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Joan Bondareff on

The Role of Small Vessels in National Security: Is DHS Doing Enough?

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Introduction. With thirteen million registered recreational vessels (and perhaps eight million unregistered vessels) plying U.S. waters every year, it is not surprising that the Commandant of the Coast Guard, Admiral Thad Allen, has raised the critical question as to whether these vessels are "Friend or Foe?" and, in reply to his own question, said it is "Tough to Tell."¹ But the Coast Guard and its parent organization, the Department of Homeland Security (DHS), have taken serious steps to develop a new security strategy focused solely on small vessels. A small vessel is defined as a vessel that is less than 300 gross tons and generally less than 100 feet in length. It can be a recreational, fishing, or commercial vessel for purposes of this strategy. With the exception of small commercial vessels that do meet a higher standard of security,² as a general rule, these vessels are not subject to SOLAS or the ISPS Code.³

The Coast Guard, DHS, and Congress, since 9/11, initially focused on the security requirements for large vessels.⁴ However, given the role small vessels played in the tragic 2000 attack on the *USS Cole*⁵ and the apparent maritime link to the 2008 Mumbai attacks,⁶ it is understandable that in recent years these agencies and Congress have turned their attention to small-vessel security.

This attention has resulted in the issuance by DHS of a Small Vessel Security Strategy (Strategy) in April 2008. Subsequently, in September 2009, the DHS Office of Inspector

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1. Thad Allen, *Friend or Foe? Tough to Tell*, Proceedings (Oct. 2008), available at www.usni.org.
 2. The requirements for commercial small vessels are described at length in the October 2009 issue of *Foghorn* magazine, a publication of the Passenger Vessel Association. See www.foghornmagazine.com.
 3. The International Convention for the Safety of Life at Sea (SOLAS), adopted November 1, 1974, entered into force May 25, 1980, as amended by the International Ship and Port Facility Security Code (ISPS), which entered into force July 1, 2004. Go to www.imo.org/Conventions.
 4. The Marine Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064, was one of the first U.S. laws to address security requirements for large vessels, and is intended to implement the IMO's ISPS Code for them.
 5. Raphael Perl & Ronald O'Rourke, Congressional Research Service Report No. RS20721, *Terrorist Attack on USS Cole: Background and Issues for Congress* (Jan. 20, 2001).
 6. "The United States warned the Indian government about a potential maritime attack against Mumbai at least a month before last week's massacre in the country's financial capital left nearly 180 dead, a U.S. counterterrorism official told CNN." *Source: U.S. Warned India about possible Mumbai attack*, Dec. 2, 2008, <http://www.cnn.com/2008/WORLD/asiapcf/12/01/india.attacks2/index.html>.

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General (OIG) released a report critical of the Strategy, entitled "DHS' Strategy and Plans to Counter Small Vessel Threats Need Improvement."⁷ This article reviews and discusses the 2008 Strategy, the OIG report, efforts by private entities such as the National Association of Boating Law Administrators (NASBLA) and the Passenger Vessel Association (PVA) to enhance maritime security, as well as the recent issuance by the International Maritime Organization (IMO) of nonbinding guidelines for the security of vessels that are not covered by SOLAS or the ISPS Code. The article also touches briefly on recent, relevant congressional actions.

Review of the DHS Small Vessel Security Strategy. After hosting a 2007 Summit in Arlington, Virginia, with involved stakeholders, in 2008 DHS issued its Strategy. The Strategy initially notes the difference between the present security regimes for large and small vessels. For example, all large vessels have to submit to the Coast Guard a ninety-six-hour "Advance Notice of Arrival" and a cargo manifest/crew list within twenty-four hours of departure, and must carry the Automatic Identification System. In contrast, DHS acknowledged that it lacks centralized access to hull identification and vessel registration (owner) data with respect to small vessels, there are uneven requirements for small-vessel user certification and documentation, and there are very limited advance-notice requirements for most small recreational vessels arriving from abroad.

While acknowledging that the vast majority of small-vessel operators are legitimate, law-abiding citizens, DHS expressed its concern that small vessels could be implicated in a terrorist-related attack. As the Commandant identified in his "Friend or Foe" letter, referenced above, several serious attacks have been linked to small vessels, including the *USS Cole* attack, the October 2002 attack by a small fishing vessel with explosives into the side of the supertanker *Limburg*, and the November 2005 attack on the cruise ship *Seabourne Spirit* by terrorists using twenty-five-foot inflatable boats.⁸

The Small Vessel Security Strategy identified the following four scenarios of greatest concern that small vessels could pose in terrorist-related attacks:

1. "Domestic Use of Waterborne Improvised Explosive Devices (WBIEDs)";

7. DHS OIG-09-100.

8. Proceedings, *supra* note 1, at 15.

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2. "Conveyance for smuggling weapons (including WMDs) into the United States";
3. "Conveyance for smuggling terrorists into the United States"; and
4. "Waterborne platform for conducting a stand-off attack (e.g. Man-Portable Air Defense System (MANPADS)) attacks."

