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How to Allocate Responsibilities Between the Navy and Coast Guard in Maritime Counterterrorism Operations

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How to Allocate Responsibilities Between the Navy and Coast Guard in Maritime Counterterrorism Operations

DOUGLAS DANIELS*

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"The maritime domain – including international waters, the sea approaches to the United States, our territorial seas, and other U.S. navigable waters – are guarded by a dynamic and highly effective partnership between the U.S. Navy and U.S. Coast Guard. The U.S. Navy defends the sea approaches to the United States and works with the U.S. Coast Guard to patrol international waters and our territorial seas."

- Paul McHale, Assistant Secretary of Defense
for Homeland Defense¹

I. INTRODUCTION

Assistant Secretary of Defense Paul McHale noted that the Coast Guard and Navy share the responsibility of defending the American homeland from attack. Yet it is important to allocate responsibilities with respect to different threats in order to avoid the needless duplication of efforts or capabilities, or even worse, a situation where the appropriate response capability is lacking due to ambiguity in responsibility. The nature of this delineation of responsibilities, however, is a matter that is still being determined, especially with regard to the potential threat of maritime terrorism targeting the United States' shores. This Note proposes that the Coast Guard's unique role as both an armed force and a law enforcement agency makes it ideally suited to combat most threats of maritime terrorism bound for the United States' territory, regardless of whether the aggression falls under the purview of "homeland security" or "homeland defense."² The Navy, on the other hand, should provide support to the Coast Guard when necessary to secure and defend the homeland from terrorism.

Our government has identified the significant threats maritime terrorism poses for our collective security and continues to develop strategies to counter these threats.³ Yet the emergence of terrorism as the paramount threat to the United States' security has created unprecedented national security dilemmas and debates. In countering terrorism, novel concerns have arisen, such as a debate over the military's involvement in domestic security, the difference between homeland security and homeland defense, and whether counterterrorism is appropriately considered a military or law enforcement mission.⁴ While policymakers

1. *Hearing Before the Subcomm. on Terrorism, Unconventional Threats and Capabilities*, 109th Cong. 5 (2005) (statement of the Honorable Paul McHale, Assistant Secretary of Defense for Homeland Defense), available at <http://www.house.gov/hasc/testimony/109thcongress/Terrorism,%20Unconventional%20Threats/3-15-05McHale.pdf>.

2. See *infra* text accompanying note 148 for a distinction between homeland security and homeland defense.

3. See *infra* Part III.

4. Under U.S. law, acts of terrorism involve the commission of a crime, in most cases

and scholars continue to struggle with these questions, this Note will instead address a much narrower question incidental to these broader concerns: specifically, the legal issues and policy concerns behind apportioning interdiction responsibilities between the Departments of Defense and Homeland Security with respect to maritime counterterrorism operations. For a variety of reasons explained below, this Note will stress the importance of interagency cooperation in countering maritime terrorism, but will also explain why the Coast Guard is the appropriate agency to respond to most incidents of maritime terrorist threats that directly target the American homeland.

II. THE THREATS

With the end of the Cold War, there arose a false optimism that the United States would no longer face the prospect of an armed attack upon its shores. It took the tragic events of September 11, 2001, to shake America from its complacency and force the country to squarely confront the reality that terrorism, and terrorists' potential use of weapons of mass destruction ("WMD")⁵ against the United States, is now the pre-eminent threat to national security. Maritime terrorism is but one manifestation of the terrorist threat, yet the potential implications of a successful maritime smuggling venture involving WMD attacks at sea, or strikes against a major port, are grave. The possibility of a maritime terrorist attack against United States territory is very real and is demon-

rendering domestic counterterrorism a law enforcement responsibility. Although there are various definitions of "terrorism," this Note applies the definitions for international and domestic terrorism under 18 U.S.C.A. § 2331 (West 2004):

(1) the term "international terrorism" means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum; . . . (5) the term "domestic terrorism" means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C.A. § 2331 (West 2004).

5. As defined in 18 U.S.C.A. § 2332a(c) (West 2004), WMD include destructive devices as defined in 18 U.S.C. § 921 (2000) (explosives and large bore weapons), and chemical, biological and radiological weapons.

strated by the existence of an "al-Qaeda navy" consisting of approximately fifteen ships,⁶ the discovery of an al-Qaeda training manual on maritime attacks,⁷ and the occurrence of previous instances of maritime terrorism.

A. *Examples of Previous Instances of Maritime Terrorism*

There have already been several major incidents of maritime terrorism in the last two decades, all having taken place abroad. Perhaps the most infamous act of maritime terrorism was the October 1985 hijacking of the Italian cruise ship *Achille Lauro*.⁸ This incident sparked an international uproar, and in large part compelled the United Nations General Assembly to pass a resolution⁹ condemning terrorism and urging States to contribute to its elimination. The *Achille Lauro* incident also exposed a gap in the United Nations Convention on the Law of the Sea ("UNCLOS").¹⁰ When UNCLOS was adopted in 1982, the *Achille Lauro* incident had not yet occurred, and the bipolar world order of the Cold War dominated the thoughts of national security experts and policymakers. Accordingly, while UNCLOS does establish universal jurisdiction over acts of piracy in accordance with customary international law,¹¹ it does not address maritime terrorism *per se*. Further, UNCLOS defines piracy as an act of violence, detention, or depredation committed by the crew of a ship or aircraft, directed at another ship or aircraft.¹² This traditional definition, which requires violence from one ship against another, does not extend universal jurisdiction to many forms of maritime terrorist activities, such as passenger hijackings or vessel bombings.

To remedy this jurisdictional gap, States negotiated the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Convention").¹³ While it, too, does not confer uni-

6. John Mintz, *15 Freighters Believed to Be Linked to Al Qaeda; U.S. Fears Terrorists at Sea; Tracking Ships Is Difficult*, WASH. POST, Dec. 31, 2002, at A1.

7. See Gregory Katz, *Risk of Shipping Attacks Growing; Containers on Rail, Rigs, Ships Move Globally, in U.S. with Little Scrutiny*, DALLAS MORNING NEWS, Dec. 2, 2002, at 1A.

8. See Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269 (1988) (discussing the hijacking and whether maritime terrorism can be considered "piracy").

9. G.A. Res. 40/61, ¶¶ 1, 5-8, 13, U.N. Doc. A/RES/40/61 (Dec. 9, 1985), available at <http://www.un.org/terrorism/res.htm>.

10. United Nations Convention of the Law of the Sea ("UNCLOS"), Dec. 10, 1982, 1833 U.N.T.S. 397.

11. *Id.* arts. 100-107, 110.

12. *Id.* art. 101.

13. International Maritime Organization Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668.

versal jurisdiction beyond acts of piracy, it requires States to criminalize certain violent acts at sea¹⁴ and to cooperate in enforcement¹⁵ as well as apprehension¹⁶ and extradition¹⁷ of maritime terrorists. Although the SUA Convention currently has 126 State parties, representing 82.12% of the world's merchant fleet by tonnage,¹⁸ the threat of maritime terrorism has not diminished.

In October 2000, an al-Qaeda sponsored suicide boat attacked the destroyer USS *Cole* in Yemen claiming the lives of seventeen sailors and nearly sinking the ship.¹⁹ This attack was followed two years later by another successful suicide boat attack in Yemen against the French tanker *Limburg*, which resulted in one death and a large oil slick, not to mention significant economic disruption to the Yemeni economy.²⁰ In April 2004, another suicide boat attack against Iraq's Al-Basra and Khawr al-Amaya oil terminals was thwarted, but claimed the lives of two Navy sailors and one Coast Guardsman.²¹ The most costly incident of recent maritime terrorism was the February 2004 bombing of the *Superferry 14* in the Philippines by the terrorist group Abu Sayyaf.²² This attack resulted in the destruction of the ship and over one-hundred deaths.²³ It takes little effort to imagine the consequences if such an attack were directed at a large cruise ship carrying thousands of passengers.

B. Other Potential Forms of Maritime Terrorism

These major incidents of maritime terrorism were limited to attacks against ships and oil terminals. However, maritime terrorism has the potential to manifest itself in forms that pose an even greater threat to lives and property. While hijackings and attacks against vessels can be extremely costly, an attack against a port could have even graver consequences. The accidental explosions that utterly destroyed the ports of

14. *Id.* arts. 3-6.

15. *Id.* arts. 12-14.

16. *Id.* arts. 7-8.

17. *Id.* art. 11.

18. Press Release, International Maritime Organization, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference (Oct. 17, 2005), available at http://www.imo.org/Newsroom/mainframe.asp?topic_id=1018&doc_id=5334.

19. WILLIAM LANGEWIESCHE, *THE OUTLAW SEA* 38 (North Point Press 2004).

20. *Id.* at 38-39.

21. Kendra Helmer, *Suicide Bombing Attack Claims First Coast Guardsman Since Vietnam War*, STARS AND STRIPES – EUROPEAN EDITION, Apr. 27, 2004, available at <http://www.estripes.com/article.asp?section=104&article=21023&archive=true>.

22. Captain James Pelkofski, *Before the Storm: Al Qaeda's Coming Maritime Campaign*, PROCEEDINGS OF THE U.S. NAVAL INST., Dec. 2005, at 21-22.

23. *Id.* at 22.

Texas City in 1947²⁴ and Halifax in 1917,²⁵ causing thousands of deaths, demonstrate that an attack against a major port has the potential to create severe loss of life and property, as well as to sever a critical commercial artery. A disabling attack upon a port may be carried out in many ways. Several examples include the use of a high-yield ammonium nitrate-fuel oil bomb or a “dirty nuke”²⁶ smuggled in a shipping container,²⁷ the use of a ship itself as a WMD (for example, placing a bomb on a tanker carrying highly volatile liquid natural gas),²⁸ or the scuttling of a hijacked ship in a harbor’s channel to obstruct shipping. Because maritime trade comprises 90% of the United States’ overseas trade and is the lifeblood of its economy,²⁹ ports make attractive targets for terrorists who seek to inflict economic damage in addition to loss of life and property.³⁰

Maritime terrorism can manifest itself in other forms as well. The most basic threat of maritime-related terrorism is the shipboard smuggling of WMD, their components, and even terrorists themselves.³¹ Indeed, the oceans’ sheer vastness and the ease of maritime transport make shipborne smuggling the likely means terrorists would choose to bring WMD into the United States.³² The issues related to terrorism and smuggling create a need for a global interdiction capability to address these threats even before they reach our shores. In addition, some poten-

24. See 1947 Texas City Disaster, <http://www.local1259iaff.org/disaster.html> (last visited Mar. 1, 2006).

25. See HRM – Community – Halifax Explosion, <http://www.halifax.ca/community/explode.html> (last visited Mar. 1, 2006).

26. The term “dirty nuke,” as opposed to a true nuclear explosive, describes an explosive device that detonates through a conventional, chemical reaction in order to disperse radioactive material. While not as destructive as a nuclear bomb, a “dirty nuke” requires less expertise to create, but still requires the bomb maker to obtain radioactive material.

27. See STEPHEN FLYNN, *AMERICA THE VULNERABLE* 17-35 (Harper Collins 2004) (illustrating a hypothetical attack against a U.S. port, including the use of a bomb smuggled in a shipping container).

28. See *Tanker Blast Could Have Wide Reach; Report Says a Terrorist Attack on a Shipment of Liquid Natural Gas Could Spread Fire a Mile Away*, L.A. TIMES, Dec. 21, 2004, at A31.

29. ROUND TABLE OF INTERNATIONAL SHIPPING ASSOCIATIONS, INTERNATIONAL SHIPPING – CARRIER OF WORLD TRADE 2 (Maritime Int’l Secretariat Services Ltd. 2005), available at <http://www.marisec.org/worldtradeflyer.pdf>.

30. See Commander Stephen E. Flynn, U.S.C.G., *Homeland Security Is a Coast Guard Mission*, in TODAY’S BEST MILITARY WRITING 269, 274 (Walter J. Boyne, ed., Forge Books 2004) (explaining the potentially devastating economic consequences of a successful terrorist attack that disables a major port).

31. See LANGEWIESCHE, *supra* note 19, at 40-43 (discussing, *inter alia*, the strange case of Amid Farid Rizk, who was nicknamed “container Bob” after he was apprehended in October 2001 in Italy while attempting to smuggle himself into Canada in a neatly furnished shipping container).

32. See, e.g., THE WHITE HOUSE, THE NATIONAL STRATEGY FOR MARITIME SECURITY 4 (Sept. 2005), available at http://www.dhs.gov/interweb/assetlibrary/HSPD13_MaritimeSecurityStrategy.pdf; Flynn, *supra* note 30, at 270-72.

tial threats may wreak havoc domestically from beyond American shores. Some security experts have opined that a cargo ship of “al-Qaeda’s navy” armed with a SCUD missile is yet another possible threat against which the United States must guard.³³

In light of the aforementioned examples of possible maritime terrorist threats, which amount to a mere handful of the myriad ways terrorists may use the sea to attack American shores, there can be little doubt that the United States’ 95,000 miles of shoreline and 301 ports of entry³⁴ will be highly vulnerable to terrorism unless significant steps to enhance security are taken.

