No. 8, 28th Cong., 5 Stat. 797 (Mar. 1, 1845).

28. *Id.* Texas was formally admitted as a state on December 29, 1845. *Id.*

29. *Id.*

Shortly after Texas gained Statehood, "[t]he Mexican army crossed the Rio Grande and declared war upon the United States."[30] No longer an independent nation, Texas was able to rely on the national defense of the United States. To protect the borders of the United States against an invading foreign nation, President Polk declared war on Mexico shortly thereafter, explaining that:

> Texas, by the final action of our Congress, had become an integral part of our Union. The Congress of Texas, by its act of December 19, 1836, had declared the Rio del Norte [Rio Grande] to be the boundary of that republic. Its jurisdiction had been extended and exercised beyond the Nueces [River]. The country between that river and the Del Norte [Rio Grande] had been represented in the congress and in the convention of Texas; had thus taken part in the act of annexation itself; and is now included within one of our congressional districts. Our own Congress had, moreover, with great unanimity, by the act approved December 31, 1845, recognized the country beyond the Nueces as a part of our territory, by including it within our own revenue system; and a revenue officer, to reside within that district, has been appointed, by and with the advice and consent of the Senate. It became, therefore, of urgent necessity to provide for the defence [sic] of that portion of our country.[31]

B. *U.S.–Mexico Border Treaties*

The United States and Mexico have numerous treaties in force today.[32] Among these is the Treaty of Guadalupe Hidalgo, which formally ended the Mexican–American War in 1848.[33] The Treaty affirmed the Rio Grande, also called the Rio Bravo del Norte, as the recognized "[b]oundary line between the two Republics."[34] Although the river has a well-known history of changing its channel, causing aggravation to car-

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30. United States v. La., Tex., Miss., Ala. & Fla., 363 U.S. 1, 56 (1960) *supplemented sub nom.* United States v. Louisiana, 382 U.S. 288 (1965).

31. *Id.*

32. DEP'T OF STATE, TREATIES IN FORCE 180–89 (Jan. 1, 2011), *available at* http://www.state.gov/documents/organizations/169274.pdf.

33. Treaty of Guadalupe Hidalgo, U.S.–Mex., Feb. 2, 1848, 9 Stat. 922, TS 207.

34. *Id.* art. V. Article V was amended by the Gadsen Treaty, signed December 30, 1853, 10 Stat. 1031, TS 208. It was later invalidated by the Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and the Colorado River as the International Boundary, signed November 23, 1970, 23 U.S.T. 371. However, both Gadsen and the 1970 Treaty, and, indeed, all relevant treaties have continuously recognized the Rio Grande as the international border.

tographers and statesmen alike, the two nations have always recognized that their border is the center of the river, wherever it may then lie.[35]

In 1889, the two sovereign nations established the International Boundary Commission, which is now known as the International Boundary and Water Commission (IBWC).[36] The American arm of the IBWC is a federal agency charged with applying the treaties between the United States and Mexico specifically regarding "boundary demarcation [and] national ownership of waters . . . in the border region."[37]

C. *The U.S.–Texas Border with Mexico Today*

Today, the United States–Mexico border is one of the deadliest places in the world—on the Mexican side. Between 2007 and 2010, over 50,000 murders were recorded in Mexico.[38] Mexico has a population of almost 115 million.[39] To put those numbers into perspective, consider that the United States, with a population of almost 309 million, had 63,740 murders during the same period.[40] Simply put, Mexico's murder rate is more than double that of the United States.

A recent report on border security reported that almost half of Mexico's murders occurred in the six Mexican states that border the United States.[41] But so-called "spillover" violence from Mexico into the United States is not as rampant as some politicians would have people believe, as revealed by comparing crime data from the F.B.I. and from Mexico's In-

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35. Convention to Facilitate the Carrying Out of the Principles Contained in the Treaty of November 12, 1884, and to Avoid the Difficulties Occasioned by the Reason of the Changes which Take Place in the Beds of the Rio Grande and Colorado Rivers, U.S.–Mex., Mar. 1, 1889, 26 Stat. 1512, TS 232. This treaty was extended indefinitely by Article 2 of the treaty signed February 3, 1944, 59 Stat. 1219, TS 994.

36. *Id.*; State v. Hidalgo Cnty. Water Control & Imp. Dist. No. 18, 443 S.W.2d 728, 736 (Tex. Civ. App.—Corpus Christi 1969) (observing the name change).

37. Hidalgo Cnty. Water Control & Imp. Dist. No. 18, 443 S.W.2d at 736 (discussing the IBWC); *Mission Statement*, INT'L BOUNDARY & WATER COMM'N, U.S. SEC., http://www/IBWC.state.gov/home/html (last visited Apr. 4, 2012).

38. ADAM ISACSON & MAUREEN MEYER, EL COLEGIO DE LA FRONTERA NORTE & WASH. OFF. ON LATIN AM., BEYOND THE BORDER BUILDUP: SECURITY AND MIGRANTS ALONG THE U.S.–MEXICO BORDER 5 (Apr. 2012), *available at* http://www.justf.org/files/pubs/120419_WOLA_Beyond.pdf (citing CORY MOLZAHN, VIRIDIANA RÍOS, & DAVID A. SHIRK, TRANS-BORDER INST., UNIV. OF SAN DIEGO, DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS THROUGH 2011 (2012), *available at* http://justiceinmexico.files.wordpress.com/2011/02/2011-tbi-drugviolence4.pdf.

39. *The World Factbook*, CIA, http://www.cia.gov/library/publications/the-world-factbook/geos/mx.html (last visited May 9, 2012).

40. F.B.I, Crime in the United States 2010: Table 1, by Volume and Rate per 100,000 Inhabitants, 1991–2010, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls (last visited May 9, 2012).

41. ISACSON & MEYER, *supra* note 38.

stituto Nacional de Estadística y Geografía (National Institute of Statistic and Geography).[42] For example, Laredo, Texas, with a population of almost 231,000, had a 3.9 murder rate per 100,000 people while Nuevo Laredo, Tamaulipas experienced a 37.5 per 100,000 people murder rate with 384,000 residents; Ciudad Juárez, Chihuahua, with a population of 1.3 million, had the highest murder rate of 282.7 per 100,000 people whereas its counterpart, El Paso, Texas, with a population over 624,000, had a total murder rate of only 0.8 per 100,000 people.[43] In fact, El Paso is tied with Lincoln, Nebraska for the title of lowest murder rate in the United States.

But, those statistics do not take into account the rise in kidnappings, briberies, or trafficking of drugs or humans.[44] In 2012, the Southern District of Texas has convicted a major Zetas cartel hitman and drug trafficker with responsibility for the gruesome murders of two Americans who were kidnapped from Nuevo Laredo;[45] a Mexican who was carjacking residents of McAllen, Texas;[46] a Mexican and a Honduran who kidnapped a father and son in Fresno, Texas;[47] a Webb County sheriff's deputy for using his office and official vehicle as an escort for drug traffickers;[48] a ring of individuals involved in the sex trafficking of Mexican girls into Houston sex clubs;[49] a Mexican kidnapping ring with almost 20 kidnap victims freed when the ring was raided.[50] In addition are the many convictions for drug trafficking and arms trafficking. All of these

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42. *Id.* at 6.

43. *Id.*

44. Ashley Fantz, *The Mexico Drug War: Bodies for Billions,* CNN (Jan. 20, 2012 9:03AM) http://www.cnn.com/2012/01/15/world/mexico-drug-war-essay/index.html.

45. Press Release, U.S. Atty's Off, S.D. Tex., Texas Jury Convicts Zeta Hitman "Cachetes" (Jan. 25, 2012), *available at* http://www.justice.gov/usao/txs/1News/Releases/2012%20January/120125%20Castillo-Chavez.html.