As part of its strategic vision for responding to these potential scenarios, the Strategy determined that a "one-size-fits-all approach cannot adequately ensure U.S. maritime security and safety due to the diversity of the maritime domain and the heterogeneity of the small vessel community."⁹ Therefore, the Strategy contains four diverse goals with specific objectives pertaining to each goal.

The first goal is to: "*Develop and leverage a strong partnership with the small vessel community and public and private sectors in order to enhance maritime domain awareness.*"¹⁰ A specific objective to address this goal is to partner with the eighty million individuals who participate in recreational boating activities each year, and to increase public awareness of how to report suspected terrorist activity through America's Waterway Watch (AWW).¹¹ DHS cited as a prime example of the success of AWW when a tour boat operator in Florida in 2003 reported suspicious activity by one of its passengers, which led to the investigation of the suspect and his apprehension in New York.¹²

The second goal of the Strategy is to: "*Enhance maritime security and safety based on a coherent plan with a layered, innovative approach.*"¹³ To implement this goal, the Coast Guard will identify which operators present a low-risk profile, and develop appropriate risk-targeting systems to distinguish high-risk users. The Coast Guard also called for enhanced use of the ninety-six-hour-advance-notification rule for recreational vessels entering U.S. waters from overseas.

9. Strategy at 11, 15.

10. Strategy at 16.

11. www.AmericasWaterwayWatch.org.

12. Strategy at 16.

13. *Id.* at 17.

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The third major goal is to: "*Leverage technology to enhance the ability to detect, determine intent [of], and when necessary, interdict small vessels.*"¹⁴ To achieve this goal, the Coast Guard acknowledged that it must expand research into low-cost, non-intrusive, small-vessel-identification systems, such as radio frequency identification (RFID) tags, adaptable miniature transponders, portable GPS devices, or cell-phone-based recognition systems.¹⁵ The Coast Guard also has memoranda of understanding with States to allow access to basic information about state-registered recreational vessels through the Vessel Identification System.

The fourth and final goal of the Strategy is to: "*Enhance coordination, cooperation, and communications between Federal, state, local, and Tribal partners and the private sector as well as international partners.*"¹⁶ One way to implement this goal, according to DHS, is to update area maritime security processes to ensure that small vessels are addressed when conducting area assessments and developing area security-management plans. Another method, as the Commandant described in "Friend or Foe," is to partner with organizations such as NASBLA. He credits NASBLA with "advocating for the state registration of all motorized and non-powered vessels (canoes, kayaks, etc.)" to increase maritime domain awareness at the local and state levels. The PVA is another source of cooperation on security matters.¹⁷

To carry the Strategy to the next phase, the Coast Guard is developing an implementation plan to provide detailed direction to all DHS agencies on how to achieve the four major goals. As of this writing, we do not have information on the date of release of the plan.

Review of the OIG Report and DHS Response. DHS OIG found the Strategy to be deficient in certain respects after comparing it with the six characteristics for an effective national anti-terrorism strategy articulated by the General Accounting Office (GAO) in its 2004 report entitled "Combating Terrorism: Evaluation of Selected Characteristics in National Strategies Related to Terrorism."¹⁸ The six characteristics pre-

14. *Id.* at 19.

15. *Id.* at 20.

16. *Id.*

17. See www.passengervessel.com.

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scribed by GAO include: problem definition and risk assessment; goals and performance measures; identification of resources; organizational roles and responsibilities; and integration and implementation.

The OIG criticized the Coast Guard for not addressing all of the characteristics laid out in the GAO report, such as setting priorities, milestones, performance measures, or progress indicators. The OIG also criticized the Coast Guard/DHS for not providing detailed information regarding costs, human capital, resources, or economic principles. Finally, the OIG commented that DHS had not sufficiently analyzed the adequacy of certain programs and processes that DHS would rely on in support of its Strategy, such as the AWW and the Pleasure Boat Reporting System that Customs and Border Protection administers for small vessels traveling to the United States from a foreign country. OIG complained that the AWW is not widely known, that AWW calls are not tracked, and that the Pleasure Boat Reporting System is ineffective and the data it gathers not accurate.