III. COUNTERING THE THREATS

The United States has taken numerous, meaningful steps towards protecting the homeland from terrorist attacks. One significant step was the consolidation of all the federal agencies responsible for border protection under the Department of Homeland Security (“DHS”), pursuant to the Homeland Security Act of 2002.³⁵ The signing of the bill on January 25, 2003, joined twenty-two agencies consisting of 210,000 personnel under the DHS, including the Coast Guard.³⁶ This major reorganization of government agencies was intended to optimize interoperability and information sharing and reduce needless redundancy in capabilities and operations. While there have been significant improvements, it will take a few years of initial growing pains before the United States will reap the reorganization’s optimum benefits.

A. *The Establishment of Northern Command and its Role in Homeland Defense*

In April 2002, the President announced the addition of United States Northern Command (“NORTHCOM”) to the unified command plan, thereby establishing a Department of Defense (“DoD”) entity responsible for homeland defense.³⁷ NORTHCOM’s mission is

[to c]onduct operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories, and interests within the assigned area of responsibility (AOR); and
[a]s directed by the [P]resident or [S]ecretary of [D]efense, provide

33. Otto Kreisher, *A New Missile Threat?*, SEA POWER, Nov. 2005, at 26-27.

34. Flynn, *supra* note 27, at 12.

35. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

36. Constantine G. Papavizas & Lawrence I. Kiern, *2001-2002 U.S. Maritime Legislative Developments*, 34 J. MAR. L. & COM. 451, 459 (2003).

37. See U.S. Northern Command: History, http://www.northcom.mil/about_us/history.htm (last visited Mar. 1, 2006).

defense support of civil authorities including consequence management operations.

[U.S. Northern Command] plans, organizes, and executes homeland defense and civil support missions, but has few permanently assigned forces. The command is assigned forces whenever necessary to execute missions as ordered by the [P]resident. . . .³⁸

Despite ongoing clarification efforts, the delineation of responsibility between the DHS's role in homeland security and the DoD and NORTHCOM's roles in homeland defense remains somewhat murky. Although the Office of Homeland Security made a distinction between homeland security and homeland defense on the theory that the latter involves military attacks against the homeland,³⁹ there still exists ambiguity stemming from the matter of whether a response to a non-State terrorist threat is properly considered a "military" or a "law enforcement" mission.⁴⁰ Below, this Note will explore the differences between these missions in the maritime realm, concluding with recommendations concerning the delineation of responsibilities with respect to the interdiction of maritime terrorist threats.⁴¹

B. *Other Maritime Security Initiatives and Policies*

In addition to the restructuring of our government and its command and control frameworks, there have been other significant initiatives and strategic plans to battle maritime terrorism. On May 31, 2003, President Bush announced the Proliferation Security Initiative ("PSI"), which seeks global cooperation in the interdiction of WMD, their delivery systems, and related materials.⁴² The objectives of the PSI and the suppression of maritime terrorism are supported by the October 2005 draft protocol to amend the SUA Convention,⁴³ which opened for signature in

38. U.S. Northern Command – About Us, http://www.northcom.mil/about_us/about_us.htm (last visited Mar. 1, 2006).

39. THE WHITE HOUSE, NATIONAL STRATEGY FOR HOMELAND SECURITY (July 16, 2002), available at http://www.dhs.gov/interweb/assetlibrary/nat_strat_hls.pdf.

40. See, e.g., Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 308-316 (2003) (explaining that since September 11, 2001, there has been a fundamental shift from viewing terrorism as a criminal act towards an increasing view that terrorism is an act of war).

41. See *infra* Part VIII.

42. Press Release, The White House, Fact Sheet on Proliferation Security Initiative and Statement of Interdiction Principles (Sept. 4, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>; Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 528 (2004).

43. International Conference on the Revision of the SUA Treaties, Consideration of a Draft Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Oct. 13, 2005) (on file with author).

February 2006. According to the International Maritime Organization, the amendments to the SUA Convention will

broaden the list of offences made unlawful under the treaties, such as to include the offence of using a ship itself in a manner that causes death or serious injury or damage and the transport of weapons or equipment that could be used for weapons of mass destruction. The 2005 SUA Protocol introduces provisions for the boarding of ships where there are reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention.⁴⁴

The ship boarding provisions of the amendments to the SUA Convention, along with bilateral ship boarding agreements between the United States and foreign flag States, will expand the maritime interdiction capabilities of the U.S. Coast Guard and Navy around the globe, at least with respect to the boarding of vessels flagged by participating States.

The question of obtaining jurisdiction to board, search, and detain vessels suspected of terrorist activities that are not flying the flag of a State participating in cooperative arrangements such as the PSI or SUA is a complex and broad issue and is beyond the scope of this Note, although it has been analyzed elsewhere.⁴⁵ It is United States policy to comport with international law,⁴⁶ as indicated in the PSI's interdiction principles.⁴⁷ In most circumstances, the interdiction of any given confirmed threat will be justifiable under international law by treaty or *ad hoc* flag State consent, customary international law,⁴⁸ the self-defense

44. Press Release, International Maritime Organization, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference (Oct. 17, 2005), available at http://www.imo.org/Newsroom/mainframe.asp?topic_id=1018&doc_id=5334.

45. See, e.g., Byers, *supra* note 42; Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131 (2005); Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253 (2005); Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 341 (2002); see also Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MSU-DCL J. INT'L L. 1 (2000) (advocating the establishment of universal jurisdiction over the crimes of drug smuggling and terrorism).

46. E.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (declaring that "[i]nternational law is part of our law").

47. Press Release, The White House, Fact Sheet: Proliferation Security Initiative: Statement of Interdiction Principles (Sept. 4, 2003) (citing the PSI's objective to "stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks") (emphasis supplied), available at <http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>.

48. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES §§ 402-403 (1987) (describing the various theories allowing a State to exercise extraterritorial jurisdiction).

provisions of Article 51 of the United Nations Charter,⁴⁹ or other sources.⁵⁰ For the purpose of discussing the DoD and DHS's roles in the interdiction of maritime threats bound for the United States, this Note will presume the existence of a legitimate jurisdictional basis for such operations.

Other examples of efforts taken to enhance global maritime security include the International Maritime Organization's International Ship and Port Facility Security Code⁵¹ ("ISPS") and its domestic codification through the Maritime Transportation and Security Act of 2002,⁵² U.S. Customs and Border Protection's Container Security Initiative ("CSI"),⁵³ and the military antiterrorism efforts abroad in Operation Enduring Freedom and domestically in Operation Noble Eagle. The White House has also promulgated doctrines on protecting the homeland from terrorism including, *inter alia*, the National Security Strategy of the United States⁵⁴ and the National Strategy for Homeland Security,⁵⁵ both of which were issued in 2002. To prevent terrorist attacks within the United States, these strategies recognize the importance of interdicting threats as far away from our borders as possible.

Pursuant to these strategies, the Coast Guard released its own doctrine on protecting the homeland from maritime threats in its Maritime Strategy for Homeland Security⁵⁶ in December 2002. The Coast

49. U.N. Charter art. 51 (affirming the "inherent right" to use force in self-defense against an "armed attack"). There is debate whether this authorizes preemptive use of force against non-State actors such as terrorists absent authorization by the United Nations Security Council; *see* Byers, *supra* note 42, at 532 (describing valid preemptive applications of art. 51); *but see* Logan, *supra* note 45, at 270 (dismissing "pre-emptive military action . . . as a legitimate exercise of self-defense").

50. *See, e.g.*, S.C. Res. 1540, ¶¶ 2-3, 10, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (United Nations Security Council Resolution 1540, which calls upon States to take actions to prevent terrorist proliferation of WMD).

51. The ISPS imposes new international regulations upon the shipping industry, including, *inter alia*, requirements for security plans for "ships and port facilities" and long-range tracking of ships at sea. *See* IMO Adopts Comprehensive Maritime Security Measures, http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689#code (last visited Dec. 19, 2005).

52. Maritime Transportation and Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (unofficially codified at 46 U.S.C.A. §§ 70101-70117 (West 2004)).

53. Press Release, U.S. Customs and Border Protection, Fact Sheet: Container Security Initiative (Sept. 30, 2006) (describing the CSI's objectives to effectively extend the United States' borders by inspecting shipping containers abroad, before they arrive at American ports), *available at* http://www.cbp.gov/xp/cgov/border_security/international_activities/csi (click "Downloadable CSI Fact Sheet").

54. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 17, 2002), *available at* <http://www.whitehouse.gov/nsc/nss/2002/nss.pdf>.

55. THE WHITE HOUSE, NATIONAL STRATEGY FOR HOMELAND SECURITY (July 16, 2002), *available at* http://www.dhs.gov/interweb/assetlibrary/nat_strat_hls.pdf.

56. U.S. COAST GUARD, MARITIME STRATEGY FOR HOMELAND SECURITY (2002), *available at* http://www.uscg.mil/news/reportsandbudget/Maritime_strategy/USCG_Maritime_Strategy.pdf.

Guard's strategy stressed the importance of interagency cooperation and communication⁵⁷ to improve "Maritime Domain Awareness" ("MDA").⁵⁸ For matters of "Maritime Homeland Security," the Coast Guard is the lead agency supported by the DoD,⁵⁹ and those roles are reversed in matters of "Maritime Homeland Defense."⁶⁰ It also described the concept of a "layered" defense to defeat threats far from the United States' shores and to provide back-up capabilities in detection and response should a threat slip by unnoticed.⁶¹ The Strategy also recognized terrorism's dual nature as either an act of war or a crime⁶² and distinguished between the two on the basis of whether any given incident could be linked to a State sponsor.⁶³

C. *The National Strategy for Maritime Security*

In September 2005, the White House released the National Strategy for Maritime Security.⁶⁴ It states that "[d]efending against enemies is the first and most fundamental commitment of the United States Government. Preeminent among our national security priorities is to take all necessary steps to prevent WMD from entering the country and to avert an attack on the homeland."⁶⁵ The Strategy reaffirms the goal of interdicting terrorists before they are able to attack the homeland:

The United States will prevent potential adversaries from attacking the maritime domain or committing unlawful acts there by monitoring and patrolling its maritime borders, maritime approaches, and exclusive economic zones, as well as high seas areas of national interest, and by stopping such activities at any stage of development or deployment. The United States will work to detect adversaries before they strike . . . to block their freedom of movement . . . [and] stop them from entering the United States. . . . If terrorists cannot be

57. *Id.* at 23.

58. *Id.* at 20. Maritime Domain Awareness is defined as "comprehensive information, intelligence, and knowledge of all relevant entities within the U.S. Maritime Domain – and their respective activities – that could affect America's security, safety, economy or environment." *Id.* at 32.

59. *Id.* at 12. "Maritime Homeland Security" is described as "the concerted national effort lead by the U.S. Coast Guard to secure the homeland associated with or in the U.S. Maritime Domain from terrorist attacks." *Id.* at 32.

60. *Id.* at 13.

61. U.S. COAST GUARD, MARITIME STRATEGY FOR HOMELAND SECURITY, *supra* note 56, at 28-29.

62. *Id.* at 9. When an act of terrorism has "State sponsorship" it is considered an act of war, and conversely when there is no sponsor the act is considered a "criminal act." *Id.*

63. *Id.* at 4. What constitutes a "state sponsor" of terrorism is not clearly defined, although under 22 C.F.R. § 126.1(d) (2006), exports are restricted to the following designated State supporters of international terrorism: "Cuba, Iran, Libya, North Korea, Sudan and Syria."

64. NATIONAL STRATEGY FOR MARITIME SECURITY, *supra* note 32.

65. *Id.* at 7.

deterred by the layered maritime security, then they must be interdicted and defeated, preferably overseas.⁶⁶

To achieve the aforementioned preventative goals, the Strategy calls for a multi-faceted approach to improving maritime domain awareness, through such activities as maritime patrols and monitoring, improvement in interagency operability and communications, and enhanced intelligence gathering, sharing, and analysis.⁶⁷ The Strategy also recognizes the need to develop tactical plans for the interdiction of possible and confirmed threats⁶⁸ and that either military or law enforcement entities could respond to maritime terrorist events.⁶⁹ The Strategy also calls for the development of a Maritime Operational Threat Response Plan⁷⁰ to coordinate the government's strategic-level response to maritime threats against the homeland by designating roles and responsibilities.

D. *The Navy and Coast Guard and Maritime Threats to National Security*

The abovementioned group of established plans designates response strategies for threats and acts of terrorism. As a practical matter, when it comes to seaborne threats beyond our territorial seas – whether they are acts of war or terrorism, including conventional acts of violence or those involving WMD, or ordinary crimes such as piracy, drug smuggling, illegal migration, and fisheries violations – it will be either the Navy or Coast Guard that must respond. These are simply the only governmental entities with the ships and armament to deal with maritime acts of war or terrorism.⁷¹ In traditional areas of law enforce-

66. *Id.* at 8-9.

