



COMMENT

UNREGULATED AND UNDER THE RADAR: THE NATIONAL SECURITY CASE FOR FEDERAL REGULATION OF CERTAIN SMALL MARITIME VESSELS

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While other forms of terrorist attack have received far more media attention, the threat of an attack utilizing a small maritime vessel remains a credible threat to American national security. In addition, while other potential conveyances for terrorist attacks have received extensive review and increased regulation in the post 9/11 security environment, small vessels have remained largely unregulated at the federal level as states have continued their traditional role as the primary regulator of small vessels. Examples of small vessel attacks on U.S. interests abroad illustrate the acknowledged vulnerabilities of American maritime interests in ports both at home and abroad. Despite these vulnerabilities, the advancement of potential legal regimes to combat them has been slow to develop at the federal level. This comment argues that a federal regulatory regime for certain small vessels that takes into account the concerns of all stakeholders is necessary to combat this evolving national security threat.

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INTRODUCTION

On October 6, 2002, in the early morning hours, a small vessel charted course toward the MV *Limburg*, an oil tanker flying a French flag in the Gulf of Aden off the coast of Yemen.¹ As one sailor recounted, he saw the small vessel move towards the MV *Limburg* and then ram the ship, causing a massive explosion and fire while also spilling about 90,000 barrels of oil into the sea.² The event, later ruled a terrorist attack, killed one sailor and injured twelve.³ Osama Bin Laden and Al-Qaeda eventually claimed responsibility for the attack, stating that the attack had “hit the umbilical cord and lifeline of the crusader community.”⁴ The attack on the MV *Limburg* was all the more devastating because it was a reminder of how vulnerable American interests are to a small vessel attack. Just two years, pre the attacks of September 11, 2001 (“9/11”), the USS *Cole* was also attacked by Al-Qaeda operatives while refueling in the Gulf of Aden.⁵ This shocking attack killed 17 American sailors and injured another 39.⁶ Although these attacks occurred halfway around the world, the threat of a small vessel attack is not limited to American interests in the Middle East and other conflict regions. Rather, the examples of the USS *Cole* and MV *Limburg* illustrate why these small vessel attacks are such a threat to American interests everywhere: they can be completed with relatively little funding and they do not require sophisticated

¹ Sebastian Rotella & Esther Schrader, *Tanker Blast Likely a Terror Attack, French Say*, L.A. TIMES (Oct. 11, 2002), <http://articles.latimes.com/2002/oct/11/world/fg-tanker11>.

² *Id.*

³ *Al-Qaeda Fugitive Killed in Yemen*, BBC NEWS (Oct. 1, 2006, 12:50 PM), http://news.bbc.co.uk/2/hi/middle_east/5396862.stm.

⁴ Ewen MacAskill & Brian Whitaker, *Alleged Bin Laden letter revels in recent attacks*, THE GUARDIAN (Oct. 15, 2002, 3:56 AM), <https://www.theguardian.com/world/2002/oct/15/alqaida.terrorism>.

⁵ *Id.*

⁶ *Id.*

technology.⁷ Given the obvious vulnerability, the threat of a small vessel attack in American waters and ports has been widely acknowledged by the American national security community, specifically the United States Coast Guard (“USCG”).⁸

The risk of a small vessel security incident is also far broader than simply the threat of a terrorist attack with a small vessel in American waters or ports. The threat of transnational criminal organizations trafficking in illicit contraband with small vessels is another great threat to American national security.⁹ This threat is a daily one in American ports as small vessels are, for the most part, unregulated, and are not required to announce arrivals in advance, make initial landing at a designated port of entry, or continually broadcast their position via transponder.¹⁰ This phenomenon creates a difficult enforcement environment for the USCG and other agencies charged with securing American maritime borders. Moreover, although the threat of transnational criminal organizations using small vessels to traffic in illicit contraband is acknowledged, most federal policy has focused on regulating the entrance of weapons and people into the country, not conveyances such as small vessels.¹¹

⁷ Akiva Lorenz, *The Threat of Maritime Security to Israel*, INT’L INST. FOR COUNTER-TERRORISM (Sept. 24, 2007), <http://www.ict.org.il/Article.aspx?ID=983> (noting that Al-Qaeda needed only about 40,000 American dollars in funding to carry out the USS *Cole*).

⁸ See U.S. COAST GUARD, *Western Hemisphere Strategy* (Sept. 2014) [hereinafter *USCG Western Hemisphere Strategy*]; U.S. DEP’T OF HOMELAND SEC., *Small Vessel Security Strategy* (Apr. 2008) [hereinafter *U.S. DHS Small Vessel Security Strategy*].

⁹ See *Securing the Border: Understanding Threats and Strategies for the Maritime Border: Hearing before the S. Comm. on Homeland Sec. and Gov’t Affairs*, 114th Cong., 3-4 (2015) (statement of Randolph D. Alles, Assistant Comm’r, Office of Air & Marine, U.S. Customs & Border Prot., Dep’t of Homeland Sec.) (discussing the threat of small vessels being used by transnational criminal organizations to traffic illicit contraband) [hereinafter *Securing the Border*].

¹⁰ *Id.*

¹¹ See generally U.S. CUSTOMS AND BORDER PROT., PROHIBITED AND RESTRICTED ITEMS (2015), <https://www.cbp.gov/travel/us-citizens/know-before-you-go/prohibited-and-restricted-items> (last visited Aug. 24, 2016). See generally U.S. DEP’T OF

However, a 2009 study conducted by the Customs-Trade Partnership Against Terrorism (“C-TPAT”) found that 34-percent of security breaches were due to a lack of conveyance security and inspection.¹² Further, given the sheer amount of vessels and people that must be inspected every year, the transnational criminal threat is constant. In 2014, the USCG screened 124,000 vessel Notices of Arrival (“NOA”) and 32.7 million crew and passenger records, illustrating the tremendous amount of opportunities available for transnational criminal organizations to traffic illicit goods into the United States.¹³ Although progress has been made in the area of small vessel security since 9/11, there is still no federal statute requiring small recreational vessels that leave American territorial waters and their operators to meet any uniform standards or federal regulations.¹⁴ Instead, small vessel licensing and regulation has been left almost exclusively to the states, which view vessel registration requirements as mainly a revenue generating enterprise, not a means of enhancing maritime security.¹⁵

This Comment argues that these growing national security threats from small vessels necessitate a federal statute. The statute would govern certain small vessels and preempt state regulations, which are insufficient given the increased risk of terrorist attack and the increased threat of illicit trafficking from transnational criminal

HOMELAND SEC., CROSS U.S. BORDERS (2015), <http://www.dhs.gov/how-do-i/cross-us-borders> (last visited Aug. 24, 2016).

¹² U.S. CUSTOMS-TRADE P’SHIP AGAINST TERRORISM, 5 STEP RISK ASSESSMENT PROCESS GUIDE 7 (2010).