46. Press Release, U.S. Atty's Off, S.D. Tex., Mexican Man Sentenced to 10+ Years in Federal Prison for Carjacking (Jan. 20, 2012), *available at* http://www.justice.gov/usao/txs/1News/Releases/2012%20January/120120%20Quezada-Luna.html.

47. Press Release, U.S. Atty's Off, S.D. Tex., 11+ Years in Hostage Taking Case (Feb. 29, 2012), *available at* http://www.justice.gov/usao/txs/1News/Releases/2012%20February/120229%20Guzman.html.

48. Press Release, U.S. Atty's Off, S.D. Tex., Former Webb County Deputy Constable Sentenced to Five Years (Feb. 2, 2012), *available at* http://www.justice.gov/usao/txs/1News/Releases/2012%20February/120202%20Garcia.html.

49. Press Release, U.S. Atty's Off, S.D. Tex., Last of 10 Pleads Guilty in Alien Harboring Case (Mar. 19, 2012), *available at* http://www.justice.gov/usao/txs/1News/Releases/2012%20March/120319%20Belmontes.html.

50. Press Release, U.S. Atty's Off, S.D. Tex., Nine Convicted in Hostage Taking/Harboring Case (Mar. 2, 2012), *available at* http://www.justice.gov/usao/txs/1News/Releases/2012%20March/120302%20Cedillo-Narvaez%20et%20al.html.

convictions are similar to those won by the United States Attorney's Offices in other border regions.

In July 2010, the United States Mission in Mexico instructed its personnel that they were forbidden to drive from the United States–Mexico border "to or from the interior of Mexico."[51] The following year a travel warning was issued for the general public.[52] In February 2012, the United States State Department issued an updated travel warning for Mexico specifically identifying the Mexican state of Chihuahua, directly across from Texas, as an area of "special concern" to which Americans "should defer non-essential travel."[53]

Similarly, Texas issued repeated travel warnings. In 2012, Texas warned against traveling to Mexico during Spring Break.[54] In 2011, noting some of the most reported border murders, Texas repeated its 2010 travel warnings.[55] Near its border, Arizona went so far as to post signs on Interstate 10 south of Phoenix, that read, "'DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED / Active Drug and Human Smuggling Area / Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed.'"[56]

While "spillover" violence is largely limited to those engaged in criminal activities, it is not always the case. As shown above, kidnap and carjackings of Americans, from Texas and Arizona to Alabama and

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51. BUREAU OF CONSULAR AFF. U.S. DEP'T OF STATE, TRAVEL WARNING: MEXICO (Feb. 8, 2012), *available at* http://travel.state.gov/travel/cis_pa_tw/tw/tw_5665.html.

52. *Id.*

53. *Id.*

54. Press Release, Tex. Dep't of Pub. Safety, Pub. Aff. Off., DPS Advises Against Spring Break Travel to Mexico (Mar. 6, 2012), *available at* http://www.txdps.state.tx.us/director_staff/public_information/pr030612.pdf.

55. Press Release, Tex. Dep't of Pub. Safety, Media Relations Off., Avoid travel to Nuevo Laredo this July Fourth weekend (July 2, 2011), *available at* http://www.txdps.state.tx.us/director_staff/public_information/pr070211.pdf; Press Release, Tex. Dep't of Pub. Safety, Media Relations Off., DPS Discourages Spring Break Travel to Mexico (Mar. 1, 2011), *available at* http://www.txdps.state.tx.us/director_staff/public_information/pr030111.pdf; Press Release, Tex. Dep't of Pub. Safety, Media Relations Off., DPS Repeats Warning to Avoid Travel to Mexico (Jan. 28, 2011), *available at* http://www.txdps.state.tx.us/director_staff/public_information/pr012811a.pdf; Press Release, Tex. Dep't of Pub. Safety, Media Relations Off., DPS Urges Holiday Travelers to Avoid Mexico (Dec. 16, 2010), *available at* http://www.txdps.state.tx.us/director_staff/public_information/pr121610.pdf; Press Release, Tex. Dep't of Pub. Safety, Media Relations Off., Law Enforcement Agencies Urging Texans to Stay on U.S. Side of Falcon Lake (Oct. 1, 2010), *available at* http://www.txdps.state.tx.us/director_staff/public_information/pr100110.pdf; Press Release, Tex. Dep't of Pub. Safety, Media Relations Off., DPS Urges Spring Break Travelers to Avoid Mexico (Mar. 4, 2010), *available at* http://www.txdps.state.tx.us/director_staff/public_information/pr030410.pdf.

56. Arizona v. United States, 567 U.S. ___, 132 S. Ct. 2492, 2500 (2012) (quoting App. 170 and citing Pet.'s Br. 5–6).

Georgia, are a direct result of the violence in Mexico.[57] By far, the overwhelming numbers of criminal convictions in the border states are related to drug consumption by Americans, whether that means importing the drugs themselves or the ancillary crimes related to protecting the shipments or protecting the traffickers.[58]

As all other states, Texas created and maintains institutions to protect its citizens from criminal activities. And, like some of its sister states, Texas is been frustrated with what it perceives to be an inadequate federal response to the dangers. We turn to examining the law enforcement mechanisms Texas has and is employing.

IV. TEXAS ARMED FORCES

A. *Texas Military Forces*

The United States Constitution forbids any state from "keep[ing] Troops, or Ships of War in time of Peace."[59] Because states had militias before the Constitution and as the Constitution does not forbid them, states are authorized to maintain militias.[60] In Texas, authority for the state's militia is within the Executive powers enumerated in Title 4 of the Texas Government Code, Chapter 431. There are three branches of Texas's military forces: the Texas State Guard, the Texas Army National Guard, and the Texas Air National Guard.[61]

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57. Fantz, *supra* note 44.

58. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2010, FISCAL YEAR 2010 STATISTICAL HIGHLIGHTS, *available at* http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf (last visited May 9, 2012). *Id.* In 2010, the U.S. Attorney's Office filed 68,591 cases against 91,047 defendants. *Id.* Of those, 14,149 were narcotics cases filed against 27, 997 defendants, resulting in 25,218 defendants convicted (a 92 percent conviction rate). *Id.* Also, representing a large number of filings were immigration cases with 29,843 cases filed against 31,122 defendants and 28,684 defendants convicted (a 96 percent conviction rate).

59. U.S. CONST. art. I, § 10, cl. 3.

60. Houston v. Moore, 18 U.S. 1, 9 (1820).

61. TEX. GOV'T CODE § 431.001 (2012); *Mission & Purpose*, TEX. ST. GUARD, http://www.txsg.state.tx.us/about/about.aspx (last visited Feb. 16, 2013).

> The Texas State Guard (TXSG) mission as a branch of the Texas Military Forces is to provide mission-ready military forces to assist State and local authorities in times of state emergencies, with homeland security and community service through Defense Support to Civil Authorities (DSCA). To augment the other two branches of the Texas Military Forces, the Texas Army National Guard and Texas Air National Guard as force multipliers. Missions are directed by the Commander in Chief of the Texas Military Forces the Governor of Texas and commanded by the Texas Adjutant General.

Id.