67. *Id.* at 16-17, 22.

68. *Id.* at 21.

69. NATIONAL STRATEGY FOR MARITIME SECURITY, *supra* note 32, at 22.

70. *Id.* at 27; THE WHITE HOUSE, NATIONAL STRATEGY FOR MARITIME SECURITY: MARITIME OPERATIONAL THREAT RESPONSE PLAN (2005) (on file with author). Although the plan addresses this Note's topic of the apportionment of interdiction responsibilities in response to maritime terrorist threats, the plan is considered "for official use only" and therefore cannot be discussed in this forum.

71. According to the National Response Plan, the Attorney General, acting through the Federal Bureau of Investigation ("FBI"), has lead responsibility for the criminal investigation of terrorist incidents. NATIONAL RESPONSE PLAN, TERRORISM INCIDENT LAW ENFORCEMENT AND INVESTIGATION ANNEX (Dec. 2004). Because this Note addresses the responsibilities of the DoD and DHS with regard to maritime terrorism, the Department of Justice's role is beyond the scope of this Note. There has been friction between the Coast Guard and FBI regarding each agency's proper role in combating maritime terrorism. *FBI, Coast Guard in Squabble*, ASSOCIATED PRESS, Apr. 3, 2006, available at <http://www.cbsnews.com/stories/2006/04/03/terror/main1467671.shtml>. This friction may be the result of the National Response Plan's failure to address the specific threat of maritime terrorism. Regardless, this Note will assume that the FBI's lack of appropriate platforms for maritime interception operations requires either the Coast Guard or Navy to serve as first responder to most incidents of maritime terrorism.

ment, the Coast Guard has the lead role and at times acts with the support of the Navy.⁷² In times of war, the Navy has either taken operational control of Coast Guard assets or absorbed the organization as a whole.⁷³ Yet the novel problem of maritime terrorism, and its dual nature as a crime and a military threat, poses questions concerning the appropriate roles of the Navy and Coast Guard. To identify these roles, it is first necessary to identify these two services' general legal authorities.

IV. THE DOD, DHS, COAST GUARD, NAVY, AND LAW ENFORCEMENT

From a legal perspective, the Coast Guard and Navy differ primarily in their law enforcement authority. While the Coast Guard, since its inception in 1790 as the Revenue-Cutter Service,⁷⁴ continues to serve as a law enforcement agency with distinct statutory authority,⁷⁵ the Navy has no general statutory law enforcement authority. This distinction is solely based on domestic law and policy, as international law recognizes naval vessels as having law enforcement authority where the flag State has jurisdiction.⁷⁶ The lack of any stand-alone statutory authority for the Navy to conduct domestic law enforcement is the result, at least in part, of the question of whether the military should be involved in law enforcement in the first place.⁷⁷

Indeed, the use of the armed forces to enforce domestic laws has spurred much debate.⁷⁸ Arguments for or against military involvement

72. This routinely occurs in counter-narcotics operations, where Naval assets operate under Coast Guard commanders' tactical control to effect the interdiction of drug smugglers. *See infra* text accompanying notes 98-100.

73. *See* 14 U.S.C. §§ 1-4, 10 U.S.C. § 5013a (2000) (granting authority for the Coast Guard to act as a "specialized service" within the Navy upon declaration of war or upon direction of the President). The Coast Guard has not been transferred in its entirety to the Navy since World War II, although certain Coast Guard assets have been assigned to operate with the Navy in all wars post-World War II. *See* JOHNSON, *infra* note 74, at 194-95, 281, 331-32.

74. The original system of cutters, intended to combat smugglers who sought to avoid the payment of tariffs, initially operated in a customs role as the maritime adjunct to the Treasury Department. It was not widely known as the Revenue-Cutter Service until the 1890s. ROBERT ERWIN JOHNSON, *GUARDIANS OF THE SEA: HISTORY OF THE UNITED STATES COAST GUARD, 1915 TO THE PRESENT* 1-2 (United States Naval Institute 1987).

75. 14 U.S.C. §§ 2, 89, 143 (2000).

76. UNCLOS, *supra* note 10, arts. 107, 110, 111, 224.

77. The applicable DoD Directive acknowledges "the historic tradition of limiting direct military involvement in civilian law enforcement activities." DEPARTMENT OF DEFENSE, DIRECTIVE 5525.5, *DoD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS*, art. 4 (Dec. 20, 1989). For an argument against military involvement in civil law enforcement, *see generally* Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383 (2003).

78. *See, e.g.*, Commander Gary Felicetti, U.S.C.G. & Lieutenant John Luce, U.S.C.G., *The*

in law enforcement range in scope and justification. These arguments are based on statutory interpretation, or sometimes the more ambiguous question of whether there is a traditional aversion to military law enforcement efforts under the American ethos or the Constitution itself.⁷⁹ In addition to “libertarian” concerns, there is also the question of whether the use of the military in any domestic capacity would detract from its warfighting readiness⁸⁰ or embroil it in politics.

A. *The Posse Comitatus Act and Related Laws and Policies*

Military lawyers, policymakers, and civilian scholars have long struggled over whether the famous (or perhaps infamous)⁸¹ Posse Comitatus Act (“PCA”)⁸² applies to the Navy. Because this subject has

Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done, 175 MIL. L. REV. 86 (2003) (providing an in-depth analysis of the Posse Comitatus Act’s legislative history, criticizing the modern application of the Act and related laws as a relic of the post-Civil War Reconstruction Era. and describing the DoD’s interpretation of the Act as overly restrictive); Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL’Y 99 (2003) (describing how the military’s involvement in the war on drugs has eroded the Posse Comitatus Act’s significance and how the war on terror may result in an increase of domestic military intervention); Kealy, *supra* note 76 (criticizing the use of the military in domestic law enforcement and calling for a revision of the Posse Comitatus Act and related laws to secure civil liberties from infringement by domestic use of the armed forces); Lieutenant John P. Coffey, U.S.N.R., *The Navy’s Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 GEO. L.J. 1947 (1987) (asserting that any Naval involvement in law enforcement without an express grant from Congress is illegal).

79. Opponents of the use of the armed forces in law enforcement point to the U.S. Constitution’s provisions that grant Congress authority to appropriate funds for an Army but limit funding to just two years, thereby keeping the Army in check and requiring a periodic reassessment of the merits of having a standing Army. U.S. CONST. art. I, § 8, cl. 12. While not determinative of whether the founding fathers collectively opposed the use of the military to enforce the law, the provisions do reflect our nation’s principle of civilian control over the military and the aversion to standing military forces held by some of our founders. Interestingly, no such appropriations restrictions are imposed upon the Navy. *See* U.S. CONST. art. I § 8, cl. 12. For a comprehensive discussion of the constitutional and historical elements of the use of the military to enforce the law, *see* Felicetti & Luce, *supra* note 78, at 93-147.

80. *See* 10 U.S.C. § 376 (2000) (prohibiting military assistance to civilian law enforcement where such assistance would “adversely affect the military preparedness of the United States” and requiring the Secretary of Defense to pass regulations to prevent a degradation in readiness). *See also* Lieutenant Commander Michael T. Cunningham, U.S.C.G.R., *The Military’s Involvement in Law Enforcement: The Threat Is Not What You Think*, 26 SEATTLE U. L. REV. 699 (2003) (arguing that concern over the military’s involvement in law enforcement should not focus on the unlikely possibility of abuse of power, but rather on the degradation in military readiness combat units experience when conducting law enforcement missions).

81. The term “infamous” is used due to the widespread and unresolved debate the PCA has caused. By one count, between 1990 and 2003 there were thirteen articles on the topic in *THE ARMY LAWYER*, as well as numerous articles in the civilian sector. *Id.* at 700.

82. 18 U.S.C. § 1385 (2000) (The PCA states: “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part

already been examined in depth,⁸³ this Note will provide an abbreviated analysis of the PCA and Naval participation in law enforcement.

The short and obvious answer is that the PCA does not apply to the Navy because the statute's terms refer only to the Army and Air Force and criminalize their use as a domestic police force.⁸⁴ Yet the PCA does not stand alone in governing the military's involvement in law enforcement. Chapter 18 of Title 10 of the United States Code has additional provisions covering all DoD branches of the armed forces.⁸⁵ The Navy's potential role in domestic law enforcement is muddled as a result of a statutory mandate under Title 10 that requires the Secretary of Defense to promulgate regulations prohibiting the Army, Navy, Air Force, and Marines from "direct participation . . . in a search, seizure, arrest, or similar activity."⁸⁶

The military's involvement in law enforcement is further complicated by a list of statutory exceptions to the general prohibition on law enforcement activities, allowing the DoD to furnish training, facilities, and equipment to state and federal law enforcement agencies.⁸⁷ In addition, the DoD may assign personnel to operate equipment provided at the request of any federal law enforcement agency that has jurisdiction to enforce customs, narcotics, immigration, and antiterrorism laws.⁸⁸ The authority to operate equipment is somewhat circumscribed, however, to achieve a list of numerated ends.⁸⁹ These objectives include, *inter alia*, aerial reconnaissance, detection and monitoring of criminal threats, transportation of law enforcement personnel, and the intercept-

of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both").

83. Lieutenant Christopher A. Abel, U.S.C.G., *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445 (1990) (providing a thorough analysis of the PCA and its application to the Navy and making the argument that the Navy can and should participate in law enforcement on the high seas). Despite the sound arguments presented by Lt. Abel and others, DoD and Navy policy continues to prohibit the Navy from conducting direct law enforcement activities.

84. 18 U.S.C. § 1385 (2000); *see, e.g.*, *United States v. Acosta-Cartagena*, 128 F. Supp. 2d 69, 71 (D. P.R. 2000) (dismissing defendant's claim that § 1385 applies to the Navy: "Defendants are wrong. Section 1385 prohibits the Army and Air Force from enforcing civilian law, but not the Navy").

85. 10 U.S.C.A. §§ 371-378, 380-382 (West 2004), *amended by* Pub. L. No. 109-304, 120 Stat. 1485 (2006).

86. 10 U.S.C.A. § 375 (West 2004).

87. 10 U.S.C.A. §§ 372 -373 (West 2004), *amended by* Pub. L. No. 109-304, 120 Stat. 1485 (2006).

88. 10 U.S.C.A. § 374 (West 2004), *amended by* Pub. L. No. 109-304, 120 Stat. 1485 (2006). In light of the growing threat of terrorism, in 1998 Congress added antiterrorism as a mission area supported by the DoD. *See* Pub. L. No. 105-277, 112 Stat. 2681-567 (1998).

89. 10 U.S.C.A. § 374(b)(2) (West 2004), *amended by* Pub. L. No. 109-304, 120 Stat. 1485 (2006).

tion of vessels or aircraft outside the United States' land area to issue an order to stop on behalf of law enforcement officials.⁹⁰ There is also a separate statute that allows the DoD to provide assistance to the Department of Justice in emergency situations involving chemical or biological weapons, provided that the assistance does not amount to direct participation in any arrest, search, seizure, or intelligence gathering.⁹¹

As a whole, these statutes indicate a congressional willingness to allow increased military participation in certain law enforcement operations, but they are explicit in their purpose of prohibiting direct DoD participation in any law enforcement activities. However, yet another section of Title 10 states that these grants and restrictions do not curtail the executive's use of the military to conduct law enforcement operations beyond any previously existing restraints.⁹² Hence, it can be argued that the Title 10 restrictions do not apply to the Navy because prior to their passage the existing restrictions were governed primarily by the PCA, which makes no mention of the Navy. On the other hand, because DoD regulations barred the Navy's involvement in direct law enforcement activities prior to the passage of the Title 10 provisions, it has been reasoned that Congress intended to maintain the status quo and to uphold the DoD's self-imposed restrictive policy.⁹³ Regardless, it remains a matter of interpretation as to whether the Navy, absent explicit statutory authority, is limited only to those law enforcement activities authorized under chapter 18 of Title 10 and other statutes. The confusion over the PCA and the Title 10 statutory provisions has caused some scholars to call for revisions and clarification.⁹⁴

The end result of the PCA and related laws is that the Navy may conduct some law enforcement activities, but gray areas remain regarding the extent of this authority. Therefore, there is ambiguity as to

90. *Id.*

91. 10 U.S.C.A. § 382 (West 2004); *see also* 18 U.S.C.A. § 2332e (West 2004) (authorizing the Attorney General to request assistance from the DoD in emergency situations involving WMD). In the case of emergencies involving nuclear weapons, DoD personnel may assist the Attorney General and make arrests under some circumstances. 18 U.S.C.A. § 831 (West 2004).

92. 10 U.S.C.A. § 378 (West 2004).

93. *See United States v. Roberts*, 779 F.2d 565, 567-68 (9th Cir. 1986). For a critique of this view, *see Felicetti & Luce, supra* note 78, at 157-59.