¹³ *Prevention of and Response to the Arrival of a Dirty Bomb at a U.S. Port: Hearing before the H. Subcomm. on Coast Guard and Mar. Transp.*, 114th Cong. 3 (2015) (statement of Rear Admiral Peter. J. Brown, Assistant Commandant for Response Policy, U.S. Coast Guard).

¹⁴ See U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at i.

¹⁵ See generally *Registration Related Fees*, STATE OF CALIFORNIA DEPARTMENT OF MOTOR VEHICLES (2016), https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv_content_en/dmv/pubs/brochures/fast_facts/ffvr34 (illustrating that the State of California’s Fee Structure for Vessel Registration lacks a security component) [hereinafter *Registration Related Fees*].

organizations. Part I of this Comment examines the acknowledged threat of terrorist attack from small vessels in American coastal waters and the policy that has been enacted in the wake of the terrorist attacks of 9/11. This section also explores the danger of transnational criminal organizations using small vessels to engage in illicit activities and the policy that has been enacted in this area. Part II provides an overview of the current USCG, Environmental Protection Agency (“EPA”), state, and local regulations surrounding small vessels. Part III discusses the federal preemption of state law in the maritime sphere, examine other areas of maritime law in which the federal government has preempted state regulation, and demonstrates why federal preemption in the area of small vessels is a valid exercise of federal power under the Constitution’s Admiralty Clause (Article III, Section 2). Part IV lays out this Comment’s solution: an enabling statute to increase regulation of small vessels at the federal level, which would give the USCG the power to promulgate regulations related to any small vessels traveling outside the territorial seas of the United States, or 12 nautical miles.

This Comment argues that the United States should use a version of Singapore’s current regime as a model for regulating small vessels that wish to travel outside U.S. territorial seas and mandate that: (1) operators of these small vessels must maintain an operator’s license similar to the Transportation Worker Identification Credential (“TWIC”) required for transportation workers; and (2) require these small vessels to be tagged with a Harbor Craft Transponder System (“HARTS”), which transmits each vessel’s position, course, and speed. In addition, this Comment argues that the enacting statute should require states with access points to waters beyond U.S. territorial seas to enter into new Memoranda of Agreement (“MOA”) involving all maritime law enforcement in order to provide clarity in the enforcement of these new regulations and to ensure information sharing between federal, state, and local maritime law enforcement. The ultimate goal is to articulate a legal regime that can respond to the

increased threat from small vessels while taking into account the concerns of all stakeholders.

I. BACKGROUND: THE SMALL VESSEL THREAT

As is evident from responses to the USS *Cole* and the MV *Limburg*, the threat of a small vessel attack has been acknowledged by the national security community in the United States.¹⁶ In assessing this threat, the national security community has prescribed a variety of policies in an attempt to ensure the security of American ports and coastal waters.¹⁷ Additionally, the use of small vessels by transnational criminal organizations to traffic in illicit contraband is also well recognized.¹⁸ Thus, there has been a movement among policy makers to respond to the security threat of unregulated small vessels.

A. *The Recognized Threat of a Small Vessel Terrorist Attack*

Over 17 million small vessels operate in American waters.¹⁹ Every one of them is a potential bomb that could be used to inflict harm on an American port, industrial vessel, or military ship.²⁰ Although, at the time of this Comment, estimates state that as many as 22 million small vessels are operating in American waters, the threat of a small vessel attack is predominately from vessels near border regions and high-value targets.²¹ Therefore, although the characterization of small vessels as 17 million potential bombs may be

¹⁶ See USCG WESTERN HEMISPHERE STRATEGY, *supra* note 8; U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8.

¹⁷ See *id.*

¹⁸ See *Securing the Border*, *supra* note 9

¹⁹ Ben Iannotta, *17 Million Potential Bombs*, C4ISR DIG. ED. (Apr. 7, 2008), <http://archive.defensenews.com/article/20080407/C4ISR01/804070305/17-million-potential-bombs>.

²⁰ *Id.*

²¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-32, MARITIME SECURITY: DHS COULD BENEFIT FROM TRACKING PROGRESS IN IMPLEMENTING THE *SMALL VESSEL SECURITY STRATEGY*, Highlights of GAO 14-32 (2013) [hereinafter GAO 14-32].

somewhat far-fetched, the threat of small vessel attacks and smuggling operations is a genuine one that has been acknowledged by the highest ranking national security officials in the United States.²²

As former Department of Homeland Security (“DHS”) Secretary Michael Chertoff warned at the National Small Vessel Security Summit in 2007, “The enemy is not wasting time . . . This attack technique [using a small vessel] is one they have used before [and] it is one that they will likely use again.”²³ In 2008, USCG Admiral Thad Allen cautioned that small vessel security is an “asymmetric threat” and that small vessels exposed “inherent vulnerabilities” in our maritime security apparatus.²⁴ In July 2015, the chairman of the Senate Committee on Homeland Security and Governmental Affairs, Rob Johnson (R-WI), acknowledged the threat that small vessels pose on the Great Lakes in his home state because of their ability to “blend in with commercial trade and recreational boaters,” creating “a challenging enforcement environment.”²⁵ Even President Obama has acknowledged the threat, specifically in a declaration entered into with Canada in 2011 entitled *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness*, which includes the goal of implementing the DHS *Small Vessel Security Implementation Plan*.²⁶ In addition to the general threat of a small vessel attack, the DHS *Small Vessel Security Strategy* recognizes two specific scenarios as the gravest small vessel threats: (1) domestic use of waterborne improvised explosive devices (“WBIED”); and (2) waterborne platforms for conducting a standoff attack (e.g., man-portable air

²² U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 31 (quoting DHS Secretary Michael Chertoff on the threat of a small vessel terrorist attack).

²³ *Id.*

²⁴ Admiral Thad Allen, *Friend or Foe? Tough to Tell*, PROCEEDINGS 15, 18 (2008).

²⁵ See *Securing the Border*, *supra* note 9 at 1.

²⁶ *Leveraging Law Enforcement Cooperation to Enhance Security Along America’s Coasts: Hearing Before the H. Subcomm. on Border & Mar. Sec.* 112th Cong. 17-18 (2011) (statement of Rear Admiral Paul Zukunft, Assistant Commandant for Marine Safety, Sec., & Stewardship, U.S Coast Guard).

defense system (“MANPADS”) attacks).²⁷ These are noteworthy both for the destruction they can cause and the fact that they have been carried out by terrorists internationally in the past.²⁸

The loss of human life following a small vessel attack is an obvious and serious concern, but the hidden cost is the effect that a small vessel attack would have on our port system. Even if a major American port was shut down for only a few days following a small vessel attack, the economic costs could be in the billions.²⁹ A 2006 study cited in the DHS *Small Vessel Security Strategy* estimated that the economic impact of a 15-day closure at the Port of Los Angeles/Long Beach due to a radiological bomb would be approximately \$34 billion.³⁰ A more recent 2014 study on the national impact of a west coast port stoppage found that the reduced economic output for a stoppage of 5 days would be \$9.4 billion (.05% of GDP); a stoppage of 10 days would result in a .12% loss of GDP, or \$21.2 billion.³¹ Despite other more high-profile security threats, the threat of a small vessel attack has been acknowledged at the highest levels of government because of its clear potential for human and economic loss. This concern is also warranted because a small vessel attack has

²⁷ U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 11.