The Texas State Guard "has four major Sub-Commands: Army, Air, Maritime, and Medical."[62] Formed in 2006, the Texas Maritime Regiment has over 200 members who "provide[ ] mission-ready volunteer[s] . . . for operations in support of homeland security, natural disasters[,] and state agencies."[63] The Texas State Guard is a recognized state militia.[64] The purpose of the Texas State Guard is defined by statute:

To provide mission-ready volunteer military forces for use by the state in homeland security . . . as a supplement to the Texas National Guard, the Texas State Guard exists as part of the state militia under the Second Amendment to the [U.S.] Constitution and a defense force under 32 U.S.C. § 109.[65]

The Texas Military Forces may be called into service by the Governor of Texas.[66] Unless the guard or militia has been federalized by the Presi-

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62. *Mission & Purpose*, TEX. ST. GUARD, http://www.txsg.state.tx.us/about/about.aspx (last visited Feb. 16, 2013). The purpose of each of those units is described as follows:

> Army - To provide trained soldiers for Defense Support to Civil Authorities (DSCA), support the Texas Army National Guard, and non-governmental organizations (NGO).
>
> Air - The mission of the Air Wings is to provide mission-capable airmen as a force multiplier for the Texas Air National Guard and for other missions in support of homeland security through Defense Support to Civil Authorities (DSCA).
>
> Maritime - The mission of the Texas Maritime Regiment (TMR) is provide highly trained military personal for Defense Support to Civil Authorities (DSCA), for operations in the maritime, littoral, and riverine environments in support of homeland defense and in response to man-made or natural disasters.
>
> Medical - The mission of the Texas Medical Brigade (TMB) is to augment health and medical support in times of need. TMB maintains a highly trained force that is rapidly deployable to provide appropriately qualified Health, Medical and Support personnel in accordance with the Defense Support of Civil Authorities (DSCA) missions.

Id.

63. FACT SHEET: TEXAS MARITIME REGIMENT, TEX. ST. GUARD (2011), http://www.txsg.state.tx.us/factsheets/images/TXSG_FS_06-11.pdf. The Texas Maritime Regiment (TMAR) is just one of four major units of the Texas State Guard. *Id.* "The Maritime Regiment specifically embraces the unique structure and traditions of America's Naval and Marine forces in preparing troops to carry out duties related to Texas' land, marine, littoral and riverine environments." *Id.*

64. 32 U.S.C. § 104(a) ("Each State, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands may fix the location of the units and headquarters of its National Guard.").

65. TEX. GOV'T CODE § 431.051 (2012).

66. TEX. CONST. art IV, § 7; TEX. GOV'T CODE § 431.002(a) (2012). The statute reads:

> (a) The governor is the commander-in-chief of the state military forces, except any portion of those forces in the service of the United States, and has full control and

dent of the United States, the Governor of Texas is its Commander-in-Chief.[67]

B. *Texas Department of Public Safety*

The Texas Legislature has broad authority to determine what is within police power.[68] Police power is limited to that which is appropriate and reasonably necessary for the protection of the general welfare, and public health and safety.[69] The Texas Department of Public Safety (DPS) is tasked "[t]o maintain public safety in the State of Texas."[70] The mission of the DPS is fivefold:

(1) to supervise traffic on rural highways;

(2) to supervise and regulate commercial and "for hire" traffic;

(3) to preserve the peace, to investigate crimes, and to arrest criminals;

(4) to administer regulatory programs in driver licensing, motor vehicle inspection, and safety responsibility; and

(5) to execute programs supplementing and supporting the preceding activities.[71]

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authority over all matters relating to the state military forces, including their organization, equipment, and discipline.

(b) If the governor is unable to perform the duties of commander-inchief, the adjutant general shall command the state military forces, unless other state law requires the lieutenant governor or the president of the senate to perform the duties of governor.

Id.

67. *Ex parte* Dailey, 93 Tex. Crim. 68, 72–73, 246 S.W. 91, 93 (Tex. Crim. App. 1922).

68. *See* Majestic Indus., Inc. v. St. Clair, 537 S.W.2d 297, 302–03 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (citing East New York Savings Bank v. Hahn, 326 U.S. 230 (1945); Stephenson v. Binford, 287 U.S. 251 (1932)) (discussing the ability of the state to expand its police powers to deal with a variety of problems).

69. Al-Yahnai Fountain Hawkins v. State, No. 11-04-00278-CR, 2005 WL 2156981, at *1 (Tex. App.—Eastland Sept. 8, 2005, no pet.) (stating that the State uses its "police power in the interest of the welfare and safety of the general public"); Falfurrias Creamery Co. v. City of Laredo, 276 S.W.2d 351, 353 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.) ("It is well settled that under our plan of government the police power extends only to those regulations which are reasonably necessary and appropriate to the protection of the public health, safety and morals.").

70. 37 TEX. ADMIN. CODE § 1.1(a) (2012). "The department works toward the attainment of this objective within existing regulations and in cooperation with other agencies and persons with mutual or related responsibilities. It seeks to preserve the peace and to protect the persons, property, rights, and privileges of all people in the State of Texas." *Id.* § 1.1(b).

71. *Id.* § 1.2.

Within the DPS's police authority, the agency is given specific jurisdictions which include narcotics and "special crimes."[72]

C. *The New Texas Navy*

On December 8, 2011, the Texas DPS unveiled the first in a new fleet of "shallow water interceptor" patrol boats.[73] The boats, nicknamed the New Texas Navy, form the DPS's Tactical Marine Unit and "join the battle along the Rio Grande and international lakes."[74] At a cost of approximately $580,000 per boat, the 34-foot long boats need less than two-feet of water to operate and feature armored glass and hulls, 4 machine-gun turrets with Mark 240 Bravo automatic machine-guns each capable of delivering 900-rounds per minute, night-vision cameras, and three 300-horsepower Mercury Verado engines designed to run as quietly as possible.[75] Steve McCraw, Director of DPS, is reported to have said the boats are "fully capable of taking whatever threats they'll encounter," specifically stating that the boats will be used for drug and human trafficking interdiction "across that river and those waterways."[76] To prove his point, "most of the commissioners" of DPS went on one of the patrol boats "to experience their operations" and, it just so happened that "[w]hile on patrol[,] they came across an apprehension of a large quantity of marijuana and they were able to observe first-hand the importance of these boats and operations."[77]

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72. *Id.* § 1.3.

73. Press Release, Tex. Dep't Pub. Safety, DPS Unveils New Patrol Vessels (Dec. 8, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*); Robert Hadlock, *Armored Boats Added to DPS Arsenal: Boats are Bullet-Proof*, KXAN AUSTIN (Dec. 11, 2011, 9:40 AM), http://www.kxan.com/dpp/news/texas/new-dps-boats-tools-in-drug-smuggling?hpt=us_bn5.

74. Robert Hadlock, *Armored Boats Added to DPS Arsenal: Boats are Bullet-Proof*, KXAN AUSTIN (Dec. 11, 2011, 9:40 am), http://www.kxan.com/dpp/news/texas/new-dps-boats-tools-in-drug-smuggling?hpt=us_bn5. "The 34-foot long boats feature armored glass and armored hulls, along with 900-horsepower engines. The vessels sport [four] machine gun turrets and state of the art night vision cameras." *Id.*

75. PUB. SAFETY COMM'N (AUSTIN, TEX.), MINUTES, DIRECTOR'S REPORT 2 (Mar. 21, 2012), http://www.txdps.state.tx.us/calendar/documents/minutes032112.pdf. The authors have been unable to further identify which "apprehension" was being referenced in the statement. Attempts to contact the DPS for answers regarding the incident and the Tactical Marine Unit in general have not received any reply or response.

76. Robert Hadlock, *Armored boats added to DPS arsenal: Boats are bullet-proof*, KXAN.COM, http://www.kxan.com/dpp/news/texas/new-dps-boats-tools-in-drug-smuggling ?hpt=us_bn5 (last updated Dec. 9, 2011 9:40 AM).

77. PUB. SAFETY COMM'N, *supra* note 75. The authors have been unable to further identify which "apprehension" was being referenced in the statement. Attempts to contact the DPS for answers regarding the incident and the Tactical Marine Unit in general have not received any reply or response.

D. *Law on the Border*

Texas is in the United States Coast Guard's District 8.[78] District 8 stretches from North Dakota's Canadian border to the Gulf of Mexico from Colorado to the Chattahoochee River.[79] The Coast Guard does not maintain a permanent presence on the Rio Grande, Falcon Lake, or Lake Amistad.[80] However, the Coast Guard does participate in selective joint operations with the forces tasked to the Rio Grande and its lakes.[81]

Lake Amistad is governed under the auspices of the National Park Service.[82] The Park Service is responsible for issuing passes to persons to enjoy the lake and surrounding area as well as ensuring that boats on the American side of the lake are properly registered and display current lake use permits.[83] The National Park Service's authority is codified in Chapter 36 of the Code of Federal Rules.[84]

In 2008, the Park Service and the United States Customs and Border Protection (CBP) established a joint task force with shared operational

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78. *Units*, U.S. COAST GUARD, http://www.uscg.mil/top/units/ (last modified Jan. 26, 2012).