94. *See, e.g., John R. Brinkerhoff, The Posse Comitatus Act and Homeland Security*, J. HOMELAND SEC. (Feb. 2002), <http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm> (stating that the PCA "is inappropriate for modern times and needs to be replaced by a completely new law," and it "does not provide a basis for defining a useful relationship of military forces and civil authority in a global war with terrorism"); Felicetti & Luce, *supra* note 78, at 182 (advocating legislation that would grant DoD personnel law enforcement authority in certain areas, such as WMD response, and legislation that would permit the Secretary of Homeland Security to use DoD personnel in any role); *but see Kealy, supra* note 77, at 430-34 (advocating a more restrictive revision to the PCA and related laws).

whether the Navy's authority to participate in law enforcement operations might vary with factors such as the location of the operation, the substantive law being enforced, the suspects' citizenship, and the degree of supervision by civilian law enforcement authorities. Because the statutes provide no clear baseline, and the guidelines that are provided are open to interpretation, there is no definitive, universally accepted rule concerning the Navy's ability to conduct law enforcement operations.

In light of this legal ambiguity, the DoD has taken a cautious approach to law enforcement operations. Although the PCA (and the related laws under chapter 18 of Title 10) apparently do not apply to the Navy, DoD regulations⁹⁵ continue to take a restrained approach and place restrictions on all branches of the armed forces, except the Coast Guard. The Navy followed the DoD directive with its own instruction⁹⁶ that essentially restates the DoD regulations. Interestingly, the Navy's instruction acknowledges that the Navy and Marine Corps are not controlled by the PCA but notes that their involvement in direct law enforcement activities is nevertheless prohibited under DoD policy.⁹⁷

B. *The Operational Effect of Restraints on Military Participation in Law Enforcement*

The operational outcome of the statutes and policies is most clearly visible in counter-narcotics operations. Naval vessels on counter-narcotics patrols are required by law to carry Coast Guard law enforcement detachments ("LEDETS").⁹⁸ When the time comes for a Naval vessel to interdict a suspected drug smuggler, the ship will shift its tactical control to the Coast Guard, hoist the Coast Guard ensign⁹⁹ to signify its law enforcement authority as a temporary Coast Guard unit, and then deploy its LEDET to carry out the law enforcement boarding. While the LEDET is responsible for conducting any searches, seizures, or arrests under its statutory Coast Guard authority, it may utilize Naval personnel

95. DoD Directive 5525.5, *supra* note 77, enclosure 4 (providing guidelines governing military participation in civilian law enforcement).

96. DEPARTMENT OF THE NAVY, OFFICE OF THE SECRETARY, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, SECNAV INSTRUCTION 5820.7B (1988).

97. *Id.* art. 9(a).

98. 10 U.S.C. § 379 (2000).

99. The Coast Guard ensign is the symbol of authority for Coast Guard units carrying out their law enforcement mission. It was adopted in 1799 at the behest of Treasury Secretary Oliver Wolcott, who noted that Revenue Cutters required some means of identifying themselves as having the authority to stop and board vessels to collect tariffs on imports. See GEORGE E. KRIETEMEYER, *THE COAST GUARDSMAN'S MANUAL* 84-86 (Naval Institute Press) (8th ed. 1991). See also *infra* note 101. The ensign is a flag with sixteen vertical red and white stripes, with the United States' coat of arms in the upper left hand corner and the Coast Guard emblem centered over the seventh stripe. 33 C.F.R. § 23.15 (2004).

and equipment, but this is carefully done so as to ensure that any law enforcement activity undertaken by Navy personnel is done under the supervision of a Coast Guard boarding officer. The Navy can also provide assistance in compelling a vessel to stop through the use of disabling fire, but the law requires that these actions must occur with a Coast Guardsman present.¹⁰⁰

It may seem that the elaborate procedure involving the shift of tactical control, hoisting the Coast Guard ensign, and ensuring the LEDET supervises the actions of Naval personnel is a needless charade.¹⁰¹ There is little doubt that the narco-traffickers pay no heed to the arguably artificial distinctions that U.S. law and policy make between the Navy and Coast Guard's respective authority. However, the procedure makes sense for several reasons. First, by ensuring that the LEDET is involved in every step of the operation, it simplifies the identification of witnesses and makes the subpoena process smoother should the case proceed to trial. Because Naval personnel are more likely to be unavailable to testify at trial due to extended overseas deployments, it makes sense for Coast Guardsman to supervise their actions and witness all aspects of the mission. Additionally, the use of LEDET personnel as the boarding team is mission-effective¹⁰² because they are specialists in vessel boardings and inspections with extensive training and experience in the collection and preservation of evidence and in the detection of hidden compartments. While Naval personnel have expertise in vessel boardings, the focus of their training and expertise is generally on maritime interception operations. Those operations involve maritime embargoes and the interdiction of personnel and weapons to further political or military objectives, rather than the enforcement of U.S. laws and regulations with the goal of criminal prosecution. Furthermore, Coast Guard personnel in the field are backed by the dedicated shore-side support of operators and attorneys who coordinate the case and ensure arrested sus-

100. 14 U.S.C.A. § 637 (West 2004) (authorizing warning shots and disabling fire from naval vessels or aircraft when a Coast Guardsman is on board).

101. *But see* *United States v. Del Prado-Montero*, 740 F.2d 113, 114-16 (1st Cir. 1984) (recognizing the hoisting of the Coast Guard ensign on board a Navy destroyer as "signifying [the vessel's] Coast Guard control and mission" and affirming the authority of the Navy to assist the Coast Guard); *United States v. Rasheed*, 802 F. Supp. 312, 324-25 (D. Haw. 1992) (in the case of a joint Coast Guard-Navy boarding of a drug smuggling vessel, viewing the actions of Naval personnel as legitimate where they avoided direct participation in any searches or arrests and "provided only logistical support and backup security" to the Coast Guard boarding team).

102. The Navy-LEDET team has been extremely effective and has historically been responsible for anywhere from approximately one-half to three-quarters of the total amount of drugs seized on the high seas annually. *See* Coast Guard Drug Seizure Statistics, <http://www.uscg.mil/hq/g-o/g-opl/Drugs/Statswww.htm> (last visited Mar. 1, 2006).

pects and evidence pass through the appropriate channels for prosecution.

Moreover, the Navy ship's tactical shift to Coast Guard control and its use of the LEDET prevent defense attorneys from obtaining acquittals based on the alleged impropriety of direct Naval involvement in any search, seizure, and arrest. The Coast Guard's law enforcement authority is well settled in law,¹⁰³ and the use of LEDET boarding teams instead of unsupervised Naval personnel avoids complications at trial. However, the question remains whether the involvement of Naval personnel in direct law enforcement activities is actually problematic for prosecutors. Courts have determined that the PCA itself does not apply to the Navy,¹⁰⁴ but they have mixed viewpoints concerning the applicability of the provisions of Title 10, chapter 18.¹⁰⁵ Despite this, no court has struck down any maritime drug interdiction on the basis of Naval involvement. However, some courts have hinted at the creation of an exclusionary rule should it become necessary to put an end to "widespread and repeated violations" of the Title 10 prohibitions on direct military participation in civilian law enforcement.¹⁰⁶ Although courts have consistently stopped short of applying an exclusionary rule in these cases, the avoidance of direct law enforcement activities by Naval personnel in routine circumstances is sound practice simply because it avoids judicial concerns regarding statutory construction and restrictions.¹⁰⁷ Such a policy also reflects the spirit of the PCA and the related

103. *United States v. Chaparro-Almeida*, 679 F.2d 423, 425-26 (5th Cir. 1982) (stating that the PCA does not extend to the Coast Guard).

104. *See, e.g., United States v. Walden*, 490 F.2d 372, 373-74 (4th Cir. 1974) (explaining that the PCA does not control the Navy or Marines, although the Navy adopted self-imposed restrictive regulations); *United States v. Yunis*, 924 F.2d 1086, 1093-94 (D.C. Cir. 1991) (noting that the PCA "places no restrictions on naval participation in law enforcement operations" and that inclusion of the Navy in the PCA was considered and rejected by Congress); *United States v. Roberts*, 779 F.2d 565, 567 (9th Cir. 1986) (declining to "defy" the PCA's "plain language" by extending it to the Navy); *but see United States v. Chae Wan Chon*, 210 F.3d 990, 993-94 (9th Cir. 2000) (refusing to "construe this omission [of the Navy in the PCA] as congressional approval for Navy involvement in enforcing civilian laws" including civil enforcement activities by civilian agents of the Naval Criminal Investigative Service).

105. *See, e.g., Roberts*, 779 F.2d at 567-68; *Rasheed*, 802 F. Supp. at 324-25.

106. *See Walden*, 490 F.2d at 377 (declining to impose an exclusionary rule "at this time" on the grounds that the court was unaware of any "widespread or repeated violations" of the PCA and that the military can be expected to abide by its prohibitions); *Roberts*, 779 F.2d at 568 (citing *United States v. Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979)) (adopting *Walden* and *Wolffs'* approach and withholding the application of any exclusionary rule until such time as the military's violation of the PCA becomes "widespread and repeated," thereby creating a need to deter military involvement in civilian law enforcement).

107. *See, e.g., United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1477-78 (11th Cir. 1992) (explaining that "passive participation" of Naval personnel during a Coast Guard operation that led to the defendants' arrests "did not implicate the Posse Comitatus Act."); *United States v. Kahn*, 35 F.3d 426, 432 (9th Cir. 1994) (explaining that where the Navy provides backup support

Title 10 laws, even if the letter of the law is somewhat confusing with respect to the Navy. Until Congress explicitly clarifies the Navy's role in law enforcement activities, the DoD and Navy will most likely continue their restrictive policies.

C. An Analysis of the Restrictions on the Navy's Participation in Law Enforcement

Regardless of the opaque state of the law, the Navy could very likely take direct law enforcement action – especially in an emergency¹⁰⁸ – without jeopardizing any subsequent prosecution. In extraordinary circumstances, such as in the apprehension of dangerous terrorists, even direct Naval involvement in law enforcement activities is not likely to trigger the exclusionary rule or otherwise result in an acquittal under current law.

This probable judicial deference is grounded on several bases. First, as previously described,¹⁰⁹ courts have been hesitant to invalidate law enforcement actions by Naval personnel because such involvement has been infrequent and constrained. Therefore, it is not likely that a court would invalidate evidence against or the apprehension of suspected terrorists by Naval personnel based on the PCA or any other related laws. This treatment will likely continue until such apprehensions become “repeated and widespread,” which is unlikely given the sparse record of apprehensions of terrorists at sea. Second, beyond the debate concerning whether the PCA and related laws apply to the Navy, there is additional debate as to the applicability of these laws beyond the United States' territory.¹¹⁰ This is particularly significant because this is

in a Coast Guard operation and does not participate in the search of the ship or the arrest and interrogation of the suspects, the military assistance is indirect, not an exercise of military power, and not pervasive); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1259 (9th Cir. 1998) (explaining that the Navy personnel's involvement is not a direct law enforcement activity and does not violate 10 U.S.C. §§ 371-382); *Rasheed*, 802 F.Supp at 323-25 (same).

108. DoD policy allows the Navy to take actions that are likely to involve participation in law enforcement activities upon prior approval by the Secretary of Defense, where the criminal activity poses a serious threat to the United States' interests and civilian agencies cannot adequately respond. DoD DIRECTIVE 5525.5, *supra* note 77, art. E4.3.

109. *Supra* text accompanying notes 105-07.

110. There are mixed views on the extraterritorial application of the PCA and related laws. *See Kahn*, 35 F.3d at 431, where the court concluded that Title 10, Chapter 18's provisions apply extraterritorially based on its language:

§ 374(b)(2)(F) (mentioning ‘law enforcement operation outside of the land area of the United States’); § 379(a) (mentioning ‘naval vessels at sea’); § 379(d) (mentioning ‘area outside the land area of the United States’). Since these sections impose limits on the use of American armed forces abroad, the appellee is wrong in suggesting that the restrictions on military involvement in civilian law enforcement operations do not extend to activities outside the United States.

Kahn, 35 F.3d at 431 n.6. *But see United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991)

where most potential maritime terrorist apprehensions would be expected to occur.

Finally, the *Ker-Frisbie* Doctrine¹¹¹ bars an acquittal based on the theory that the method used to bring the defendant before the court was illegal. The doctrine has been applied in cases where the Coast Guard was believed to have violated international law in the apprehension of drug and migrant smugglers. Courts, however, have upheld their convictions based on the determination that a defendant could not “assert the illegality of his obtention to defeat the court’s jurisdiction over him.”¹¹² Although this principle has generally been applied to cases involving the extraterritorial apprehension of suspected criminals in violation of international law, when considered broadly it can also apply to

(stating that “some courts have taken the view that the Posse Comitatus Act imposes no restriction on use of American armed forces abroad, noting that Congress intended to preclude military intervention in domestic civil affairs.” However, the two cited cases pre-date Title 10, Chapter 18’s relevant provisions) (citing *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948); *D’Aquino v. United States*, 192 F.2d 338, 351 (9th Cir. 1951)). In 1989, the Department of Justice’s Office of Legal Counsel drafted a memorandum on the PCA’s extraterritorial effect. It concluded that the PCA does not apply extraterritorially and because 10 U.S.C. § 378 (2000) states that the provisions under Chapter 18 do not reduce the Executive’s authority to use the military for law enforcement purposes, the Chapter 18 laws should not be construed to apply extraterritorially. Memorandum from the DOJ Office of Legal Counsel to Gen. Brent Scowcroft, at 20 (Nov. 3, 1989) (on file with author). For a general discussion of the legal and policy considerations implicated by the extraterritorial application of the PCA and the use of the military to conduct arrests abroad, see Christopher A. Doneso, Note, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military*, 41 DUKE L.J. 867 (1992).