²⁸ *Id.* at 12, 14 (citing the USS *Cole* attack as an example of a WBIED attack and citing Somali pirate attack as an example of a MANPADS Attack).

²⁹ Brian Patrick Hill, *Maritime Terrorism and the Small Boat Threat to the United States: A Proposed Response* (Mar. 2009) (unpublished Master’s Thesis, Naval Postgraduate School) (on file with Naval Postgraduate School) (citing Alex Viega, *Los Angeles Ports Facing Strike Threat*, ASSOCIATED PRESS (July 16, 2007)) (noting that, in 2002, a Longshore Workers Union 10-day strike on the west coast cost the U.S. economy an average of \$1 billion dollars per day in losses).

³⁰ U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 11 (citing *The Economic Impact of a Terrorist Attack on the Twin Ports of Los-Angeles-Long Beach*, in *THE ECONOMIC IMPACTS OF TERRORIST ATTACKS* (2006)).

³¹ *The National Impact of a West Coast Port Stoppage*, NAT’L ASS’N OF MFRS. & NAT’L RETAIL FED’N 5 (June 2014), <https://nrf.com/sites/default/files/Port%20Closure%20Full%20Report.pdf>.

several characteristics that make it appealing to terrorist organizations of all sizes and capabilities.

1. Low Startup Costs

The costs associated with a small vessel attack are relatively low, with the USS *Cole* attack costing Al-Qaeda only about \$40,000.³² The security community has recognized that small boat attacks are preferred by terrorist organizations because of these low costs in comparison to more sophisticated means of maritime terrorism.³³ As maritime security scholars have illustrated, obtaining a vessel capable of carrying out a small vessel attack is simply not cost prohibitive to terrorist organizations.³⁴ For instance, in discussing the low startup costs associated with transnational criminal organizations obtaining vessels to illegally fish, Anastasia Telesetsky noted that an organization could obtain a 152-foot vessel with tons of storage capacity on the open market for a mere \$200,000.³⁵ Even more concerning, the size of the vessel in this example is much larger than the vessels that were used to carry out the USS *Cole* and MV *Limburg* attacks. A terrorist organization could use something as low-cost as a small fiberglass boat (as Al-Qaeda did in the USS *Cole* attacks).³⁶ The cost prohibitive aspects of other forms of terrorism do not apply to the small boat threat.

³² Akiva Lorenz, *The Threat of Maritime Security to Israel*, INT'L INST. FOR COUNTER-TERRORISM (Oct. 1, 2007), <http://www.ict.org.il/Article.aspx?ID=983>.

³³ Philip Guy, *Maritime Terrorism*, CTR. FOR SEC. STUDIES 5 (2011).

³⁴ Anastasia Telesetsky, *Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime*, 41 ECOLOGY L.Q. 939, 951-52 (2014) (discussing the ease with which transnational criminal organizations can obtain fishing vessels for IUU fishing).

³⁵ *Id.* at 939, 952.

³⁶ CINDY C. COMBS & MARTIN W. SLANN, ENCYCLOPEDIA OF TERRORISM 353 (2009) (discussing USS *Cole* attack).

2. Potential for Attacks by Unsophisticated Actors

Another central reason why small vessel attacks are a continuing threat is that they do not entail a great deal of organizational or operational sophistication. The example of Somali piracy off the coast of Africa illustrates this point.³⁷ As former Senator John D. Rockefeller (D-WV) stated in 2009 during a subcommittee hearing on the growing piracy issue, the situation was frustratingly akin to “men in speed boats” abusing “the most powerful and advanced Navy in the world.”³⁸ The frustration with the Somali piracy issue is well documented, and numerous solutions have been offered as practical steps that can be taken against the threat of a small boat attack on a commercial ship.³⁹

Unfortunately, certain inherent characteristics of small vessel attacks make them more accessible to unsophisticated actors. One is that there is a very low barrier to entry in terms of the skills necessary to operate a small vessel.⁴⁰ While other types of attacks require a higher level of sophistication, such as the skills associated with the 9/11 hijackings, operating a small boat does not require extensive skills or experience, and few regulations limit unsophisticated actors from obtaining these skills.⁴¹ A second characteristic is that a small vessel

³⁷ *Piracy on the High Seas: Protecting Our Ships, Crews, and Passengers: Hearing before S. Subcomm. on Surface Trans. and Merch. Marine, Infrastructure, Safety, and Sec.*, 111th Cong. Appx. (2009) (prepared statement of Sen. John D. Rockefeller IV) (discussing the unsophisticated nature of Somali piracy).

³⁸ *Id.*

³⁹ See generally Theodore T. Richard, *Reconsidering the Letter of Marque: Utilizing Private Security Against Piracy*, 39 PUB. CONT. L.J. 411 (2010) (discussing private security solution to Somali piracy); see also Martin N. Murphy, *Suppression of Piracy and Maritime Terrorism--A Suitable Role for a Navy?* NAVAL WAR C. REV. (2007) (discussing whether the suppression of piracy is best carried out by a Navy or other means).

⁴⁰ U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 5 (discussing the low barriers to entry in the small vessel community).

⁴¹ *Id.*

attack requires very little planning and can be coordinated fairly quickly. The alleged mastermind behind the USS *Cole* and MV *Limburg* attacks, Abd al-Rahim al-Nashiri, was able to plan and execute the USS *Cole* attack a mere 10 months after the failed small vessel attack on the USS *The Sullivans*, illustrating the ease with which the materials and personnel necessary to carry out the attack could be acquired.⁴² Although al-Nashiri was known as “the Prince of the Sea” for his maritime terrorism activities, it is up for debate whether he was truly a sophisticated operative, considering that one U.S. intelligence official charged with interrogating him called him “the dumbest terrorist I have ever met.”⁴³ These two characteristics demonstrate that the small boat threat presents a unique array of vulnerabilities due to its unsophisticated methods and the low skill barrier to entry.

B. Transnational Organized Crime: Small Vessels and the Trafficking of Illicit Contraband

Aside from the threat of a terrorist attack, unregulated small vessels also present an appealing avenue for transnational criminal organizations to traffic illicit contraband into the United States.⁴⁴ The DHS *Small Vessel Security Strategy* identifies two of the gravest threats from small vessels: (1) A conveyance for smuggling weapons (including Weapons of Mass Destruction (“WMDs”)) into the United States; and (2) A Conveyance for smuggling terrorists (or other illegal

⁴² NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9-11 COMMISSION REPORT: AL QAEDA AIMS AT THE AMERICAN HOMELAND (2004).