79. *Id.*

80. *See Carter Continues Push for Coast Guard Fast Boats on Rio Grande*, CONGRESSMAN JOHN CARTER: REPRESENTING THE 31ST DISTRICT OF TEXAS (Mar. 21, 2011), http://carter.house.gov/press-releases/carter-continues-push-for-coast-guard-fast-boats-on-rio-grande/ (describing Texas politician's reference to lack of Coast Guard presence along Rio Grande, including the Lake Amistad community); *Louie Gohmert says Gov. Rick Perry is begging for Coast Guard to patrol two border lakes*, POLITIFACT TEXAS (May 10, 2011), http://www.politifact.com/texas/statements/2011/may/24/louie-gohmert/louie-gohmert-says-gov-rick-perry-begging-coast-gu/ (noting Texas Governor Rick Perry's plea for the Coast Guard to add patrol to the Falcon Lake community due to dangerous living conditions).

81. *See U.S. Coast Guard and Border Patrol Collaborate on Enforcement Operations in Texas*, U.S. CUSTOMS AND BORDER PROTECTION (June 24, 2008), http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2008_news_releases/june_2008/06242008_3.xml (noting that the "Del Rio [CBP] Sector recently conducted a joint enforcement operation utilizing the combined assets and resources of the Amistad Lake Task Force and the United States Coast Guard, Corpus Christi Sector on the Amistad International Reservoir / Lake to stem illicit maritime trafficking.").

82. *A Borderland Paradise*, NAT'L PARK SERVICE, http://www.nps.gov/amis/index.htm (last updated Feb. 11, 2013); *see also* 36 C.F.R. § 7.79 (2007) (detailing special regulations of the National Parks Service for Amistad Recreation Area); CAROL E. PURCHASE ET AL., AMISTAD NAT'L RECREATION AREA, TEXAS, WATER RESOURCES SCOPING REPORT 1 (Sept. 2001), *available at* http://www.nature.nps.gov/water/planning/management_plans/amis_wrsr_screen.pdf (noting that the IBWC "assigned administration of all [American] lands and [American] surface waters of the reservoir" to the National Parks Service).

83. *Amistad: Fees & Reservations*, NAT'L PARK SERVICE, http://www.nps.gov/amis/planyourvisit/feesandreservations.htm (last updated Feb. 11, 2013).

84. *See* 36 C.F.R. § 1.1 (discussing the purpose of the National Parks Service). Authority derives from 16 U.S.C. §§ 1, 3, 9a, 4601–6a(e), 462(k).

offices to serve Lake Amistad.[85] CBP also operates a port of entry on the Amistad Dam, near Del Rio, Texas.[86] In addition to the many drug interdictions it has effected,[87] the CBP has also assisted in lake rescues.[88] However, Lake Amistad itself is controlled by the authority of the IBWC.[89]

Unlike Amistad, Falcon Lake supports a state park under the Texas Parks and Wildlife Department (TPWD).[90] The park was created by a lease from the IBWC and opened in 1965.[91] The reservoir remains under the control of the IBWC.[92] TPWD, in conjunction with local sheriffs, provide primary police presence on the lake.[93] In addition, Texas statute

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85. Bob Janiskee, *National Park Service and US Border Patrol to Share a New Operations Center at Lake Amistad National Recreation Area*, NAT'L PARKS TRAVELER (July 27, 2008, 5:53 PM), http://www.nationalparkstraveler.com/2008/07/national-park-service-and-us-border-patrol-share-new-operations-center-lake-amistad-national.

86. *See Port of Entry–Del Rio/Amistad Dam*, CBP.GOV, http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/tx/2302.xml (noting Amistad Dam as a port-of-entry under the supervision of the U.S. Customs and Border Protection).

87. *Border Patrol Texas Task Force Seizes 500 Pounds of Marijuana*, U.S. CUSTOMS AND BORDER PROTECTION (Oct. 31, 2007), http://www.cbp.gov/archived/xp/cgov/newsroom/news_releases/archives/2007_news_releases/102007/10312007_2.xml.html ("Lake Amistad, Texas task force seized more than 500 pounds of marijuana and detained four suspects yesterday. The incident occurred when Border Patrol agents, assigned to Border Patrol's marine operations on Lake Amistad, observed a fishing boat traveling toward the international boundary at a high rate of speed."); *CBP Officers Seize 2 Marijuana Loads at Del Rio Port of Entry*, U.S. CUSTOMS AND BORDER PROTECTION (July 16, 2009), http://cbp.gov/archived/xp/cgov/newsroom/news_releases/archives/2009_news_releases/july_2009/07162009_8.xml.html ("U.S. Customs and Border Protection officers at the Del Rio port of entry seized two significant loads of marijuana valued at $54,000 during inspections at the Del Rio and Amistad Dam crossings.").

88. *Border Patrol Agents in Del Rio Rescue Family from Sinking Boat*, U.S. CUSTOMS AND BORDER PROTECTION (Mar. 30, 2009), http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2009_news_releases/march_2009/03302009_12.xml (announcing that "U.S. Border Patrol agents located a submerged vessel and rescued a family stranded on Lake Amistad Sunday. . . [A]gents assigned to the Del Rio Sector Lake Task Force were contacted by the National Park Service, requesting assistance in locating a sinking boat carrying three adults and a three-month-old child.").

89. *See Amistad Reservoir*, TEXAS PARKS & WILDLIFE DEP'T, http://www.tpwd.state.tx.us/fishboat/fish/recreational/lakes/amistad/ (noting the International Boundary and Water Commission as the reservoir controlling authority for Lake Amistad).

90. *Falcon State Park*, TEXAS PARKS & WILDLIFE DEP'T, http://www.tpwd.state.tx.us/state-parks/falcon.

91. *Id.* (follow "History" hyperlink).

92. *See Falcon International Reservoir*, TEXAS PARKS & WILDLIFE DEP'T, http://www.tpwd.state.tx.us/fishboat/fish/recreational/lakes/falcon/ (showing the International Boundary and Water Commission as the reservoir controlling authority for Falcon Lake).

93. *Game Warden: Law Enforcement Off the Pavement*, TEX. DEP'T PARKS & WILDLIFE, http://www.tpwd.state.tx.us/warden/ (last visited Feb. 12, 2013).

mandates Parks and Wildlife "cooperate in the enforcement and administration of federal acts and rules and regulations."[94]

As might be expected, the heaviest burden for law enforcement along the Rio Grande border falls on the local sheriffs' area. The 1,200-plus mile Rio Grande is also the border to twenty Texas counties. In Texas, the highest law enforcement officer at the county level is the sheriff. In 2005, the sheriffs in the Texas border counties formed the Texas Border Sheriffs Coalition.[95] The sheriffs and the Coalition are "bolstered by Sheriffs, City Police Departments, Texas Department of Public Safety with their Texas Rangers, Highway Patrol, Aviation Assets, Investigators, the Texas Parks and Wildlife Division (Game Wardens), and . . . Federal partners lead by Customs and Border Protection."[96] The overarching goal of the Coalition is to focus on crimes along the border. Between November 2008 and May 2010, the Coalition seized 8,763 pounds of marijuana.[97]

Law enforcement is also provided by other divisions of Homeland Security, including Immigrations and Customs Enforcement (ICE), Drug Enforcement Agency (DEA), Department of Transportation (USDOT), Department of Agriculture (USDA), the Department of the Interior (USDI), the Food and Drug Administration (FDA), Fish and Wildlife

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94. TEX. PARKS & WILD. CODE § 13.303 (2012). The statute, in its entirety, provides:

(a) The department shall cooperate with departments of the federal government and other departments of state and local government, including as a part of the state plan, water districts, river authorities, and special districts in outdoor recreation. The department shall issue rules and regulations to cooperate in the enforcement and administration of federal acts and rules and regulations.