111. *Ker v. Illinois*, 119 U.S. 436, 444-45 (1886) (declining to overturn defendant’s conviction, where defendant was illegally and forcibly abducted in Peru in order to bring defendant before an Illinois court to stand trial for larceny and embezzlement charges); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (holding “that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a ‘forcible abduction’ There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will”).

112. *United States v. Postal*, 589 F.2d 862, 873 (5th Cir. 1979) (citing the *Ker-Frisbie* Doctrine); see also *United States v. Best*, 304 F.3d 308 (3d Cir. 2002) (applying the *Ker-Frisbie* Doctrine to overturn the trial court’s dismissal of migrant smuggling charges against defendant, where the trial court erroneously held that the defendant’s apprehension by the Coast Guard in the U.S. contiguous zone near St. Croix violated international law and therefore defeated the court’s jurisdiction), *rev’g* *United States v. Best*, 172 F. Supp. 2d 656 (D. V.I. 2001). For an alternative viewpoint and a critique of the *Best* decision and the *Ker-Frisbie* Doctrine generally, see Brandy Sheely, Recent Development, *United States v. Best: International Violation Schmiation – The Ker-Frisbie Doctrine Trumps All*, 11 TUL. J. INT’L & COMP. L. 429 (2003). Author’s note: for reasons that need not be explored in depth here, I take exception with the court’s conclusion that the Coast Guard’s arrest of the migrant smuggler in the U.S. contiguous zone prior to his entry into U.S. territorial seas violated international law. Per UNCLOS, *supra* note 10, art. 33, a coastal state may exercise the necessary control within its contiguous zone to prevent infringement of its immigration laws – this should be construed to include arrest and imprisonment where circumstances warrant.

Naval apprehensions in maritime counterterrorism operations.¹¹³ Although courts have invalidated agency law enforcement actions that exceeded express statutory authority,¹¹⁴ it is unlikely that the Navy's mere lack of authority to seize or arrest will prove fatal to any given apprehension.

In *Frisbie*,¹¹⁵ the Court refused to grant *habeas corpus* relief to a defendant who had been illegally kidnapped by Michigan state agents in Illinois and then forcibly returned to Michigan to face murder charges. The Court reasoned that the defendant's due process rights required only the hearing on the charges at trial and the manner in which the defendant was brought before the tribunal was immaterial. Although the Michigan agents' lack of law enforcement jurisdiction may have made them liable for civil charges or perhaps criminal charges under a kidnapping statute,¹¹⁶ it did not defeat the Michigan court's jurisdiction over the defendant. Even assuming *arguendo* that a Naval apprehension of a terrorist on the high seas is not explicitly authorized under U.S. law, it follows that the *Ker-Frisbie* Doctrine ensures that this "illegal" apprehension will generally not result in acquittal.¹¹⁷

113. See *United States v. Yunis*, 924 F.2d 1086, 1092-93 (D.C. Cir. 1991) (dismissing the defendant's invocation of the *Toscanino* Exception to the *Ker-Frisbie* Doctrine, where defendant was indicted for violating the Hostage Taking Act, 18 U.S.C. § 1203 (2000), apprehended by undercover FBI agents on a yacht in the Mediterranean Sea, and then transported to the United States by the Navy).

114. See, e.g., *United States v. Sarmiento*, 750 F.2d 1506, 1506-07 (11th Cir. 1985) (invalidating the defendant's indictment for marijuana smuggling on the grounds that the Customs service exceeded its statutory authority by searching and seizing defendant's vessel beyond "customs waters") In this brief, *per curiam* opinion, the *Sarmiento* Court did not consider the *Ker-Frisbie* doctrine and invalidated the Customs agents' actions on the ground that their actions were in direct violation of their statutory authority. Although worthy of a note in itself, it is debatable whether the outcome would have been different if the court had considered the *Ker-Frisbie* doctrine or if the facts involved law enforcement action *without* statutory authority or vice law enforcement action *in violation of* statutory authority.

115. *Frisbie*, 342 U.S. at 522-23.

116. *Id.* at 523.

117. See *United States v. Cotten*, 471 F.2d 744, 749 (9th Cir. 1973) (applying the *Ker-Frisbie* Doctrine to the Posse Comitatus Act and concluding that the alleged illegal apprehension of the defendant by military personnel in Vietnam could not constitute a bar to prosecution). There are two exceptions to the *Ker-Frisbie* doctrine. First, if the defendant's apprehension violated a self-executing treaty to which the United States was a party (such as an extradition treaty), the court may not exercise jurisdiction over the defendant. *Postal*, 589 F.2d at 873-78 (explaining that the district court lawfully exercised jurisdiction over the defendant despite his allegedly illegal apprehension by the Coast Guard for drug smuggling in apparent violation of the 1958 Convention on the High Seas, because the treaty was not self-executing); see also *United States v. Alvarez-Machain*, 504 U.S. 655, 663-70 (1992) (allowing jurisdiction following the forcible abduction of a murder suspect from Mexico by Mexicans acting as American agents, despite the existence of an extradition treaty between the United States and Mexico, on the ground that the treaty's terms did not bar the defendant's apprehension). The second exception to the *Ker-Frisbie* doctrine, known as the *Toscanino* exception, bars jurisdiction over suspects where the government's conduct "shocks the conscience" and violates the defendant's due process right.

Despite the likelihood that occasional direct Naval involvement in law enforcement would not jeopardize a subsequent prosecution, the Navy has continued to operate in a manner that avoids such direct participation. This is true in counter-narcotics operations, as well as in maritime homeland security missions. In these circumstances, the Navy has operated with the Coast Guard and thereby avoided the question of what might happen if the Navy conducted law enforcement operations independently.

Following the September 11th terrorist attacks, the Chief of Naval Operations offered his assistance to the Commandant of the Coast Guard. As a temporary measure to enhance port security operations, the Coast Guard assumed tactical control of four Navy patrol crafts and operated them in the vicinity of the United States' coast to conduct security boardings.¹¹⁸ The procedures for this new operation followed the LEDET model, with Naval personnel providing backup support to Coast Guard boarding teams. Even if one asserts that these procedures are unnecessary as a matter of law, they are nevertheless required under DoD and Naval policy.¹¹⁹ This arrangement with the Coast Guard taking the lead in the law enforcement and the Navy in a supporting role proved effective for post-9/11 security operations just as it has been for counter-narcotics operations.¹²⁰

For various reasons, the Coast Guard is the appropriate choice for the maritime homeland security mission. However, as the patrol craft operations demonstrate, the Navy's cooperation and assistance in homeland security is often required for mission success. As Assistant Secretary of Defense Paul McHale has described, this "highly effective partnership between the U.S. Navy and U.S. Coast Guard"¹²¹ is critical to denying terrorists the ability to strike at the United States' shores.

Thus, the unsettled debate over the PCA and related laws under Title 10, along with the DoD's arguably over-restrictive, self-imposed policy concerning the Navy', has little negative operational effect.

United States v. Toscanino, 500 F.2d 267, 273-76 (2d Cir. 1974) (holding that the *Ker-Frisbie* Doctrine must yield to the defendant's due process right, which was violated when he was kidnapped in Uruguay by Brazilians acting as American agents and subsequently tortured for seventeen days prior to being flown to the United States and arrested).

118. PA1 Patrick Montgomery, U.S.C.G., *Joining Forces*, COAST GUARD, Dec. 2001/Jan. 2002, available at <http://www.uscg.mil/hq/g-cp/cb/Dec2001Jan2002/joiningforces.html>. Ultimately, five of the patrol craft were loaned to the Coast Guard indefinitely in 2004. See Information on the Cyclone Class PCs and WPCs, <http://www.ww2pcsa.org/cyclone-patrol-coastals.html> (last visited Dec. 24, 2005).

119. It has been suggested that the DoD and Navy should change their regulations to permit greater involvement in the maritime homeland security mission. See Felicetti & Luce, *supra* note 77, at 179-82.

120. See *supra* note 118.

121. *Supra* text accompanying note 1.

Rather, the result has been a positive, cooperative approach between the Coast Guard and Navy in combating maritime drug smuggling and terrorism. In the interest of clarity, it may be prudent for the DoD and Navy to relax their policies concerning enforcement measures in counterterrorism or for Congress to revise the statutes to clearly authorize direct Naval participation in maritime homeland security operations. Regardless, however, of any revisions to law and policy, the Navy has a variety of important roles and missions, and maritime homeland security can be expected to remain the Coast Guard's responsibility. As such, the Navy's role as a supporting agency in homeland security is quite appropriate.

V. THE COAST GUARD, LAW ENFORCEMENT, AND HOMELAND SECURITY

The discussion of the legal elements in the previous section suggests that the Navy could occasionally take direct law enforcement actions incident to the maritime homeland security mission without any detriment to prosecutorial efforts. Although it may be prudent for the DoD and Navy to relax their self-imposed restrictive policies to more easily allow such actions in exigent circumstances, the Coast Guard properly retains primary responsibility for maritime homeland security.¹²² This makes good sense because maritime homeland security is principally a domestic law enforcement mission and calls for the Coast Guard's unique maritime law enforcement expertise. The Navy, whose missions have traditionally been war-fighting and overseas power projection, has neither the same degree of law enforcement expertise nor the clear authority to enforce domestic criminal laws. Thus, regardless of the applicability of the PCA to the Navy or the question of its extraterritorial applicability, the Coast Guard remains the appropriate agency to assume the lead federal role in regard to maritime law enforcement operations. However, as experience through real-world operations (such as the LEDET model) demonstrates, synergy through the cooperation of the two services enhances operational success.¹²³ Even with the Coast Guard in the lead role for maritime homeland security, the DoD and

122. NATIONAL STRATEGY FOR MARITIME SECURITY, *supra* note 32, at 23.

123. Examples of successful cooperation include "response to the Haiti-Cuba mass migrations in 1993-94, support of the TWA flight 800 salvage operations, expeditionary force protection in the aftermath of the terrorist attacks on USS *Cole*, Arabian Gulf UN embargo operations, response to the 11 September 2001 terrorist attacks on the United States, and ongoing peacetime engagement and counter-narcotics operations." Department of the Navy and United States Coast Guard, National Fleet: A Joint Navy/Coast Guard Policy Statement, Jul. 8, 2002, at 2 (on file with author) (describing, generally, the mutual goals of the Navy and Coast Guard to develop defense plans and procure ships in a manner to avoid duplication of capabilities and to allow each services' characteristics to compliment one another).

Navy have essential supporting roles. Such an arrangement is statutorily supported, as the Coast Guard is authorized to avail itself of the assistance of any federal agency in the performance of its duties.¹²⁴

Throughout its history, the Coast Guard has been responsible for countering criminal threats targeting the United States. Thus, in addition to its statutory law enforcement authority, the Coast Guard has in place the cutters, equipment, personnel, training, doctrine, and administrative support to conduct the maritime homeland security mission and to deny terrorists access to our shores.

However, Homeland Security is not a new mission for the Coast Guard. Port and maritime security has been a mission for the Coast Guard since 1917, with the establishment of the Espionage Act, followed by the Magnuson Act. It has received different emphasis over the years, but security is not a new mission for the Coast Guard. . . . Maritime Homeland Security has been a responsibility of the Coast Guard for years, but the threat is different now. We live in a much different world after 9/11, and we need to train and equip our people to deal with new and emerging threats.¹²⁵

The Coast Guard has enhanced its capability to respond to maritime terrorism through the establishment of Maritime Safety and Security Teams ("MSSTs"). MSSTs serve to "safeguard the public and protect vessels, harbors, ports, facilities, and cargo in waters subject to the jurisdiction of the United States from destruction, loss or injury from crime, or sabotage due to terrorist activity. . . ."¹²⁶ In addition to port security competencies, these teams also have the capability to respond to threats offshore and board non-compliant vessels suspected of terrorist activities. Some specialized teams also have the advanced capability to conduct opposed boardings. Coast Guard ships and aircraft also have the capability and unfettered authority to issue disabling or destructive fire against vessels that fail to comply with orders to stop or otherwise pose a threat of force.¹²⁷

124. 14 U.S.C. § 141(b) (2000). Under this statute, the Coast Guard may "avail itself of such officers and employees, advice, information, and facilities of any Federal agency . . . as may be helpful in the performance of its duties." While this statute does not explicitly grant the Coast Guard power to "deputize" personnel from other agencies (including the Navy) to act under Coast Guard authority, it may legitimize the use of Naval assets in situations where the Coast Guard may not be able to respond immediately. See *infra* text accompanying notes 172-75.