⁴³ Patrick Hill, *supra* note 29, at 28; See Ali H. Soufan, *Will a CIA Veteran’s Book Save a Terrorist*, BLOOMBERG VIEW (May 8, 2012, 7:00 PM), <http://www.bloombergvie.com/articles/2012-05-08/will-a-cia-veteran-s-book-save-a-terrorist-> (noting CIA official Jose Rodriguez in his book endorsed a colleague’s characterization of Al-Nashiri as “the dumbest terrorist I have ever met”).

⁴⁴ U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 12-13 (noting two of the gravest threats from a small vessel are the smuggling of people into the United States and the smuggling of illegal weapons or nuclear material into the United States).

maritime migrants) into the United States.⁴⁵ The documented links between terrorist organizations and transnational criminal organizations that have become evident in recent years make these two threats even more troubling.⁴⁶

One example of these two threats converging is the danger that transnational criminal organizations may engage in human trafficking aboard small vessels. In 2010, the USCG detained 2,088 illegal migrants attempting to enter the United States by sea, and it is suspected that thousands still attempt to journey to the United States by sea every year.⁴⁷ Many of these migrants also pay thousands of dollars to illegal smugglers in an attempt to make this journey; exacerbating the human costs of this phenomenon.⁴⁸ In addition to the threats from terrorism previously noted, this example illustrates the threat that small vessels being used by transnational criminal organizations pose to the security of the United States. After examining the current federal policy with regards to small vessels, it seems clear that the current regime comes up short in countering the threats of a terrorist attack and transnational organized crime.

⁴⁵ *Id.*

⁴⁶ See Tamara Makarenko, *The Crime-Terror Continuum: Tracing the Interplay between Transnational Organized Crime and Terrorism*, 6 GLOBAL CRIME 1, 129-45 (2004) (arguing that the 1990's can be seen as the decade where crime-terror nexus was consolidated); see also Louise I. Shelley & John T. Picarelli, *Methods and Motives: Exploring Links Between Transnational Organized Crime and International Terrorism*, 9 TRENDS IN ORGANIZED CRIME 2, 52-67 (2005) (arguing that the methods not motives approach to analyzing the relationship between terrorism and transnational organized crime has become restrictive in the 21st century).

⁴⁷ Ray Walser, Jena Baker McNeil, & Jessica Zuckerman, *The Human Tragedy of Illegal Immigration: Greater Efforts Needed to Combat Smuggling and Violence*, THE HERITAGE FOUND. (June 22, 2011), <http://www.heritage.org/research/reports/2011/06/the-human-tragedy-of-illegal-immigration-greater-efforts-needed-to-combat-smuggling-and-violence>.

⁴⁸ *Id.*

C. *Current Federal Policy on Preventing Terrorist Attacks and Transnational Crime by Small Vessels*

Regulation surrounding the small vessel community spans across 18 federal agencies and is a difficult area in which to articulate a coherent federal policy.⁴⁹ However, in 2008, DHS published the *Small Vessel Security Strategy*, a comprehensive small vessel security plan for the country. When publishing this plan, DHS envisioned “a coordinated effort of Federal, state, local, and tribal authorities, together with international partners, private industry, and recreational users of the waterways” to improve maritime security and safety.⁵⁰

In addition to identifying potential threats and laying out a strategic vision, the strategy also identified four major goals: (1) developing and leveraging a strong partnership with the small vessel community, and public and private sectors, in order to enhance maritime domain awareness; (2) enhancing maritime security and safety; (3) leveraging technology to enhance the ability to detect, determine intent, and when necessary, interdict small vessels based on a coherent plan with a layered, innovative approach; and (4) enhancing coordination, cooperation, and communications between federal, state, local, tribal partners, and the private sector as well as international partners.⁵¹ In essence, DHS sought to enhance security as much as it could within the current federal regulatory framework for small vessels. Although these are all worthy goals, as with many strategies and policies without a specific authorizing statute,

⁴⁹ U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 5.

⁵⁰ *Id.* at i.

⁵¹ *Id.* at 16-21.

implementation has lagged⁵² It took until 2011 for the USCG to release the *Small Vessel Security Implementation Plan*.⁵³

In addition to the general theme of state and local cooperation in the *Small Vessel Security Strategy*, DHS and the USCG lay out some substantive implementation measures in the *Small Vessel Security Implementation Plan*. The most significant regulation mandated automatic identification system (“AIS”) carriage on commercial vessels 65 feet and longer, tugs of 26 feet and longer with over 600 horsepower, and certain passenger carrying vessels.⁵⁴ The USCG did finally issue a final regulation on AIS carriage pertaining only to commercial vessels in January 2015 and included small vessels, under 300 gross tons, which “come from a foreign port or place.”⁵⁵ However, this regulation does not apply to noncommercial small vessels, any commercial vessels under 300 gross tons, or any commercial vessels permanently in the United States.⁵⁶ As this overview demonstrates, steps have been taken in line with the 2008 *Small Vessel Security Strategy* to improve small vessel security. However, as the following part of this Comment illustrates, much of the regulation concerning small vessels still falls to the states.

II. THE CURRENT REGULATORY REGIME CONCERNING SMALL VESSELS

Before implementing a new federal regulatory regime, it is important to identify what regulations currently exist and why they

⁵² GAO 14-32, *supra* note 21 (stating that DHS should begin to track progress in implementing the small vessel security strategy).

⁵³ See U.S. DEP’T OF HOMELAND SEC., SMALL VESSEL SECURITY IMPLEMENTATION PLAN REPORT TO THE PUBLIC (2011) [hereinafter SMALL VESSEL SECURITY IMPLEMENTATION PLAN]

⁵⁴ *Id.* at 6.

⁵⁵ Vessel Requirements for Notices of Arrival and Departure, and Automatic Identification System, 80 Fed. Reg. 5,283 (Jan. 30, 2015) (to be codified at 46 C.F.R. pts. 4, 148, 33 C.F.R. pts. 62, 66, 101, 110, 117, 118, 151, 160, 161, 164, 165).

⁵⁶ *Id.*

fail to meet security needs. This portion of the Comment provides an overview of current state regulations on small vessels and their jurisdiction, the USGC's current minimal regulations on small vessels, and the EPA's movement to regulate small vessels in recent years.

A. Review of Current State Regulations on Small Vessels and their Jurisdiction

This section reviews small vessel regulations for four jurisdictions: California, Texas, Florida, and New York. These states are chosen for their high boating populations and because they are highly populated coastal areas that could be appealing targets for terrorist groups and for transnational criminal organizations.