(b) The department shall implement programs and coordinate with departments and agencies of the federal government, including the United States Border Patrol and the Drug Enforcement Administration, and other departments of state and local government, if necessary, to minimize environmental damage to any land under the control and custody of the department along this state's border with Mexico.

Id.

95. *Tribpedia: Texas Border Sheriffs Coalition*, TEX. TRIBUNE, http://www.texastribune.org/texas-mexico-border-news/texas-border-sheriffs-coalition/about/ (last visited Feb. 12, 2013); DONALD L. REAY, EXEC. DIR., TEX. BORDER SHERIFFS COALITION, ADDRESS TO THE U.S. SENATE CAUCUS ON INTERNATIONAL NARCOTICS CONTROL 3 (May 5, 2010), *available at* http://drugcaucus.senate.gov/Don-Reay-5-5-10.pdf. The Coalition includes the following Texas counties: Brewster, Cameron, Culberson, Dimmit, El Paso, Hidalgo, Hudspeth, Jeff Davis, Jim Hogg, Kinney, Maverick, Pecos, Presidio, Star, Terrell, Val Verde, Webb, Willacy, Zapata, and Zavala. *Id.*

96. DONALD L. REAY, EXEC. DIR., TEX. BORDER SHERIFFS COALITION, ADDRESS TO THE U.S. SENATE CAUCUS ON INTERNATIONAL NARCOTICS CONTROL 3 (May 5, 2010), *available at* http://drugcaucus.senate.gov/Don-Reay-5-5-10.pdf.

97. *Id.*

(USFWS), and the Environmental Protection Agency (EPA).[98] Although, some, like USDOT, USDA, FDA, and USFWS are involved only for specific instances.[99]

V. AUTHORITY FOR THE RIO GRANDE

The Supreme Court has affirmed that it is "unquestionably established the Rio Grande from New Mexico to the Gulf [is] the land boundary not only of the United States but also of Texas."[100] The United States' border with Mexico is 1,933 miles long.[101] Of that length, 1,241 miles track the Rio Grande where it represents the international border between Mexico and Texas.[102]

A. *Treaty Limitations*

Under the American Constitution, authority to enter international treaties is exclusively reserved to the President.[103] The earliest United States–Mexico treaty that remains in force is the Treaty of Guadalupe Hidalgo, which brought the Mexican–American War to finality.[104] Article V established what has become the common language for the Rio Grande border:

> The Boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande . . . ; from thence, up the middle of that river, following the deepest channel, . . . to the point where it strikes the Southern boundary of New Mexico.[105]

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98. Tex. Comptroller of Pub. Accounts, State Functions at the Texas–Mexico Border and Cross-Border Transportation, Window on State Gov't, § II (Jan. 2002), *available at* http://www.window.state.tx.us/specialrpt/border/index.html.

99. *Id.*

100. United States v. Louisiana, 363 U.S. 1, 61, (1960), *supplemented sub nom.* United States v. Louisiana, 382 U.S. 288 (1965).

101. JANICE CHERYL BEAVER, CONG. RESEARCH SERV., U.S. INTERNATIONAL BORDERS: BRIEF FACTS 1 (2006), *available at* http://www.fas.org/sgp/crs/misc/RS21729.pdf.

102. *Id.*

103. U.S. CONST. art II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties").

104. Treaty of Guadalupe Hidalgo, *supra* note 33.

105. *Id.* This language is remarkably similar to the Republic of Texas Boundary Act of 1836, 1 Laws, Republic of Texas 133–34 (1836) which defined the Republic's border to "run[ ] west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source." Compare this earliest treaty to one of the most recent:

> . . . [T]he international boundary between the United States and Mexico in the limitrophe sections of the Rio Grande . . . shall run along the middle of the channel occupied by normal flow . . . and from that time forward, this international boundary shall

Both nations agreed that the river was navigable and neither nation would interfere with the free navigation of the river.[106] The Treaty of Guadalupe Hidalgo further provides that it is solely the responsibility of the United States, not the territorial government of Texas, to control the border's "savage tribes" and allows that the national government of the United States may fortify the border.[107]

As many are aware, rivers have a tendency to change course over time. Texans and Mexicans have known for centuries that the Rio Grande is highly susceptible to changing its course and jumping its banks. As early as 1889, the two nations signed a treaty "To Avoid the Difficulties Occasioned by Reason of the Changes Which Take Place in the Beds of the Rio Grande and Colorado Rivers."[108] The Treaty of 1889 specifically provided that "all differences or questions that may arise on that portion of the frontier," that is the Rio Grande, including its natural tendency to change its bed and any works to be constructed on the river, must be "submitted for examination and decision to the International Boundary Commission [(IBC)]."[109] The IBC was given "exclusive jurisdiction."[110]

In 1944, the two sovereign nations contemplated lakes created by international dams on the Rio Grande.[111] The governments agreed that "[p]ublic use of the water surface of lakes formed by the international dams shall . . . be free and common to both countries, subject to the police regulations of each country in its territory."[112] However, the treaty explicitly states that: "Neither Government shall use for military purposes such water surface situated."[113] Changing the name of the IBC, now the International Boundary & Water Commission (IBWC), the nations continued to permit the Commission to "settle all differences that may arise between the two Governments with respect to the interpreta-

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determine the sovereignty over the lands on one side or the other of it, regardless of the previous sovereignty over these lands.

Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, U.S.–Mex., art. II, Nov. 23, 1970, 23 U.S.T. 371, T.I.A.S. No. 7313, 1972 WL 122557.

106. State v. Hidalgo Cnty. Water Control & Imp. Dist. No. 18, 443 S.W.2d 728, 737 (Tex. Civ. App.—Corpus Christi 1969).

107. Treaty of Guadalupe Hidalgo, *supra* note 33.

108. Treaty To Avoid the Difficulties Occasioned by Reason of the Changes Which Take Place in the Beds of the Rio Grande and Colorado Rivers, U.S.–Mex., Mar. 1, 1889, 26 Stat. 1512, T.S. 232, and extended indefinitely by Article 2 of Treaty Signed Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219, T.S. No. 994.

109. *Id.*

110. *Id.*

111. Treaty for Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., art. XVIII, Feb. 3, 1944, 59 Stat. 1219; 3 U.N.T.S. No. 313.

112. *Id.*

113. *Id.*

tion or application of this Treaty" and that all works, i.e., lakes, guaging, etc., would be operated by federal agencies.[114]

B. *What is a Federal Water?*

Although states have authority over their inland waters, the Constitution does reserve some specific authority to the federal government.[115] The Constitution grants specific authority to Congress "[t]o define and punish Piracies and Felonies committed on the high Seas" and "[t]o . . . make Rules concerning Captures on Land and Water."[116]

More than a century and a quarter ago, the Supreme Court established that rivers may be regulated by the Federal Government when they are navigable. In *Daniel Ball*, relying on precedent, the Court held that rivers are navigable in fact, meaning "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[117] Justice Field further refined the opinion to set the dividing line between State and Federal authority holding that waterways are:

> [N]avigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which

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114. *Id.* *See* State v. Hidalgo Cnty. Water Control & Imp. Dist. No. 18, 443 S.W.2d 728, 736 (Tex. Civ. App.—Corpus Christi 1969) (indicating that the treaty "changed the name of the International Boundary Commission, established in 1889, to the 'International Boundary and Water Commission, United States and Mexico,' and vested it with extensive authority over the Rio Grande waters including the measuring, storing and release of reservoir waters for flood prevention purposes or to satisfy the water needs of the contracting nations.").