125. Symposium, *The Red and Green Lights of Homeland Security*, 12 U.S.-MEX. L.J. 89, 91-92 (2004) (comments by Commander Steve Poulin, U.S.C.G.).

126. 46 U.S.C.A. § 70106 (West 2004), amended by Pub. L. No. 109-241, § 305, 120 Stat. 528 (2006).

127. 14 U.S.C.A. § 637 (West 2004).

A. *The Coast Guard's Broad Jurisdictional Reach*

While ships and trained personnel are essential to countering maritime terrorist threats, the Coast Guard brings unique characteristics to the maritime homeland security mission. As the primary governmental agency for maritime law enforcement, Coast Guard personnel are specialists in the field with wide jurisdictional reach. Commissioned, warrant, and petty officers trained as boarding officers have law enforcement authority in "waters over which the United States has jurisdiction,"¹²⁸ which creates expansive jurisdictional authority to conduct law enforcement boardings around the world with flag State consent or other bases of jurisdiction under international law. Although UNCLOS vests exclusive flag State jurisdiction in the flag State of vessels sailing the high seas,¹²⁹ this can be waived.¹³⁰ The Coast Guard, working with the State Department, helped negotiate numerous bilateral agreements to conduct boardings of foreign-flagged vessels suspected of violating U.S. laws.¹³¹ In addition, the Coast Guard has procedures to obtain *ad hoc* consent from the flag State to board, search, and arrest vessels not covered by a ship boarding treaty. Furthermore, the Coast Guard has procedures in place to turn over arrested suspects and evidence to the proper authorities on land and to provide follow-up support as the case goes to trial.¹³² Overall, only the Coast Guard possesses the expertise to conduct broad-based maritime law enforcement operations on the high seas.

128. 14 U.S.C. § 89 (2000). The phrase "waters over which the United States has jurisdiction" does not limit Coast Guard authority to those areas over which the United States has exclusive sovereignty. See, e.g., *United States v. Padilla-Martinez*, 762 F.2d 942, 950 (11th Cir. 1985) (stating that "merely because a vessel is of foreign registry or outside the territorial waters of the United States does not mean that it is beyond the jurisdiction of the United States. The United States has long taken the position that its jurisdiction extends to persons whose extraterritorial acts are intended to have an effect within the sovereign territory").

129. UNCLOS, *supra* note 10, arts. 92(1), 94.

130. See, e.g., *United States v. Davis*, 905 F.2d 245, 249-50 (9th Cir. 1990) (validating the exercise of United States jurisdiction over a United Kingdom-flagged vessel pursuant to authorization by the flag State to subject the vessel to American customs laws); *United States v. Rojas*, 53 F.3d 1212, 1214-15 (11th Cir. 1995) (upholding the validity of a grant from the Government of Panama to the United States to board, search, and seize one of its vessels found to be smuggling cocaine on the high seas).

131. For a discussion of bilateral agreements, see Joseph E. Kramek, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?*, 31 U. MIAMI INTER-AM. L. REV. 121 (2000). The Coast Guard is also working with various federal agencies to craft additional shipboarding agreements to further the PSI and SUA convention's objectives.

132. Procedures for obtaining flag State consent to board a foreign-flagged vessel are outlined in the MARITIME OPERATIONAL THREAT RESPONSE PLAN, *supra* note 70.

B. *Interagency Support in Maritime Law Enforcement and Security Is Critical*

In executing its law enforcement mission, the Coast Guard may require other federal agencies' assistance.¹³³ As described above, the DoD and particularly the Navy's assistance has proven invaluable in the war on drugs¹³⁴ and in patrolling the American coast following the September 11th attacks.¹³⁵ The DoD also has the assets and expertise to contribute valuable support to secure the homeland from maritime terrorism. From a tactical standpoint, the DoD can provide interdiction assistance and "specialized support, such as Explosive Ordnance Disposal (EOD)"¹³⁶ and WMD response.¹³⁷ From a strategic standpoint, the intelligence, patrol, and surveillance support that the DoD can provide to detect potential maritime threats is highly valuable.

It is critical that the Coast Guard receives interagency support to help identify maritime threats. The Coast Guard's concept of maritime domain awareness,¹³⁸ which furthers the goal of total awareness of potential threats bound for our shores, requires the close cooperation of all agencies in the intelligence community. As the National Strategy for Maritime Security states,

the United States will leverage its global maritime intelligence capability and the diverse expertise of the intelligence and law enforcement communities. The efforts of the existing maritime collection and analysis means will contribute to an intelligence enterprise equipped to collect, fuse, integrate, and disseminate timely intelligence information. This intelligence enterprise will support United States Government agencies and international partners in securing the maritime domain, as well as their other statutorily assigned missions. Additionally, the Departments of Homeland Security, Defense, and Justice will oversee the implementation of a shared situational awareness capability that integrates intelligence, surveillance, reconnaissance, navigation systems, and other operational information inputs, combined with access at multiple levels throughout the United States Government. . . . The establishment of this intelligence enterprise underscores the need for an integrated and robust maritime command

133. See 14 U.S.C. § 141 (2000) (granting the Coast Guard authority to "avail itself of such officers and employees, advice, information, and facilities of any Federal agency, State, Territory, possession, or political subdivision thereof, or the District of Columbia as may be helpful in the performance of its duties" when authorized by the head of the respective agency).

134. See *supra* note 102.

135. See *supra* text accompanying notes 118-19.

136. US DEP'T OF DEFENSE, THE DoD ROLE IN HOMELAND SECURITY: DEFENSE STUDY AND REPORT TO CONG., at 7 (2003), available at [http://www.ndu.edu/uchs/NDAA%20FY02%20Report%20\(DoD%20in%20HS\)%20-%20final.pdf](http://www.ndu.edu/uchs/NDAA%20FY02%20Report%20(DoD%20in%20HS)%20-%20final.pdf).

137. *Id.* at 7-8. See also *supra* note 91.

138. See *supra* note 58.

and control system to defeat all maritime threats.¹³⁹

Because of the vastness of the oceans and the United States' shoreline, maximizing maritime domain awareness is challenging. Recognizing this, Congress mandated that the Secretary of Homeland Security "implement a system to collect, integrate, and analyze information concerning vessels operating on or bound for waters subject to the jurisdiction of the United States, including information related to crew, passengers, cargo, and intermodal shipments."¹⁴⁰ The President also issued executive orders mandating enhanced information sharing among government agencies to help protect Americans from terrorist attacks.¹⁴¹ The Coast Guard became a member of the United States Intelligence Community in 2001¹⁴² and has already created new assets and procedures to improve its intelligence gathering and analysis capability.¹⁴³

As time goes on, information sharing between the armed forces, intelligence agencies, and civil enforcement agencies should continue to improve. Some have even advocated the establishment of a "Maritime NORAD" under the auspices of NORTHCOM to track all vessels operating in the oceans near the United States.¹⁴⁴ While it remains to be seen whether such a concept will come to fruition, this proposal shows that it is widely acknowledged that close interagency cooperation in monitoring the United States' maritime approaches is fundamental to national defense.

It is in this area that the Coast Guard can best utilize the DoD's support. For example, in December 2003, the Chief of Naval Operations

139. NATIONAL STRATEGY FOR MARITIME SECURITY, *supra* note 32, at 16.

140. 46 U.S.C.A. § 70113 (West 2004).

141. Exec. Order No. 13,356, 69 Fed. Reg. 53,599 (Sept. 1, 2004); Exec. Order No. 13,311, 68 Fed. Reg. 45, 149 (July 29, 2003).

142. See United States Intelligence Community website, http://www.intelligence.gov/1-members_coastguard.html (last visited Dec. 24, 2005). The Intelligence Community "is a federation of executive branch agencies and organizations that work separately and together to conduct intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States." It consists of the following agencies: the Army, Air Force, Navy, Marine Corps, Coast Guard, Defense Intelligence Agency, Central Intelligence Agency, National Security Agency, Federal Bureau of Investigation, National Reconnaissance Office, National Geo-Spatial Intelligence Agency, and the Departments of Energy, State, Treasury and Homeland Security.

143. For example, since September 11th, the Coast Guard has established regional intelligence collection teams, along with fusion centers on both coasts to analyze intelligence.

144. See Geoff S. Fein, *Security Beat: More Attention Urged for Maritime Defense*, NAT'L DEF. MAGAZINE, Jan. 1, 2004, at 8, available at http://www.nationaldefensemagazine.org/issues/2004/Jan/Security_Beat.htm; Donna Miles, *Planning Group Weighs Value of 'Maritime NORAD,'* ARMED FORCES INFO. SERV., Nov. 3, 2004, http://www.dod.mil/news/Nov2004/n11032004_2004110304.html; Samantha L. Quigley, *Homeland Security Defenses Must Be Active, Layered*, ARMED FORCES PRESS SERV., June 10, 2005, <http://www.jtfcs.northcom.mil/pages/news20050610.html>.

offered personnel to the Commandant of the Coast Guard to augment the Coast Guard's Maritime Domain Awareness staff.¹⁴⁵ The memorandum stated the Navy's full commitment to "supporting the Coast Guard role as the lead for Maritime Domain Awareness."¹⁴⁶ In addition, a 2003 agreement between the DoD and DHS authorized the assignment of sixty-four DoD personnel to the DHS to fill "critical specialties, principally in the areas of communications and intelligence."¹⁴⁷ And as previously discussed,¹⁴⁸ the availability of Naval assets to patrol the approaches to our coasts has proven an excellent force multiplier. The DoD's role as a supporting agency in maritime homeland security enhances the Coast Guard's ability to fulfill its responsibilities in securing the United States' shores from maritime-based threats. Consequently, the Coast Guard has been working with the DoD and Navy to create a memorandum of agreement that will provide both the "authority and procedure for DoD to respond to time-critical situations by rapidly transferring DoD assets to the Coast Guard to respond to [homeland security] missions."¹⁴⁹

VI. HOMELAND DEFENSE, HOMELAND SECURITY, AND TERRORISM

Maritime homeland defense is different from maritime homeland security. As Assistant Secretary of Defense McHale explains it, "[s]ome have asserted that the distinctions between 'Homeland Defense' and 'Homeland Security' are 'artificial' and 'impractical,' . . . but [they] rather are complimentary and consistent with the law and operational requirements."¹⁵⁰ According to NORTHCOM,

Homeland Security (HLS) is not the same as Homeland Defense (HLD). Homeland Security is the prevention, preemption, and deterrence of, and defense against, aggression targeted at U.S. territory, sovereignty, domestic population, and infrastructure as well as the management of the consequences of such aggression and other domestic emergencies. Homeland Security is a national team effort that begins with local, state and federal organizations. DoD and

145. Memorandum from Admiral Vern Clark, U.S.N., Chief of Naval Operations, to Admiral Thomas Collins, U.S.C.G., Commandant of the Coast Guard (Dec. 29, 2003) (on file with author).

146. *Id.*

147. McHale, *supra* note 1, at 13.

148. *See supra* text accompanying notes 118-19.

149. RONALD O'ROURKE, CONG. RESEARCH SERV., HOMELAND SECURITY: NAVY OPERATIONS – BACKGROUND AND ISSUES FOR CONG. 3-4 (2005) (CRS Report RS21230) (referring to Draft memorandum of agreement between the Department of Defense and Department of Homeland Security for Department of Defense support to the United States Coast Guard for Maritime Homeland Security (Feb. 2005) (on file with author)), available at <http://www.fas.org/sgp/crs/homese/RS21230.pdf>.

150. McHale, *supra* note 1, at 4.

NORTHCOM's HLS roles include homeland defense and civil support. Homeland defense is the protection of U.S. territory, domestic population and critical infrastructure against military attacks emanating from outside the United States. In understanding the difference between HLS and HLD, it is important to understand that NORTHCOM is a military organization whose operations within the United States are governed by law, including the Posse Comitatus Act that prohibits direct military involvement in law enforcement activities. Thus, NORTHCOM's missions are limited to military homeland defense and civil support to lead federal agencies.¹⁵¹

This statement reflects the DoD's restrictive policy on military involvement in law enforcement. Therefore, it clearly limits its authority to instances of protecting the homeland from military attack and supporting law enforcement agencies without any direct participation in any search, seizure, or arrest. Under this approach, any maritime threat targeting American shores – short of a military attack – will fall under the DHS's purview and will correspondingly be the Coast Guard's responsibility. Military threats by foreign governments are the DoD's responsibility. Accordingly, the Navy and perhaps the Air Force – where a threat requires rapid, outright destruction by anti-ship missiles or guided bombs – will likely counter sea-based armed attacks against the homeland.