In California, all vessels over eight feet in length and every motor vessel that is not documented by the USCG and is used principally in California must be registered in the state.⁵⁷ There are several exemptions to registration: (1) vessels registered in another state and not principally used in California; (2) non-motorized surf boards; and (3) vessels propelled solely by paddles or oars.⁵⁸ Floating structures designed to be used as stationary waterborne dwellings (houseboats) are also exempt, provided they have a permanent and continuous hookup to a shoreside sewage system.⁵⁹ At first glance, this appears to be a fairly comprehensive regulatory regime, since every motorized vessel in the state must be registered. However, the fact that vessels registered in another state and not principally used in California are exempt is problematic, given that the California Department of Motor Vehicles would be expected to determine whether a vessel is principally used in California. One way to identify

⁵⁷ *Vessel Boat Registration and Information*, STATE OF CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv_content_en/dmv/boatsinfo/boatreg (last visited Aug. 30, 2016) [hereinafter *Vessel Boat Registration and Information*].

⁵⁸ *Id.*

⁵⁹ *Id.*

out-of-state vessels is through the International Justice and Public Safety Network (“NLETS”), a nonprofit organization owned by states that facilitates information sharing between law enforcement and offers a “Coast Guard Vessel Transaction” to assist maritime law enforcement in identifying out-of-state vessels.⁶⁰ However, states must have an MOA with the USCG and the requesting state in order to obtain state vessel data through this transaction; as of 2010, only 25 states and 6 territories had such an arrangement.⁶¹ More importantly, the California regulations do not include Global Positioning System (“GPS”) tagging, AIS, or boating license requirements, with the exception of rules against minors operating some types of motorized vessels.⁶² The absence of GPS Tagging and boating license requirements means that almost anyone can operate a boat and also ensures that most vessel remain under the radar of maritime law enforcement.

In Texas, all motorized boats, sailboats over 14 feet, and sailboats with an auxiliary engine must be registered.⁶³ However, as in California, there are no GPS tagging, AIS, or boating license requirements and until September 2016 (when certain federal regulations were implemented) one could register a vessel in Texas without even presenting a driver’s license.⁶⁴

In Florida, all motorized vessels, and all non-motorized vessels over 16 feet in length must also be registered.⁶⁵ Florida also

⁶⁰ Chelsea S. Keefer, *Coast Guard Vessel Transaction*, PSC ONLINE (Apr. 30, 2010), http://psc.apcointl.org/2010/04/30/nlets_coast_guard_vessel_transaction.

⁶¹ *Id.*

⁶² *Vessel Boat Registration and Information*, *supra* note 57.

⁶³ TEX. PARKS AND WILD. CODE ANN. § 31.045 (West 2015) [hereinafter TEX. § 31.045]; 33 C.F.R. § 174 (2016) mandates that a valid driver’s license be presented for boat registration by individuals.

⁶⁴ *Id.*

⁶⁵ *Vessel Registration & Titles*, FLORIDA DEP’T OF HIGHWAY SAFETY AND MOTOR VEHICLES (2015), <https://www.flhsmv.gov/safety-center/consumer-awareness/vessel-registration-titles>.

exempts out-of-state owners from registering, provided they are registered in another state and the owner plans to return within a reasonable amount of time, which is not defined in the statute.⁶⁶ As noted in the above discussion of California's regulations, there are currently ways in which maritime law enforcement in Florida could potentially identify an out-of-state vessel.⁶⁷ One way for law enforcement to identify out-of-state vessels is the USCG's Maritime Information Exchange platform, which provides USCG maritime information publicly on the internet through searchable databases.⁶⁸ However, participation by states is voluntary; thus, not every small vessel is included in these databases currently.⁶⁹ As in Texas and California, there are no provisions for GPS tagging, AIS, or boating license requirements in Florida.⁷⁰

Finally, in New York, all vessels must be registered, with the exception of kayaks and non-motorized canoes.⁷¹ Exemptions include lifeboats, any vessel registered in another state and not kept in New York, commercial vessels registered in foreign countries, and American vessels registered with the USCG.⁷² New York does have a licensing requirement for motorboat operators under the age of 18, but again, there are no provisions for GPS tracking, AIS, or general boating license requirements.⁷³

⁶⁶ *Id.*

⁶⁷ See Keefer, *supra* note 60.

⁶⁸ *Maritime Information Exchange*, U.S. COAST GUARD (2015), (last visited Aug. 30, 2016) <https://cgmix.uscg.mil/Default.aspx>.

⁶⁹ See U.S. DHS, *PRIVACY IMPACT ASSESSMENT FOR THE COAST GUARD MARITIME EXCHANGE 2* (2015).

⁷⁰ See *Vessel Registration & Titles*, FLORIDA DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES (2015), <https://www.flhsmv.gov/safety-center/consumer-awareness/vessel-registration-titles/>.

⁷¹ *Register a Boat*, NEW YORK DEP'T OF MOTOR VEHICLES (2015), <http://dmv.ny.gov/registration/register-boat> [hereinafter *Register a Boat*].

⁷² *Id.*

⁷³ *Id.*

As shown through these examples, states regulate small vessels in a very limited way, and the limited regulations in place exist for purposes other than enhancing security.⁷⁴ In addition, all the states listed have a registration exemption for small vessels registered in another state, making tracking small vessels problematic even when the state has an MOA with the USCG.⁷⁵ As the DHS *Small Vessel Security Strategy* notes, states ought to take responsibility in facilitating small vessel regulations for certain vessels “under certain threat conditions.”⁷⁶ However, the registration fees for these small vessels, ranging from 26 to 93 dollars in New York, become a fairly significant source of revenue for state governments when multiplied by thousands and thus create a disincentive for states to take action that might decrease that revenue.⁷⁷

B. The United States Coast Guard’s Current Regulation of Small Vessels

Although largely absent from the regulation of small recreational vessels, the USCG does regulate certain small passenger and commercial vessels. Title 46 of the Code of Federal Regulations regulates various types of vessels based on size and use in the form of registration, inspection, and certification requirements.⁷⁸ At the most rudimentary level, all motorized small vessels under 300 gross tons are not required to register with the USCG.⁷⁹ Moreover, all non-self-propelled vessels under 100 gross tons, all sail vessels under 700 gross

⁷⁴ See *Registration Related Fees*, *supra* note 15; *Register a Boat*, *supra* note 70.

⁷⁵ See generally *Vessel Boat Registration and Information*, *supra* note 57;

TEX. § 31.045, *supra* note 63; *Register a Boat*, *supra* note 70.

⁷⁶ U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 25.

⁷⁷ See *Register a Boat*, *supra* note 70.

⁷⁸ Vessel Inspections, 46 C.F.R. § 2.01-7 (2014).