115. *See* Daniel Ball, 77 U.S. 557, 563 (1870), *superseded by statute*, Clean Water Act, 33 U.S.C. § 1251, *as stated in* Rapanos v. United States, 547 U.S. 715 (2006) (5-4 decision) (indicating that if multiple agencies act in the transportation, then Congress can control).

116. U.S. CONST. art I, § 8, cl. 10–11.

117. Daniel Ball, 77 U.S. at 563, *superseded by statute*, Clean Water Act, 33 U.S.C. § 1251, *as stated in* Rapanos v. United States, 547 U.S. 715 (2006) *see also* 87 U.S. 430, 431–32 (1874) (holding that the navigability of waterways depends on its usefulness for commerce).

> The navigability of a stream, for the purpose of bringing it within the terms "navigable waters of the United States," does not depend upon the mode by which commerce is conducted upon it . . . . It depends upon the fact whether the river in its natural state is such as that it affords a channel for useful commerce.

Id.

> commerce is or may be carried on with other States or foreign countries.[118]

Whether the Rio Grande is navigable water or not was settled long ago. The Supreme Court advised "the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge."[119] The Court recognized that "the Rio Grande, speaking generally, is a navigable river."[120] So, although, the Rio Grande is no longer navigable, due to dams, drought, and the general instability of the river, its earlier navigability provides the premise for its continuing consideration as if it were still navigable in fact.[121]

In 2006, the propositions expressed by Justice Field in *Daniel Ball* expanded.[122] That year, Justice Scalia announced the judgment in *Rapanos v. United States*[123] holding that under the Clean Water Act (CWA) the term "navigable waters" is "broader than the traditional definition found in *The Daniel Ball.*"[124] The Court concluded that "[t]he phrase 'the waters of the United States' includes only those relatively permanent, standing[,] or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams,' 'oceans, rivers, [and] lakes.'"[125]

In 2012, the Supreme Court took the opportunity to rule on the equal-footing doctrine.[126] Justice Kennedy delivered a unanimous opinion.[127]

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118. 77 U.S. at 563, *superseded by statute*, Clean Water Act, 33 U.S.C. § 1251, *as stated in* Rapanos v. United States, 547 U.S. 715 (2006).

119. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899).

120. *Id.* At its upper reaches and "limits of the territory of New Mexico," the Rio Grande is not navigable. *Id.*

121. State v. Hidalgo Cnty. Water Control & Imp. Dist. No. 18, 443 S.W.2d 728, 737 (Tex. Civ. App.—Corpus Christi 1969).

122. *See* Rapanos, 547 U.S. at 715 (expanding on the term navigable waters, the Court determined that under the CWA, the term navigable waters includes only relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water).

123. *Id.*

124. *Id.* at 716.

125. *Id.* The court noted that these terms pertain to relatively permanent bodies as opposed to dry channels, have intermittent water flow. *Id.*

126. PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1221 (2012). The court held that under the "equal-footing doctrine", the state did not have title to riverbeds under portions of the river, which were nonnavigable during the time of the statehood. *Id.* The equal-footing doctrine was set forth by Justice President McKinley in 1845 who wrote:

> . . . First, [t]he shores of [intrastate] navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, [t]he new states have the same rights, sovereignty, and jurisdiction over this subject as the original states.

Pollard's Lessee v. Hagan, 44 U.S. 212, 230 (1845).

127. *PPL Montana, LLC*, 132 S. Ct. at 1221.

> The title consequences of the equal-footing doctrine can be stated in summary form: Upon statehood, the State gains title within its borders to the beds of waters then navigable . . . . It may allocate and govern those lands according to state law subject only to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." . . . The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses.[128]

Texas has a favorable argument: The United States had no vested title in the bed or waters of the Rio Grande prior to Texas's statehood because Texas was an independent republic.[129] However, although Justice Scalia's ruling appears facially to apply only to Texas's forty-nine-sister states, Texas accepted that she relinquished her rights to her border with Mexico to the United States government when she accepted statehood.[130]

A fine distinction may be read in an early case considering preeminence and navigable waters.[131] In a dispute between the State of Alabama and the Federal Government over who held sovereign title and so rights to sell riparian or coastal lands, the Supreme Court held for Alabama proclaiming:

> The right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. . . . For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, and the laws, which shall be made in pursuance thereof.[132]

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128. *Id.* at 1227–28.

129. In 1836, the Republic of Texas accepted "the principal stream" of the Rio Grande as its border with Mexico. Act approved Dec. 16, 1836, 1st Cong., R.S.,. § 1, Repub. Tex. Laws 133, 134, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1192, 1193 (Austin, Gammel Book Co. 1898); *see also* Texas State Historical Association, *Boundaries,* TSHA ONLINE, http://www.tshaonline.org/handbook/online/articles/mgb0 (last visited Feb. 15, 2013).

130. Annexation of Texas, H.R.J. Res. 8, 28th Cong., 5 Stat. 797 (Mar. 1, 1845) (enacted), *available at* http://avalon.law.yale.edu/19th_century/texan01.asp (resolving that the boundaries of the new state would be "subject to the adjustment by this government of all questions of boundary that may arise with other governments").

131. Pollard's Lessee v. Hagan, 44 U.S. 212, 230 (1845).

132. *Id.* (internal citation omitted).

The subtle wordsmithing in the *Pollard's Lessee* decision hinges on "the shores and the soils *under* the navigable waters."[133] The Supreme Court affirmed that reasoning fifty years later and reaffirmed it another eighty-plus years after that. The nation's high court exclaimed:

> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of navigable water must, therefore, begin with a strong presumption against conveyance by the United States and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain."[134]

This is the foundation for the Submerged Lands Act.[135] The Submerged Lands Act[136] codifies that a state has "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States."[137] It should be noted that the Submerged Lands Act also grants states the "right and power to manage, administer, lease, develop, and use the said lands and natural resources."[138] However, any single state's "power over the beds of navigable waters remains subject to one limitation: The paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce."[139]

C. *The International Lakes?*

In addition to the waters of the Rio Grande there are the international lakes, Falcon and Amistad. Falcon Lake and Lake Amistad resulted from

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133. *Id.* (emphasis added).

134. Montana v. United States, 450 U.S. 544, 551–52 (1981) (quoting United States v. Oregon, 295 U.S. 1, 14 (1935) and United States v. Holt State Bank, 270 U.S. 49, 55 (1926), and citing Shively v. Bowlby, 152 U.S. 1, 2 (1894)).

135. United States v. La., Tex., Miss., Ala. & Fla., 363 U.S. 1, 64–66 (1960).

> The Submerged Lands Act granted to Texas the submerged lands in the Gulf of Mexico within three marine leagues from her coast, but that the Act did not grant Louisiana, Mississippi or Alabama any rights in submerged lands beyond three geographic miles from their coasts. The Supreme Court, Mr. Justice Black, held that the Submerged Lands Act granted to Florida [S]tate a three-marine-league belt of submerged land under the Gulf of Mexico seaward from its coastline.

Id.

136. 43 U.S.C. §§ 1301–1356A (2012).

137. *Id.* § 1311(a) (2012).