A. Maritime Terrorism Does Not Fall Exclusively Under Homeland Security or Defense

While NORTHCOM's description of its homeland defense roles seems straightforward, maritime terrorism creates a puzzling question. Maritime terrorism poses a threat unlike traditional concepts of sea-based "military" threats against the homeland, such as missile attacks, submarine warfare, mining of sea lanes and harbors, blockade, and invasion. Because terrorists are non-State actors, they do not fit within the usual mold of enemy combatants – yet the death and destruction they seek to inflict is tantamount to that caused by an act of war. International terrorism's dual nature – a crime and/or an act of war – makes it difficult to draw a clear distinction between homeland security and homeland defense with respect to the maritime terrorism threats the United States potentially faces. Prior to September 11th, terrorism was generally regarded as a criminal threat, although today it is increasingly viewed as a military threat:

It is sometimes unclear whether suspected terrorists whose existence

151. U.S. Northern Command - SourceWatch, http://www.sourcewatch.org/index.php?title=U.S._Northern_Command (last visited Jan. 13, 2007).

we happen to discover in the United States, Afghanistan, or elsewhere should be targeted for destruction in a military operation or captured, convicted, and sentenced to a term of years; whether they should be interrogated for military intelligence, or Mirandized, advised of their right to remain silent and questioned to obtain evidence that may be admissible in court against them; whether they should be tried before a military commission or a civilian jury; whether they are, in the end, prisoners of war (POWs), detainees, or defendants. There is even some question, from a purely legal standpoint, whether we should be seeking out all "terrorists of global reach" or only those who have violated U.S. criminal law by planning attacks against the United States and its interests overseas.¹⁵²

These considerations are unresolved when it comes to maritime terrorists, and therefore we face complicated questions regarding the distinction between homeland security and defense vis-à-vis maritime terrorism.

However, it is impractical to pigeon-hole maritime counterterrorism as either a homeland security or a homeland defense mission. It can be either depending on the circumstances and the desired outcome. Rather than attend to maritime terrorism with a front-loaded classification as a law enforcement or defense mission, planners and operators will likely have to decide the appropriate response for each threat on an *ad hoc* basis and determine whether the outcome should be arrest and prosecution or destruction and capture.¹⁵³ This objective-based approach would increase the likelihood that the right agency with the right tools for the job is tapped to respond to any given threat. As stated in the National Strategy for Maritime Security, "the Department of Homeland Security and the Department of Defense will develop a mutually agreed process for ensuring rapid, effective support to each other. Terrorist threats will be addressed as national security incidents employing as appropriate all

152. Sievert, *supra* note 40, at 308.

153. The dilemma of classifying terrorism as a crime or a military threat poses a statutory as well as a constitutional law question regarding separation of powers. Because Congress has spoken on the matter by criminalizing acts of terrorism under U.S. Code Title 18, Chapter 113B, does this preclude the President from treating acts of terrorism as a military threat? Such an outcome would seem unconstitutional (if not absurd and potentially dangerous) because the executive has the constitutional power as commander in chief to take actions in the interest of national defense. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 641-42 (1952). As the potential separation of powers problem is beyond this Note's scope, I will presume it is within the President's constitutional authority, even absent congressional grant, to take actions to defeat grave and imminent threats to national security. It follows that the same authority applies to especially serious terrorist threats. Hence, the President has discretion to respond to a terrorist threat through law enforcement agencies pursuant to his law execution authority or through the military in his role as commander in chief for more serious threats (those tantamount to a military attack).

instruments of national power to defeat the threat.”¹⁵⁴ Under this principle, the overriding concern in maritime counterterrorism is defeating the threat and protecting American people and property.

To achieve this end, it is prudent to develop plans that designate roles for anticipated threats, thereby enabling the Navy and Coast Guard to develop tactical plans and to train and equip their personnel accordingly. Pursuant to the National Strategy for Maritime Security,¹⁵⁵ the DoD and DHS have been working towards memoranda of agreement that lay out the procedures for mutual support between the Navy and the Coast Guard in maritime homeland security¹⁵⁶ and homeland defense.¹⁵⁷ While such cooperation is essential to the United States’ defense and security, the next section will further explore the objective-based approach to mission classification and explain why responding to maritime terrorism that targets our shores should primarily be a Coast Guard mission, with the DoD providing support when necessary.

VII. THE COAST GUARD’S ROLE IN HOMELAND DEFENSE

The Coast Guard, as a law enforcement agency¹⁵⁸ and a branch of the armed forces,¹⁵⁹ is uniquely suited to respond to maritime terrorism threats. Because the Coast Guard has the authority to execute both military and law enforcement missions, it has the greatest flexibility to respond effectively to maritime terrorism regardless of whether the mission is considered homeland security or homeland defense. As a result of its unique dual role, the Coast Guard has developed its own specialized equipment, training, and tactics that make it ideally suited to perform low to medium intensity combat missions, as well as law enforcement missions, which characterize most forms of anti- and counterterrorism operations.

A. *The Coast Guard’s Traditional Roles in Homeland Defense*

It is notable that the Coast Guard has prior experience with homeland defense missions. As part of its many duties during World Wars I and II, the Coast Guard lived up to its namesake – by guarding the coast from enemies through coastal lookouts and pickets to deter attacks by

154. NATIONAL STRATEGY FOR MARITIME SECURITY, *supra* note 32, at 20.

155. *Id.*

156. *See supra* note 147.

157. O’ROURKE, *supra* note 147, at 4-5 (citing the memorandum of agreement between the Department of Defense and the Department of Homeland Security for the inclusion of the U.S. Coast Guard in support of Maritime Homeland Defense (on file with author)).

158. 14 U.S.C. §§ 2, 89 (2000).

159. 10 U.S.C. § 101; 14 U.S.C. §§ 1-4, 145 (2000).

German submarines.¹⁶⁰ In World War II, in addition to its combat operations overseas, the Coast Guard established “coast watchers” who conducted beach patrols on foot and on horseback.¹⁶¹ In fact, a German plot to attack the United States with explosives smuggled into the country by sea was foiled by one such coast watcher, who discovered saboteurs shortly after they landed on the south shore of Long Island in 1942.¹⁶² In addition, since World War I, the Coast Guard has been responsible for domestic port security. This entails Coast Guard captains of the port issuing regulations and conducting patrols to prevent the sabotage of military equipment during ship load-out and to promote general port security.¹⁶³

With the exception of its continuing and important port security functions, the Coast Guard’s traditional homeland defense missions have fallen by the wayside. Today, anti-submarine warfare is strictly the domain of the Navy, and the practice of patrolling the beaches on horseback seems quaint from a modern perspective. However, the new mission of maritime counterterrorism is one that the Coast Guard is poised to perform well. The DoD, being principally responsible for homeland defense, should consider the unique characteristics that make the Coast Guard ideally suited for this mission. Coast Guard and DoD officers should continue to work closely to ensure that the Coast Guard’s special capabilities are included in homeland defense planning.

B. *Defining Homeland Defense and Security and the Objective-Based Approach*

Maritime terrorism should not be considered “homeland defense” or “homeland security” based solely on the nature of the threat or its ties to a State sponsor, but rather on the operation’s objective. If an identified threat is bound for the United States’ shores and the objective is to interdict and arrest the suspects, the mission should be considered “homeland security.” Under those circumstances, the Coast Guard, under the DHS’s auspices, should take the lead role in responding to the threat, which might include DoD assistance. On the other hand, if the nature of a particular threat is so grave that it requires threat destruction, the mission should be considered “homeland defense,” and the DoD should take the lead. However, even with the DoD playing the lead role, in many situations it will remain prudent for the Coast Guard to execute the interdiction.

160. JOHNSON, *supra* note 74, at 50, 205-07.

161. *Id.* at 203-05.

162. *Id.* at 203.

163. *Id.* at 49-50, 195-96, 281-83.

C. The Coast Guard is Uniquely Suited to Respond to Maritime Terrorism

The problem with maritime terrorism is that in many cases an identified threat may warrant outright destruction as part of a homeland defense operation, but this may not be evident upon initial detection. As stated earlier, intelligence is critical to identifying terrorist threats at sea before they are able to reach the American coast and inflict damage. But intelligence is not always entirely accurate, nor does it always provide a complete threat assessment. For this reason, it makes sense for the Coast Guard to provide the first response to suspected terrorist threats bound for our shores, particularly in those instances where the nature of the threat is not fully understood. In its dual role as a law enforcement agency and an armed force, the Coast Guard has the ability to react to threats and adapt its operational response accordingly. Thus, the Coast Guard may approach a potential maritime terrorist threat under its authority as a law enforcement agency. Then, if circumstances so warrant, it can adjust its role to that of an armed force and destroy the target. Alternatively, if an identified threat is initially thought to be an armed attack against the United States but is less severe than anticipated, the Coast Guard's first responder-status permits mission posture flexibility: the Coast Guard can instantly switch from a homeland defense role to a law enforcement role. Of course, obvious threats posing an imminent risk to life and property within the United States must be defeated as efficiently and decisively as possible. Yet where the threat is not obvious, it may be prudent for operational decision makers to consider the flexibility the Coast Guard provides as a first responder.

Under these principles, direct action by DoD forces will only be required in extraordinary circumstances where a maritime terrorist threat requires rapid destruction, calling for significant firepower beyond the Coast Guard's capability, or where adequate Coast Guard assets are not readily available. Other DoD action, such as explosive ordnance disposal and WMD response,¹⁶⁴ can be conducted as a complementary civil support mission under DHS auspices. This approach avoids the quagmire created by the PCA and related laws' ambiguity.¹⁶⁵ Although as described above,¹⁶⁶ the Navy can likely take some direct law enforcement action without disrupting an ensuing prosecution, it should not have to do so in most situations. Because the Coast Guard has the capability to assume the role of first responder in both maritime homeland security and defense, it should do so and allow the DoD to focus on its

164. See *supra* note 91.

165. See *supra* Part IV.

166. See *supra* Part IV.C.

counterterrorism operations abroad. Preserving maritime counterterrorism as primarily a law enforcement mission under the DHS and Coast Guard's domain precludes an operational clash of cultures – where the use of DoD personnel, trained and equipped in the “warrior” mindset, may find themselves in an unfamiliar context where the desired outcome is not destruction, but arrest. Such a scenario may result in improper mission execution and degradation in military readiness.

Moving military personnel between these two situations may cause the soldier to misread or misunderstand a situation and use the wrong kind of force. . . . Law enforcement missions emphasize the ability to loiter, concealment from the adversary, detection of the adversary through the analysis of indicators and warnings, and, finally, interception, all under strict constitutional and legal guidelines. . . . [Military units must focus on] warfare, not arrest procedures and rules of evidence.¹⁶⁷

Furthermore, using the Coast Guard in this role takes advantage of its extensive shore-side support network to conduct law enforcement operations and bring maritime criminals to justice. Alternatively, the Coast Guard's role as an armed force and its close ties to the DoD also allow captured maritime terrorists to be treated as “enemy combatants,” or prisoners of war. Under appropriate circumstances, in lieu of arrest the Coast Guard could transfer captured terrorists to the DoD for military detention. This decision will often not be made until the suspects are in custody¹⁶⁸ – another reason why the Coast Guard's unique flexibility suits the counterterrorism mission well.

D. *Apportioning Responsibilities Between the Coast Guard and the Navy*

A difficult question arises if, as I posit, the Coast Guard's special characteristics make it the ideal agency to respond to maritime terrorist

167. Cunningham, *supra* note 80, at 715-16.

168. The case of Jose Padilla illustrates this point. Padilla, a United States citizen, was arrested in Chicago in May 2002 on suspicion that he was involved in an al-Qaeda plot to obtain and detonate a “dirty bomb” in the United States. By the order of the President, he was designated an “enemy combatant” and transferred to military custody, where he remains today. Although the legality of Padilla's military detention has been the subject of many law review articles due to his American citizenship, the merits of his case have yet to be resolved. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 739-40 (2004). If Padilla were not a United States citizen, his designation as an “enemy combatant” would not likely cause much debate. See *Ex parte Quirin*, 317 U.S. 1, 28-31 (1942) (upholding the military detention of German saboteurs captured in the United States during World War II). In light of the debate surrounding Padilla's detention, it is interesting to note that one of the saboteurs, Herbert Haupt, was an American citizen of German-American ancestry, and the Court flatly determined that his citizenship did not alter his status as an enemy combatant. *Id.* at 37-38.

threats: how far out to sea will these responsibilities reach? Despite its namesake, the Coast Guard conducts global operations but not nearly to the same extent as the Navy. Furthermore, the Navy has been working to enhance its maritime counterterrorism mission and boarding team capabilities to interdict terrorists and weapons at sea.¹⁶⁹ With the Navy and the Coast Guard now sharing similar capabilities in maritime interception operations,¹⁷⁰ how should the nation define the boundaries between the Coast Guard and Navy's maritime counterterrorism responsibilities?

First, it is too restrictive to rely on some arbitrary dividing line set some several hundred miles offshore to define the relevant boundary.¹⁷¹ Instead, an objective-based approach should be used. All maritime terrorist threats bound for our shores, or those targeting United States-flagged vessels or citizens, regardless of where they are in the world, should be the DHS and the Coast Guard's responsibility. This is because it is more probable that the desired outcome will be prosecution – which is a law enforcement objective. In executing this global mission, the Coast Guard may utilize DoD support when necessary. Of course, this approach remains subject to the overriding rule that in cases requiring rapid, decisive action, the agency best poised to respond effectively will be the first responder.