⁷⁹ *Id.*

tons, and all steam vessels under 65 feet are also exempt from USCG regulation.⁸⁰

However, there are several ways in which a small vessel may be subject to USCG regulations. All vessels, regardless of method of propulsion, carrying combustible or flammable liquid cargo in bulk are subject to inspection and must be certified by the USCG, as are all manned barges and all vessels carrying dangerous cargos as defined by 46 C.F.R. § 98.⁸¹ For passenger vessels, all motorized vessels that carry more than 12 passengers on an international voyage, all motorized vessels over 100 gross tons that carry more than 12 passengers for hire, all submersible motorized vessels that carry at least 1 passenger for hire, and all motorized vessels under 100 gross tons that carry more than 6 passengers for hire are required to be certified and are subject to inspection.⁸² The key exception here is that all recreational vessels not engaged in trade, and all fishing vessels not engaged in ocean or coastwise service, are exempt from these registration, inspection, and certification requirements.⁸³ For sailing passenger vessels, all vessels under 700 gross tons carrying any passengers for hire are subject to inspection and certification requirements, while sailing passenger vessels over 700 gross tons are subject to the same requirements and exceptions as motorized vessels.⁸⁴ Steam vessels under 65 feet carrying passengers are also subject to the same requirements and exceptions as motorized vessels.⁸⁵ All ferries, regardless of propulsion method, are subject to certification and inspection requirements if they carry at

⁸⁰ *Id.*

⁸¹ Vessel Inspections, 46 C.F.R. § 2.01-7.; Special Construction, Arrangement, and Other Provisions for Certain Dangerous Cargoes in Bulk, 46 C.F.R. § 98 (2014) (including various items such as combustible liquids, chemical cargos, and corrosive toxic liquids among others).

⁸² 46 C.F.R. § 2.01-7.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

least one passenger for hire.⁸⁶ The most important takeaway from an analysis of these regulations for purposes of small vessel security is that all recreational vessels not engaged in trade, and all fishing vessels not engaged in ocean or coastwise service, are categorically exempt from all of these regulations, regardless of propulsion method.⁸⁷

All vessels not subject to the certification and inspection requirements of 46 C.F.R. § 2.01-2.07 are considered uninspected vessels and are thus subject to the requirements of Subchapter C of Title 46, with the notable exception of vessels operating exclusively in inland waters, which are not navigable waters of the United States.⁸⁸ However, the requirements for uninspected vessels laid out in 46 U.S.C. § 25 are not licensing or registration requirements.⁸⁹ These regulations only require that vessels meet certain requirements related to navigation lights, life preservers, fire extinguishing equipment, and other systems aboard vessels.⁹⁰

Section 25 does include provisions mandating that certain commercial fishing and passenger vessels not covered by 46 C.F.R. § 2.01-2.07 have Emergency Positioning Indicating Radio Beacons (“EPIRB”).⁹¹ These devices can track a ship if it is distressed and can be manually engaged in an emergency situation or automatically engaged if they touch water.⁹² However, these devices are not as useful

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Vessels Subject to the Requirement of This Subchapter, 46 C.F.R. § 24.05-1 (2014).

⁸⁹ 46 CFR §§ 25.01-25.50 (2015).

⁹⁰ *See id.*

⁹¹ Emergency Position Indicating Radio Beacons (EPIRB), 46 CFR § 25.26-5 to -10 (2015).

⁹² NOAA – SEARCH AND RESCUE SATELLITE AIDED TRACKING, *Emergency Position Indicating Radio Beacon (EPIRB)*, <http://www.sarsat.noaa.gov/emercns.html> (last visited Aug. 30, 2016).

from a national security perspective because they do not track a vessel's position until an emergency situation has occurred.⁹³

This discussion of USCG regulations illustrates the many exemptions that allow small vessels to avoid any licensing, registration, or inspection requirements outside of those in Section 25, which still has various exemptions. With the exception of the recently promulgated AIS requirement for small vessels under 300 gross tons from foreign ports discussed in Part I of this Comment, nearly all small vessels remain unregulated.

C. The Environmental Protection Agency's Foray into the Regulation of Small Vessels

Although small vessels have generally been regulated by individual states, the EPA's recent decision illustrates that there is precedent for such regulation, and also demonstrates the difficulties that arise when attempting to regulate small vessels.⁹⁴ The EPA's regulations focus on the discharge of ballast water by vessels under 79 feet.⁹⁵ Their first attempt to regulate small vessels in 2005, which actually excluded normal discharges incidental to operation of a vessel from the National Pollutant Discharge Elimination System ("NPDES"), was held to exceed the agency's authority under the Clean Water Act ("CWA").⁹⁶ The district court found that the CWA did not give the EPA authority to exempt certain discharges from regulation while regulating others.⁹⁷ This decision was upheld by the Ninth Circuit in 2008.⁹⁸ In response, the EPA developed two different

⁹³ See *id.*

⁹⁴ See *Vessels Program History National Pollutant Discharge Elimination System (NPDES)*, U.S. EPA, <https://www.epa.gov/npdes/vessels-program-history> (last visited Sept. 3, 2016) [hereinafter *Vessels Program History*].

⁹⁵ *Id.*

⁹⁶ Northwest Env'tl. Advocates v. EPA, 2006 WL 2669042, 5-6 (N.D. Cal. 2006).

⁹⁷ *Id.* at 15.

⁹⁸ Northwest Env'tl. Advocates v. EPA, 537 F.3d 1006, 1022 (9th Cir. 2008).

proposed permits to regulate discharges from vessels that did not exempt normal discharges incidental to operation of a vessel, in line with the Ninth Circuit's holding.⁹⁹ One of these was the Recreational Vessel General Permit, which would have applied to recreational vessels, but to which the recreational boating lobby was vehemently opposed.¹⁰⁰ However, Congress responded by passing the Clean Boating Act of 2008, which stated that recreational vessels would not be subject to the requirement of obtaining the NPDES to authorize discharges incidental to their normal operation, and directed the EPA to evaluate recreational vessel discharges and develop appropriate management practices for appropriate discharges.¹⁰¹

One of the central reasons for the inclusion of this exemption was pressure from the recreational boating lobby. Several industry groups, including the National Marine Manufacturers Association, pushed for this exemption because they believed the EPA's previous promulgation of regulations under the NPDES had "left a cloud hanging over the industry."¹⁰² Further illustrating the recreational boating lobby's influence, in 2010, Congress imposed a moratorium on the EPA, or the states requiring NPDES, permitting for discharges incidental to operation of non-recreational, commercial fishing vessels, and commercial vessels less than 79 feet.¹⁰³ However, vessels under 79 feet with ballast water discharges were not exempt from NPDES permitting.¹⁰⁴ The moratorium on requiring NPDES permitting for discharges incidental to the operation of all vessels less

⁹⁹ *Vessels Program History*, *supra* note 93.