138. *Id.*

139. *Montana*, 450 U.S. at 551 (quoting United States v. Oregon, 295 U.S. 1 (1935)).

dams built under the 1945 Treaty auspices.[140] The Treaty of 1945 placed all Rio Grande flood control under the treaty,[141] provided for hydro-electric power generation,[142] and agreed that both countries own "common interest" in the stored water in the dammed reservoirs.[143]

Lake Amistad is formed approximately 12 miles above Del Rio, Texas along the Rio Grande and 340 miles upstream from Falcon Lake.[144] Its waters are divided with 56.2 percent allocated to the United States and 43.8 percent to Mexico.[145] In 1965, the IBWC "assigned administration of all [American] lands and [American] surface waters of the reservoir . . . to the National Park Service."[146] "Virtually, all of the water within the Amistad Reservoir is owned by downstream State of Texas water rights holders and the Mexican Government."[147]

In 1990, Congress established the American "portion of the reservoir known as Lake Amistad" as the Amistad National Recreation Area (NRA).[148] By federal law, the Amistad NRA is administered by the Secretary of the Interior who must administer "subject to and in accordance with all applicable treaties" and the IBWC.[149] The Secretary is authorized by statute to enter into "cooperative agreements wit . . . the State of Texas, or any political subdivision thereof, for . . . law enforcement."[150] Presently, enforcement authority is spread among a variety of agencies including Texas Parks and Wildlife Department (TPWD), NPS, the Fish

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140. *See* Treaty for Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, *supra* note 111 (explaining that the two Governments agreed to construct dames).

141. *Id.*

142. *Id.*

143. *Id.*

144. State v. Hidalgo Cnty. Water Control & Imp. Dist. No. 18, 443 S.W.2d 728, 736 (Tex. Civ. App.—Corpus Christi 1969); CAROL E. PURCHASE, ET AL., AMISTAD NATIONAL RECREATION AREA, TEXAS, WATER RESOURCES SCOPING REPORT 9 (Sept. 2001), *available at* http://www.nature.nps.gov/water/planning/management_plans/amis_wrsr_screen.pdf.

145. *Id.*

146. CAROL E. PURCHASE, ET AL., AMISTAD NATIONAL RECREATION AREA, TEXAS, WATER RESOURCES SCOPING REPORT, TECHNICAL REPORT NPS/NRWRD/NRTR-2001/295, Dep't Interior, N.P.S. 1 (Sept. 2001), *available at* http://www.nature.nps.gov/water/planning/management_plans/amis_wrsr_screen.pdf.

147. *Id.*

148. 16 U.S.C. § 460ffff(a) (2012); *see also* PURCHASE, *supra* note 146 (stating that "[o]n November 28, 1990, Congress established Amistad National Recreation Area as a unit of the NPS system to provide for outdoor recreation use of the reservoir and to protect the scenic, scientific, cultural and other values contributing to public enjoyment of these lands and waters").

149. 16 U.S.C. § 460ffff-1(a–b) (2012).

150. *Id.* § 460ffff-1(e) (2012).

and Wildlife Service (FWS), as well as the Sheriff of Val Verde County, Texas.[151]

Falcon Lake is located 80 miles down the Rio Grande from Laredo, Texas.[152] The reservoir divides its water allocating 58.6 percent to the United States and 41.4 percent to Mexico.[153] Construction of the dam was exclusively governed by the IBWC and the State of Texas was not involved.[154]

Shortly after completion of the Falcon dam, the Texas courts had the opportunity to rule on ownership of water rights and "water rights to lands lying below" the reservoir.[155] In 1956, in a dispute over water rights for irrigation in South Texas, the Texas court "took judicial custody of the American waters of the Rio Grande in that reach of the river extending from Falcon reservoir to the Gulf of Mexico."[156] While the court stated that the Rio Grande "is an international stream constituting the boundary between two sovereign nations and does not lie Within the State of Texas," it recognized that the State has a "long standing administrative practice" of applying the state's water appropriation laws "to streams which constitute a portion of the boundaries of the state."[157] The court held this in consideration of President Roosevelt's remark that the reservoirs created under the auspices of the IBWC will provide water that "will not only supply existing uses but also will permit, by an efficient use of the water, considerable expansion of irrigated areas in Texas."[158] Indeed, the Texas Appellate Court recognized, in considering the so-called 1945 Treaty[159] that:

> While no water right as such emanated from the United States to anyone, it is a fact and circumstance of this case that the promulgation of the treaty and the construction of dams across the river has,

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151. PURCHASE, *supra* note 146, at 13 (internal citations omitted).

152. State v. Hidalgo Cnty. Water Control & Imp. Dist. No. 18, 443 S.W.2d 728, 736 (Tex. Civ. App.—Corpus Christi 1969). The Falcon dam and reservoir is located between Laredo and Roma, Texas. *Id.* at 735.

153. *Id.*

154. *Id.*

155. *Id.* at 730–31.

156. *Id.* at 738. The court issued a temporary injunction to restrain the "diversion of water from the river in violation of the court's custodial control. *Id.*

157. *Id.* at 740.

158. *Id.* at 741 (quoting Message of the President to the Senate, Feb. 15, 1944 (Senate Doc., Exec. A, 78th Cong., 2d Sess.)).

159. The treaty was actually signed in 1944, although it was not ratified by either nation until the fall of 1945. Treaty for Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, *supra* note 111.

(a) changed the river from a free flowing stream to a controlled water course, and

(b) made available for Texas users along the left or American bank of the Rio Grande a much greater amount of water for irrigation purposes by virtue of the approximate 58 percent–42 percentDivision of the waters between the United States and Mexico and the providing of storage space for flood waters.[160]

Clearly, Texas still holds the river and lakebeds of the Rio Grande, Falcon Lake, and Lake Amistad up to the point that is the international border and Texas has the right to allocate the flowing waters allocated to the United States for irrigation or consumptive purposes. But, the waters themselves are subject to exclusive federal governance.[161]

VI. In Light of *Arizona v. United States*,[162] Is the Texas Navy Acting Under Texas Police Power or Usurpation?

As discussed, the waters of the Texas–Mexico border are within the exclusive province of the national government. However, like in any other state, there is cross-over and coordination between federal and state law enforcement. Making the Texas Navy situation unique are the facts that: (1) this is not an intrastate or interstate body, it is international; and, (2) DPS has specifically stated that the boats' purposes are interdiction of illegal drugs and human trafficking.[163] These are issues that are squarely in the federal government's exclusive realm.

While state and federal laws prohibit both of these activities, it appears that after *Arizona v. United States* securing the border against these activities rests with the Federal Government, specifically, the Department of Homeland Security and CBP.[164] The reason Arizona passed S.B. 2070, the actual state law struck down in *Arizona v. United States*, was in large response to the "epidemic of crime, safety risks, [and] serious property damage . . . " associated with the influx of illegal migration . . . near the

160. State v. Hidalgo Cnty. Water Control & Imp. Dist. No. 18, 443 S.W.2d 728, 745 (Tex. Civ. App.—Corpus Christi 1969).

161. Treaty for Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, *supra* note 111.

162. 567 U.S. __, 132 S. Ct. 2492 (2012).

163. Hadlock, *supra* note 76.

164. Arizona v. United States, 567 U.S. ___, 132 S. Ct. 2492, 2499 (2012) (referencing Dep't. Homeland Security, Off. of Immigr. Stats, Immigration Enforcement Actions: 2010, 1 (2011)).

Mexican border."[165] This is no different than Texas commissioning a new navy to "combat" "our adversaries, the Mexican drug cartels."[166]

In its *Arizona v. United States* decision, the Supreme Court delivered an extensive analysis of state's sovereignty rights in relation to the federal powers to regulate exclusively and to engage in foreign relations.[167] The Court recognized as "fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the [fifty] separate States."[168] The decision relied on founding principles as expounded by John Jay in *The Federalist No. 3* that matters implicating international relations must settle with the federal government because "'bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury' might take action that would undermine foreign relations."[169]

Arizona affirms the basic and enduring principles of federalism and the preemption doctrine.[170] In the fields of immigration and, as Constitutionally mandated, foreign relations, the Federal Government completely dominates and "precludes enforcement of state laws on the same subject[s]."[171]

Arizona suggested that its state officers were permitted by federal statute to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."[172] While admitting the ambiguousness of the term "cooperate," the Court ruled that there is "no coherent understanding of the term [that] would incorporate the unilateral decision of state officers" to engage in federal immigration enforcement.[173] The Court noted that:

> [t]he Department of Homeland Security gives examples of what would constitute cooperation under federal law. These include situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow

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165. *Id.* at 250.