169. See JO3 Michael Cokos, U.S.N., *Sailors Receive New, More Intense Search and Seizure Training*, NAVY NEWSSTAND, Oct. 20, 2005, available at http://www.news.navy.mil/search/display.asp?story_id=20669 (describing enhanced, non-compliant boarding training for Navy visit, board, search, and seizure (VBSS) teams); Jason Sherman, *Doing More: The Navy Is Developing New Skills and Tactical Units to Provide Commanders with More Capabilities for the Global War on Terrorism*, SEA POWER, Oct. 2005, at 24 (describing the Navy's efforts to improve "its boarding team capabilities by providing new training and new equipment . . . [and] acquiring new capabilities to detect weapons of mass destruction at sea"); see also Lieutenant Colonel Paul Mullin, U.S.A. & Lieutenant Jon Bartee, U.S.N., *Put a Swat Team on Every Ship*, PROCEEDINGS OF THE U.S. NAVAL INST., Dec. 2002, at 30 (advocating the creation of Naval boarding teams on each ship with advanced tactical boarding training and equipment to more safely and effectively conduct maritime counterterrorism); Pelkofski, *supra* note 22, at 24 (noting improvement in VBSS teams in light of the need for Navy boarding teams to shift their focus from the maritime sanctions mission to counterterrorism).

170. For a review of maritime interception operations and their justification under international law, see Lieutenant Commander Richard Zeigler, U.S.N., *Ubi Sumus? Quo Vadimus?: Charting the Course of Maritime Interception Operations*, 43 NAVAL L. REV. 1 (1996).

171. In addition to being restrictive, setting fixed boundary lines to delineate areas of mission responsibility is also difficult from a practical standpoint. As such, defense planners have avoided bright-line divisions and have instead designated three general areas for homeland security: the homeland itself, the forward regions (outside the homeland), and the approaches (extending from the limits of the homeland to the forward region). This framework further states that "all three regions are not absolute and they may overlap or shift depending on the situation and threat therefore, all military operations associated with HS will require seamless integration and synchronization." JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-26, HOMELAND SECURITY, at I-9 (2005), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_26.pdf.

Maritime terrorist interdictions and PSI operations abroad should largely remain the DoD and the Navy's responsibility in cases where there is no direct link between the threat and our citizens or a potential target in the United States, thereby rendering the possibility of a prosecution in the United States unlikely.¹⁷² In such situations, the objective of capture for military detention is more likely than arrest for prosecution because the United States' justice system would not have jurisdiction over the act. Thus, the distinguishing outcome is whether the targeted suspects are likely to be subjected to the United States' criminal justice system. Where the United States can lawfully exercise jurisdiction under its domestic and international law, it is proper to consider the mission as homeland security, and a Coast Guard response is therefore preferable.

Under this scheme, the Navy retains primary responsibility for the interdiction of terrorists and WMD where the given threat does not directly target the United States or its citizens and where there is a low likelihood of prosecution. It is therefore important that the Navy continue to develop a non-compliant boarding capability in all its boarding teams to enable its ships to conduct effective maritime interception operations overseas and to defeat foreign acts of maritime terrorism and

172. Under various international law theories, the United States can exercise jurisdiction over maritime acts of terrorism beyond its territorial sea. These theories include: "territoriality," "effects," and the "protective principle." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 402 cmts. c-d, f (1987). Regardless of the theory used to justify an extraterritorial exercise of jurisdiction, the law generally allows States to assume jurisdiction over "conduct outside its territory that has or is intended to have substantial effect within its territory" and "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests." *Id.* § 402(1)(c), (3). The right to exercise jurisdiction is limited by a standard of reasonableness, which will consider, *inter alia*, "the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory." *Id.* § 403(2)(a). These principles have been applied in some maritime counter-narcotics cases. See, e.g., *United States v. Gonzalez*, 776 F.2d 931, 938 (11th Cir. 1985) (upholding the Coast Guard's boarding of a Honduran vessel on the high seas with flag State consent and the arrest of its crew for marijuana smuggling and noting "the United States could prosecute foreign nationals on foreign vessels under the 'protective principle' of international law, which permits a nation to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security"). Accordingly, the United States' domestic laws that criminalize terrorism and associated acts require some link to the United States – e.g. targeting United States citizens or property, a United States national committing the offense, or committing an act of violence intended to influence the United States government. See 18 U.S.C.A. §§ 2332-2332f (West 2004).

piracy.¹⁷³ This will contribute to the concept of a “layered defense”¹⁷⁴ to neutralize threats abroad before they can become threats at home.

When circumstances require, the Navy may provide back-up for homeland security missions where the desired outcome is law enforcement.¹⁷⁵ Because the Navy’s occasional involvement in law enforcement activity will not likely invalidate an ensuing prosecution,¹⁷⁶ the Navy (with the Secretary of Defense’s authorization)¹⁷⁷ can provide interdiction support in emergency law enforcement situations where the Coast Guard is unable to immediately respond. Although the Coast Guard remains the “right tool for the job” and should be the lead federal agency where the desired outcome entails a law enforcement objective (or where the threat is such that the desired outcome is initially unclear), Coast Guard assets may not always be immediately available in all situations.

Geography and asset location are especially significant factors in this equation. Of course, the Navy has a much greater overseas presence than the Coast Guard, and a situation might arise where a maritime terrorist threat far from U.S. shores could have a sufficient nexus to be subject to U.S. domestic antiterrorism laws¹⁷⁸ – thereby rendering the desired outcome a law enforcement objective. For example, a ship in the South Pacific Ocean may be carrying arms and terrorists ultimately bound for the United States, or a United States flagged vessel in the Indian Ocean could be hijacked, but the Coast Guard would not likely be able to respond immediately and an expedited response by a nearby Navy boarding team might be preferable. It is these instances where the Navy’s support will prove invaluable in filling gaps in Coast Guard capability and asset availability – just as the Coast Guard has done for

173. One example of an interdiction operation that the Navy appropriately carried out rather than the Coast Guard was the interdiction of the Cambodian-flagged, North Korean-owned freighter *So San* in December 2002. The Spanish Navy, working with the U.S. Navy, interdicted the vessel while on the high seas south of Yemen. The boarding revealed a shipment of Scud missiles bound for Yemen. Ultimately, the shipment was determined to be lawful and legitimate, and the vessel was allowed to proceed to deliver its cargo. Logan, *supra* note 45, at 253-54. Although the intelligence that led to the interdiction suggested conduct that may have adversely affected United States interests, there was no reason to believe that the conduct was subject to American domestic criminal law. Such an operation, where the objective does not foresee bringing detainees before an American criminal court, is appropriately the Navy’s responsibility.

174. See Quigley, *supra* note 144 (citing the DoD’s strategy to interdict WMD abroad); see also *supra* text accompanying notes 57-61 (the Coast Guard’s strategy for maritime homeland security).

175. 14 U.S.C. § 141 (2000). See *supra* note 122.

176. See *supra* text accompanying notes 107-16.

177. DEPARTMENT OF DEFENSE, DIRECTIVE 5525.5, *supra* note 77, art. E4.5, at 21-23; 10 U.S.C.A. § 374(b)(2) (2004); 14 U.S.C. § 141 (2000).

178. See *supra* text accompanying note 169.

the Navy for its coastal warfare missions in both Vietnam¹⁷⁹ and Iraq.¹⁸⁰ Again, a key element is cooperation and support between the two services; close coordination in developing response plans, ship boarding treaties, and disposition options is critical to avoid confusion and achieve mission success.

If the Coast Guard is to fulfill its appropriate role as first responder for maritime terrorism targeting our shores, enhanced interagency cooperation in the creation of response plans is essential. The DoD, DHS, NORTHCOM, and Coast Guard must work closely together to develop such plans and to execute training exercises, thereby ensuring that operations are conducted smoothly and effectively. In addition, compatible communications and common doctrine should be adopted wherever possible.¹⁸¹ Furthermore, adequate and continued funding of the Coast Guard's expansive recapitalization project, known as Deepwater,¹⁸² is essential to ensure the Coast Guard has the proper assets to interdict threats far from our shores in order to secure the homeland from maritime terrorism and other criminal threats.

VIII. CONCLUSION

Our nation faces a bloodthirsty and ruthless terrorist enemy. Their rhetoric speaks for itself. From an al-Qaeda training manual:

The confrontation we are calling for with the apostate regimes does not know Socratic debates, Platonic ideals or Aristotelian diplomacy. But it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun. Islamic governments have never and will never be established through peaceful solutions and cooperative councils. They are established as they always have been, by pen and gun, by word and bullet, by tongue and teeth. . . . [We pledge] to make their women widows and their children orphans . . . to make them desire death . . . to slaughter them like lambs . . . [and] to be a pick of destruction for every godless and apostate regime.¹⁸³

It is impossible to negotiate with such an enemy. To terrorists, the only

179. See JOHNSON, *supra* note 73, at 331-32.

180. See Vice Admiral James Hull, U.S.C.G., et al., *What Was the Coast Guard Doing in Iraq?*, PROCEEDINGS OF THE U.S. NAVAL INST., Aug. 2003, at 38, available at <http://www.usni.org/Proceedings/Articles03/PROhull08.htm>.

181. NATIONAL STRATEGY FOR MARITIME SECURITY, *supra* note 32, at 22.

182. See Rear Admiral Patrick M. Stillman, U.S.C.G., *Deepwater and Homeland Security*, SEA POWER, Apr. 2002, at 65, available at http://www.navyleague.org/sea_power/april_02_10.php (describing the Deepwater project's importance for modernizing the Coast Guard's fleet to maximize maritime domain awareness and operational response capabilities).

183. MILITARY STUDIES IN THE JIHAD AGAINST THE TYRANTS 6-8, available at <http://www.the-smokinggun.com/archive/jihadmanual.html> (attributed to Osama Bin Laden).

deterrent to their deadly aims is the failure of their mission. It is our government's foremost priority to secure and defend the homeland from attack by denying terrorists access to our country.

Because the United States' maritime approaches offer terrorists a means to access and attack the homeland, they must be secured via a cooperative effort by numerous government agencies. Maritime domain awareness is critical to securing our shores. Effective intelligence and surveillance through layered security measures will expose threats before they reach our shores and enable their defeat through appropriate response measures. The appropriate response should reflect the following principles:

- Responding agencies must be properly trained and equipped to handle maritime terrorist incidents. As far as practicable, roles should be determined in advance to allow agencies to prepare for their respective roles in combating terrorism.
- The lead federal agency for any maritime terrorist incident should be the one that has the greatest capability to successfully and safely execute the mission – for maritime counterterrorism, this will be either the Navy or Coast Guard.
- Subordinate to the overriding objective of the successful protection of the homeland from terrorist attack, the lead federal agency should be determined by an objective-based approach.
- Where a maritime terrorist threat is such that the desired objective of the response is interdiction and arrest, the mission should be considered homeland security, and the DHS should take the lead. Here, the Coast Guard will likely be the lead federal agency, assisted when necessary by the Navy.
- Where the maritime terrorist threat is such that the threat is considered a military attack against the United States, and the desired objective is destroying the threat, the mission should be considered homeland defense and the DoD will take the lead. Here, the Navy will likely be the lead federal agency, assisted when necessary by the Coast Guard.
- The Coast Guard's unique status as a law enforcement agency and an armed force make it ideally suited to respond to most maritime terrorist incidents, regardless of whether it is initially considered homeland security or homeland defense. The Coast Guard has the unique flexibility to perform both missions, and this flexibility may prove important in such instances where the exact nature of the threat is unknown and the desired outcome is unclear. Accordingly, the DoD and Coast Guard should work

together to ensure that the Coast Guard is included in homeland defense response plans.

- To separate the areas of responsibility between the Navy and the Coast Guard in maritime counterterrorism operations, the division should not be based principally on geography, but rather on the operation's desired objective. As a general rule, the interdiction of maritime terrorist threats targeting our shores will be more likely to result in a prosecution before a United States court, and therefore the Coast Guard should assume the duties of lead federal agency. The Navy's role in maritime counterterrorism operations includes support to the Coast Guard in situations where Coast Guard assets are unavailable, as well as foreign maritime interception operations, including WMD interdiction operations in support of the PSI where there is less likelihood that the United States will exercise criminal jurisdiction.

There is no room for parochialism in protecting the American people from terrorism. Consequently, the shared spirit of the DoD and DHS, as well as the Navy and Coast Guard, must continue to be collegial and supportive. Yet, there should be some standing delineation between the Navy and Coast Guard's maritime counterterrorism responsibilities to maximize response coverage and to allow both agencies to effectively prepare for their missions. This Note has suggested a designation scheme based on the specific mission's desired objective. Regardless of what theory is ultimately selected, the Navy and Coast Guard's continued close cooperation remains essential to avoid overlap and to allow interoperability in situations where either service acts in support of the other.