¹⁰⁰ *Id.*; *Trade Groups Lobby Support for Clean Boating Act of 2008*, PONTON AND DOCK BOAT MAGAZINE (Mar. 25, 2008), <http://www.pdbmagazine.com/2008/03/trade-groups-lobby-support-for> [hereinafter *Trade Groups Lobby Support for Clean Boating Act*].

¹⁰¹ Clean Boating Act of 2008, 33 U.S.C. § 1251 (2008)

¹⁰² *Trade Groups Lobby Support for Clean Boating Act*, *supra* note 99.

¹⁰³ See Pub. L. No. 110-299 (2010) (codified as 33 U.S.C. 1342).

¹⁰⁴ Pub. L. No. 110-299, 122 Stat. 2995 (2008) (codified as amended at 33 U.S.C. 1342 note).

than 79 feet that do not have ballast water discharges has been extended twice, and is now in place until December 2017.¹⁰⁵ However, the EPA estimates that 61,000 domestically flagged commercial vessels are still subject to the NPDES permitting requirements, including thousands of small vessels under 300 gross tons.¹⁰⁶

As the EPA's foray into the regulation of small vessels illustrates, regulating small vessels is no easy task. Small recreational vessels in particular are difficult to regulate because of the recreational boating lobby's efforts to fight regulation, fueled by fears that regulation will chill recreational boating in the United States.¹⁰⁷ However, this overview demonstrates that the EPA, despite an extended moratorium on the regulation of certain small vessels, has been able to regulate certain discharges of small vessels under 300 gross tons and under 79 feet.¹⁰⁸ Moreover, given that this Comment's proposed solution would only apply to operators and vessels wishing to travel outside the territorial sea (12 nautical miles), it would affect a smaller number of vessels than the EPA's regulations and would withstand pressure from the recreational boating lobby.¹⁰⁹ The EPA's regulatory actions also show that the federal government does have the authority to regulate small vessels with a well-crafted enacting statute from Congress. Finally, Congress may be more inclined to give the USCG power to regulate small vessels, rather than the EPA. One provision of the Clean Boating Act of 2008 directs the EPA to conduct

¹⁰⁵ Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213 § 703, 126 Stat. 1540, 1580 (2012) (extending moratorium until Dec. 2014); Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281 § 602, 128 Stat. 3022, 3061 (2014) (extending moratorium until Dec. 2017).

¹⁰⁶ *Vessels Program History*, *supra* note 93.

¹⁰⁷ *Trade Groups Lobby Support for Clean Boating Act*, *supra* note 99 (noting that the cost of proposed EPA permitting could be as high as 2,000 dollars per boat per state).

¹⁰⁸ *Vessels Program History*, *supra* note 93.

¹⁰⁹ *Maritime Zones and Boundaries*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. OFFICE OF GEN. COUNSEL, http://www.gc.noaa.gov/gcil_maritime.html (last visited Aug. 26, 2015) (noting that the territorial sea of the United States has been twelve miles since 1988).

a study on vessel discharges, but then would have the USCG promulgate regulations requiring recreational boater compliance with the study's recommended practices.¹¹⁰ This legislative history suggests that Congress is more comfortable giving the USCG regulatory authority over small vessels given its maritime expertise as opposed to the EPA, an agency that is often portrayed as an overzealous regulator. However, regardless of what agency is issuing regulations pertaining to small vessels, the relationship between federal and state law continues to play a vital role.

III. FEDERAL PREEMPTION OF STATE LAW IN THE MARITIME ARENA

In assessing whether the USCG can regulate small vessels in a more substantial way, it is important to look to other ways federal regulation has preempted state regulation in the maritime sphere. Substantial case law supports the position that the USCG may, with congressional authority, preempt state regulations of vessels, as the courts have given substantial deference to Congress in this area. This section gives a historical overview of federal regulation in the maritime arena and reviews several areas in which federal regulations have preempted state law, including regulations concerning oil tankers, recreational vessels, and regulation enacted based on a state's police power. This section also responds to potential critiques of increased federal regulation, including state sovereignty and privacy concerns.

¹¹⁰ *Clean Boating Act (CBA): About*, US ENVTL. PROT. AGENCY: *About*, <https://www.epa.gov/vessels-marinas-and-ports/clean-boating-act-cba-about> (last updated Oct. 22, 2015).

A. *Historical Overview of Federal Regulation in the Maritime Arena*

Courts have a long history of recognizing federal supremacy in the maritime arena.¹¹¹ In the seminal case of *Gibbons v. Ogden*, the Supreme Court struck down a New York law granting an exclusive license to one operator to navigate steamboats on state waters, holding that the federal license preempted the state's regulation under the Commerce Clause.¹¹² The Court again invalidated a state statute regulating maritime activity in *Sinnot v. Davenport*, where the Court held that the federal license granted to the vessel contained the only restraints that Congress had seen fit to impose on vessels engaged in the coastal fishing trade, and that the state could not add or detract from federal regulations on vessels.¹¹³ These cases illustrate that the Supreme Court recognized the federal government's supremacy in the maritime arena early in the development of American maritime law, particularly as it related to state laws that directly conflicted with congressional action.

Furthermore, the Court has held that in the absence of federal regulation, states may exercise a localized police power in the maritime sphere. In *Cooley v. Board of Warrens*, the Court upheld a Pennsylvania state law that required ships with a federal license to employ a local pilot for navigation in the Port of Philadelphia because it was not in conflict with the law of Congress and did not interfere with any system of federal regulation.¹¹⁴ Additionally, the Court upheld the constitutionality of the State of Washington's regulation of tugboats in *Kelly v. Washington* because tugboats under 65 feet in length were not regulated by the USCG; thus, the Court determined

¹¹¹ For a comprehensive overview of USCG regulations and federal preemption, see generally David E. O'Connell & Frederick J. Kenney Jr., *United States Coast Guard Vessel Regulations and Federal Preemption*, 88 TUL. L. REV. 677 (2014).

¹¹² *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹¹³ *Sinnot v. Davenport*, 63 U.S. 227, 241-44 (1859).

¹¹⁴ *Cooley v. Bd. of Warrens*, 53 U.S. 299, 321 (1851).

that Congress had not intended to occupy the entire field of regulation.¹¹⁵

In assessing the Supreme Court's view of congressional power in the maritime arena, it is evident from these cases that federal regulation will preempt state regulation in cases where Congress intends to occupy the entire regulatory field. Thus, the relevant inquiry when assessing a federal maritime statute is whether Congress has intended to occupy the entire field, or whether it has left room for the states to regulate "outside that limited field."¹¹⁶ In essence, the Court in *Kelly* endorsed a regime of concurrent powers, unless federal regulation and state regulation came into direct conflict to the point that they could not be reconciled.¹¹⁷ The point at which a conflict between state and federal regulation becomes direct has been assessed by the Court in several areas of vessel regulation.