166. Mark Wiggins, *DPS unveils new, high-powered patrol boat for border operations*, KVUE.COM (Dec. 8, 2011), *available at* http://www.kvue.com/home/related/DPS-unveils-new-high-powered-patrol-boat-for-border-operations-135296258.html# (quoting Steven C. McCraw, Director, Tex. DPS).

167. *See generally* Arizona, 567 U.S. ___, 132 S.Ct. 2492 (relying on the principles of preemption, supremacy, and federalism to strike down Arizona law which overstepped into federal domain).

168. *Id.* at 2498 (citing Chy Lung v. Freeman, 92 U.S. 275, 279–80 (1876)).

169. *Id.*

170. *Id.* at 2500–01.

171. *Id.* at 2501.

172. *Id.* at 2507 (quoting 8 U.S.C. § 1357(g)(10)(B)).

173. *Id.*

> federal immigration officials to gain access to detainees held in state facilities.[174]

Federal laws typically assign enforcement authority to one agency.[175] But, as the Supreme Court observed, federal law does provide a schema for states and local governments who wish to engage in federal enforcement functions.[176] For example, Title 8 permits:

> the Attorney General . . . [to] enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . , may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.[177]

However, a state may not unilaterally choose to enforce federal laws.[178] Texas, by forming the New Texas Navy and establishing its pur-

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174. *Id.* (referencing DEP'T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE IN IMMIGRATION ENFORCEMENT & RELATED MATTERS 13–14 (2011), *available at* http://www.dhs.gov/guidance-state-and-local-governments-assistance-immigration-enforcement-and-related-matters).

175. 14 U.S.C. § 89 (authorizes Coast Guard officers to enforce customs laws); 19 C.F.R. § 161.2 (allowing for joint enforcement by the Customs Service and the Bureau of Alcohol, Tobacco and Firearms and Department of State for import and export of "arms, ammunition, implements of war, helium gas, and other munitions of war;" with the Drug Enforcement Administration of the Department of Justice for import and export of "controlled substance;" with the Office of Foreign Assets Control of the Department of the Treasury for the import and export of "goods, services, and technology with any of those countries designated as subject to economic sanctions;" with the Nuclear Regulatory Commission for import and export of "atomic energy source material, fissionable material, and equipment and devices for utilizing or producing fissionable material;" and with the Department of Commerce as necessary).

176. *Arizona*, 567 U.S. at ___, 132 S. Ct. at 2506 (referencing 8 U.S.C. § 1357(g)(1)); *see also* 8 U.S.C. § 1103(a)(10) (authority may be extended in the event of an "imminent mass influx of aliens off the coast of the United States"); 8 U.S.C. § 1252(c) (authority to arrest in specific circumstance after consultation with the Federal Government); 8 U.S.C. § 1324(c) (authority to arrest for bringing in and harboring certain aliens).

177. 8 U.S.C. § 1357(g)(1); *see also* 28 U.S.C. § 533 ("The Attorney General may appoint officials—(1) to detect and prosecute crimes against the United States. . . .").

178. *Arizona*, 567 U.S. at ___, 132 S. Ct. at 2507. In an interesting article, David Gibson discussed the fact that "precedent effectively prevents the federal government from forcing state and local police to act" to enforce federal drug laws, and therefore, Congress "must either legislate directly (as it did by creating the DEA), or else find some way of enticing the states to enforce drug laws voluntarily." David T. Gibson, *Spreading the Wealth: Is Asset Forfeiture the Key to Enticing Local Agencies to Enforce Federal Drug Laws?*, 39 HASTINGS CONST. L.Q. 569, 573 (2012).

pose to respond to "whatever threats they[ ] encounter" including drug and human trafficking interdiction, has set upon a course predesigned to enforce federal laws.[179]

VII. CONCLUSION

The fact is this was all settled long ago. In 1875, the Supreme Court wrote:

> If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?
>
> The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.[180]

Mexico and the United States specifically agreed that neither would use the shared watery border for "military purposes."[181] Texas's militarizing the Rio Grande and its lakes violates that treaty.

Texas previously clearly recognized the supremacy of federal power in the arena of border security. For example, in a report by the Texas Comptroller on the "State Functions at the Texas–Mexico Border," the Comptroller unequivocally stated that "state and local government agencies are not directly involved in the actual border crossing process." The report explained that Texas law enforcement and regulatory authority along the border is limited to:

> collecting tolls . . . ; building and maintaining the state highways . . . and issuing permits (Texas Department of Transportation); enforcing federal, state[,] and local regulations related to traffic and vehicle safety, special permits, and driver safety (Texas Department of Public Safety, police departments, and sheriff departments); and

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179. Hadlock, *supra* note 76.

180. Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

181. Treaty for Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, *supra* note 111.

alcoholic beverage and cigarette tax collection (Texas Alcoholic Beverage Commission, Texas Comptroller of Public Accounts).[182]

The Comptroller also noted that, although DPS does "interact with commercial traffic" at the borders, only the Texas National Guard is "involved in a special federal drug interdiction task force."[183]

The New Texas Navy is not the only non-federal military-enforcement brigade. However, units, like New Mexico's "Enchilada Air Force,"[184] have been part of a national guard command structure, subject to being nationalized, and sent into combat, as the Enchilada Air Force was during the Korean War. Others, like Port of Los Angeles Police, are specifically tasked with enforcement of federal regulations.[185] But, the New Texas Navy, the DPS's Tactical Marine Unit, is neither a subdivision of a national guard militia nor specifically authorized to enforce federal laws. Indeed, nothing grants Texas any authority to "join the battle along the Rio Grande and the international lakes."[186]

One approach would be to place a federal law enforcement official on board to work with the state DPS officials. Then there might be no legal question as to the authority to engage in direct border patrol activities. Still there is the issue of territorial enforcement—it might be difficult to avoid crossing the international boundary in narrow portions of the Rio Grande. It might be seen as the type of military incursion that we object to on the part of the Mexican military. It might provoke increased militarization along the border, hindering normal activities on both sides. The solution might be for American federal officials to recognize the problems and take on a more active role in protecting those on the American side of the border so that Texas does not feel a need to fill the gap with a navy which might be operating under questionable legal authority and which could provoke inconsistencies, at best, in the U.S. position on border enforcement.

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182. Tex. Comptroller Pub. Accts., *State Functions at the Texas-Mexico Border and Cross-Border Transportation*, WINDOW ON STATE GOV'T (Jan. 2001), http://www.window.state.tx.us/specialrpt/border/index.html.

183. *Id.*

184. Charles D. Brunt, *From 'The Enchilada Air Force' to Tacos to Its Next Mission*, ABQJOURNAL.COM (Sept. 26, 2010), *available at* http://www.abqjournal.com/news/metro/260368metro09-26-10.htm.

185. *See generally* Jonathan Liljeblad, *Finding Another Link in the Chain: International Treaties and Devolution to Local Law Enforcement in the Case of the Convention on the International Trade in Endangered Species*, 18 S. CAL. INTERDISC. L.J. 527, 533–34 (2009) (discussing the "the interactions between the . . . U.S. Fish and Wildlife Service . . . and the Port of Los Angeles Police" in regards to enforcement of the Endangered Species Act).

186. Hadlock, *supra* note 76.

The bottom line is that there is some law enforcement authority for Texas Navy to operate. There doesn't seem to be authority for the New Texas Navy on its own to attempt to stop people crossing the border. Its presence might be a deterrence for unauthorized crossings, but also might be seen, in light of violence along border, as intimidating those wishing to carry on lawful activities across the border (i.e., cooking fajitas at a picnic) or seeking to cross lawfully. In the words of the Director of the Texas Department of Public Safety, the vessels of the New Texas Navy are "fully capable of taking whatever threats they'll encounter[, a]nd there will be a full spectrum of threats."[187] But those are not threats for Texas to unilaterally attack.

187. *Id.*