In response, DHS partly agreed and partly disagreed with the OIG's conclusions. For example, DHS acknowledged that it could address more of the GAO characteristics and stated that it planned to do so in the execution of its implementation plan.¹⁹ However, DHS did not concur with the OIG recommendation that it needed to evaluate the effectiveness of programs such as AWW and the Pleasure Boat Reporting System in order to use them as part of its solution to improve security from small-vessel threats, since they had been recommended by DHS agencies as useful tools.²⁰

Initial Assessment and Next Steps—Implementation Plan, IMO Guidelines, and Congressional Action. While it is beyond the scope of this article to fully assess either the GAO process or the OIG report, in the view of this author, the OIG report is fairly formulaic and fails to take into account the diffuse nature of the recreational boating community, the tremendous cost of administering a new security program for the eighty million Americans who enjoy recreational boating, and the seriousness of the effort that the Coast Guard and rest of DHS have undertaken in trying to develop a Small Vessel Security Strategy that balances the individual rights of boaters in this country to operate

18. GAO-04-408T (statement of Randall A. Yim to the Subcommittee on National Security, Emerging Threats, and International Relations of the House Committee on Government Reform, to be given February 3, 2004). The GAO has been rechristened the "Government Accountability Office."

19. OIG report, *supra* note 7, at 17.

20. *Id.*

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in U.S. waterways alongside other maritime partners with the damage that a terrorist attack from a small vessel of the nature described above could inflict on a waterway, port, or other critical infrastructure.

In the meantime, DHS is developing and planning to release an implementation plan to fill in a number of the gaps identified by the OIG. The Coast Guard has also worked closely with the IMO's Maritime Safety Committee to develop a set of nonbinding guidelines that can be used by government and private entities engaged in small-vessel operations and security. The IMO issued the guidelines in December 2008 to address the lack of existing guidance on security aspects of those ships that do not fall within the scope of SOLAS and the ISPS Code, i.e., small vessels.²¹ The IMO made clear that the guidance is not mandatory.

However, the author expects that a number of the guidelines will show up in the final Coast Guard implementation plan because they offer practical suggestions and best-management practices for government entities and operators alike. For example, the IMO recommended that Member States consider encouraging operators of pleasure craft to register with a suitable organization that could provide a database available for authorized online access to assist in both prevention and response activities related to both safety and security.²² The IMO also recommended that Member States encourage operators of small vessels engaged in international voyages to adopt, where appropriate, the provisions of the ISPS Code as industry best practice.²³ Finally, the Guidance contains detailed recommendations on how small vessels can mitigate the risk of theft, piracy, and armed robbery²⁴—a serious new (or new old) problem, but one that is not addressed in this commentary.

Congress is watching the development of the Strategy closely. In November 2009, the House Transportation and Infrastructure Committee expects to hold a hearing on Maritime Domain Awareness, which will include a review of the Strategy. Congress has also taken steps to correct the lack of criminal penalties for operators of submersible and

21. Non-Mandatory Guidelines on Security Aspects of the Operation of Vessels Which Do Not Fall Within the Scope of SOLAS Chapter XI-2 and the ISPS Code.

22. *Id.*, Annex at 5.

23. *Id.*, Annex at 6.

24. *Id.*, Annex at 20.

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semi-submersible vessels that engage in international voyages without a national registry.²⁵ And the House of Representatives just passed the Coast Guard Authorization Act for FY2010, which includes language directing the Secretary of Homeland Security to establish a Maritime Homeland Security Public Awareness Program, encouraging recreational and commercial boaters to improve awareness of activity in the maritime domain and report suspicious or unusual activity.²⁶

Conclusions. DHS and specifically the Coast Guard have undertaken a serious review of the potential threat from small vessels and taken the initial steps necessary to develop a security strategy and implementation plan for that strategy. DHS acknowledged, in response to the OIG report, that it needs to do more to follow all of the recommended GAO steps for such a strategy and plans to incorporate the suggestions in the implementation plan.

The small-boating community can expect to see closer scrutiny paid to small vessels—with accompanying increased regulation and financial commitments. The movement is likely to be in the direction of more SOLAS- and ISPS-like compliance mechanisms for owners and operators of small vessels. Companies with off-the-shelf technologies that can address these issues may also find a welcome mat at the Coast Guard.

For general information on international maritime security measures, see [Homeland Security Deskbook §10.02](#).

About the Author. [Joan Bondareff](#) is Of Counsel to Blank Rome LLP, in Washington, DC, and is a recognized expert in maritime law and regulations. Before entering private law practice, Ms. Bondareff was the Chief Counsel of the U.S. Maritime Administration and Acting Deputy Administrator; the Majority Counsel to the House Committee on Merchant Marine and Fisheries; and the Assistant General Counsel to the National Oceanic and Atmospheric Administration. Ms. Bondareff also served on the Transition Team for the Department of Transportation for the incoming Obama Administration on maritime issues. Ms. Bondareff

25. The Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. No. 110-407, 122 Stat. 4296.

26. Sec. 1101 of H.R. 3619 (2009).

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has published extensively in this field, including such articles as: *Changes in Congress — Changes in Store for the Maritime Industry*, 5 *Benedict's Maritime Bull.* 1 (2007) (co-author); *The Impact of the Economic Crisis on the Shipping Industry and Trade Consequences*, WIIT Newsletter (Women in International Trade), Winter 2009.

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