B. Regulations Related to Oil Tankers and Oil Spills

The case for federal preemption of state regulations has only grown stronger in more modern cases, particularly those concerning the regulation of oil tankers and oil spills. In *Ray v. Atlantic Richfield Co.*, the Court held that the state of Washington's attempts to regulate the design, size, and movement of oil tankers in Puget Sound was preempted by the Ports and Waterways Safety Act of 1978 ("PWSA") because state regulation "would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers."¹¹⁸ The Court expanded this regime as it relates to oil tankers in *United States v. Locke*, holding that the state of Washington's regulations concerning tanker design, equipment, and operating requirements were again preempted by the PWSA because, in cases where state laws concern national and

¹¹⁵ *Kelly v. Washington*, 302 U.S. 1, 10 (1937).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978).

international maritime commerce, “there is no beginning assumption that concurrent regulation by the state is a valid exercise of its police powers.”¹¹⁹ The Court further applied the field preemption doctrine to the Washington statute because the PWSA clearly stated that Congress had left no room for state regulation in matters related to the design of oil tankers.¹²⁰ The oil tanker cases demonstrate that the Court is inclined to allow federal preemption in the maritime sphere under the doctrine of field preemption when the statute in question demands uniformity.¹²¹ In enacting a statute to regulate small vessels for the purposes of national security, Congress would need to ensure that the statute demands uniformity in order for it be upheld. However, the oil tanker cases clearly demonstrate how expansive the doctrine of federal preemption is in the maritime arena when Congress intends to occupy the entire field of regulation.¹²²

C. *Regulations Related to Recreational Vessels*

One key provision of the Small Vessel Security Act (“SVSA”) this Comment proposes is the regulation of recreational vessels and their operators, an area where the federal government has traditionally left regulation to the states. However, the Federal Boat Safety Act of 1971 (“FBSA”) illustrates one instance where the federal government has regulated small recreational vessels, as the act expressly preempts state law unless the USCG gives states permission to regulate.¹²³ In contrast to the PWSA, the USCG is under no obligation under the FBSA to issue regulations pertaining to recreational vessels.¹²⁴ Regardless of this difference in statutory construction, any regulations issued by the USCG under the FBSA would almost certainly “be field

¹¹⁹ *United States v. Locke*, 529 U.S. 89, 108 (2000).

¹²⁰ *Id.* at 111 (citing *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141 (1982) (explaining field preemption)).

¹²¹ *Id.* at 110 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978)).

¹²² *Id.*

¹²³ 46 U.S.C. § 4306 (1983).

¹²⁴ *See* 46 U.S.C. § 4302 (2016).

preemptive of any identical state regulation.” because of the explicit preemption clause contained in the statute¹²⁵

The seminal case in this area, *Sprietsma v. Mercury Marine*, concerned whether the USCG’s decision not to promulgate regulations requiring propeller guards on recreational boats prohibited state tort claims from a plaintiff who had been killed by a vessel’s propeller.¹²⁶ The Supreme Court examined three distinct theories that could have supported the preemption defense: (1) the FBSA expressly preempts common law claims; (2) the USCG’s decision not to regulate propeller guards preempts the claims; and (3) the potential conflict between diverse state rules and the federal interest in a uniform system of regulation impliedly preempts such claims.¹²⁷ The Court found that the FBSA plainly did not expressly preempt state common law claims because the statutory language applied only to a state/local regulation, which the Court naturally read not to include common law claims as it would have been superfluous for Congress to include the word “regulation” had it intended the FBSA to preempt state common law claims.¹²⁸

In addition, the FBSA contains a clause stating that compliance does not relieve a person from liability at common law or under state law.¹²⁹ In assessing whether the USCG’s decision not to promulgate propeller guard regulations constituted implied preemption, the Court held that the USCG would have had to issue an “authoritative” message against the regulation of propeller guards in order for implied preemption to occur.¹³⁰ Finally, in addressing whether the statute as a whole implicitly preempted state common law claims, the Court held that the Act’s lack of a requirement for the

¹²⁵ O’Connell et. al., *supra* note 111, at 706.

¹²⁶ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 (2002).

¹²⁷ *Id.*

¹²⁸ *Id.* at 63.

¹²⁹ 46 U.S.C. § 4311(g) (2015).

¹³⁰ *Sprietsma*, 537 U.S. at 67.

USCG to promulgate regulations pertaining to all aspects of recreational boating meant the act did not preempt state common claims, since the FBSA specially reserves such claims (unlike the PWSA in the Oil Tanker Cases, which was silent on the issue).¹³¹ The analysis of this case is important in enacting a small vessel security statute because it illustrates that Congress must explicitly occupy the regulatory field in order for field preemption to take effect without needing to resort to implied or implicit preemption, which is far more likely to fail before the Court. Therefore, any version of the Small Vessel Security Act must require that the USCG promulgate regulations related to certain aspects of vessels and their operations, not simply give the USCG the option of doing so, as in the FBSA.

D. Regulations Preempting State Regulation Based on a State's Police Power

Another issue that could arise after enacting the SVSA might come in the form of a state attempting to subvert the Act by exercising its police power to regulate preempted categories, claiming the regulation is aimed at another purpose. In *Huron Portland Cement Co. v. City of Detroit*, a shipping company appealed a criminal fine, arguing that Detroit's smoke abatement ordinance was preempted because the vessel was engaged in interstate commerce and only subject to federal regulations regarding its smoke emissions.¹³² The Court held that there was no overlap between Detroit's ordinance and the federal statute because Congress did not intend to supersede the state's police power in areas not covered by the federal legislation; the Court found that regulating air pollution was not covered by Congress in the statute in question.¹³³ Further, the Court held that the federal licensing scheme did not immunize the vessel from a local ordinance because the ordinance did not constitute a direct regulation

¹³¹ *Id.* at 69.

¹³² *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 441-42 (1960).

¹³³ *Id.* at 445-46.

of commerce, citing *Cooley* and *Kelly*.¹³⁴ Again, this example demonstrates that any action to regulate small vessels must explicitly occupy the entire regulatory field and not leave open the opportunity for states to circumvent federal regulation by arguing that the regulation is aimed at another purpose. Although commentators have argued that a *Huron* analysis would be unlikely in today's regulatory environment, it would be unwise to rely on the Courts holding in this way.¹³⁵

Another issue that could arise in relation to the enforcement of the SVSA is privacy concerns related to the Fourth Amendment, as it is an open legal question whether operators of small vessels have greater Fourth Amendment protections than their larger counterparts.¹³⁶ However, the institution of a system that monitors small vessels' course, speed, and location, as discussed in Part IV of this Comment, would not alter the fact that this remains a disputed area of the law that is unrelated to whether vessels can be tracked, but is more concerned with the physical search of the vessel after it is detained.¹³⁷

¹³⁴ *Id.* at 447-48.

¹³⁵ O'Connell et. al., *supra* note 111, at 720-21 (arguing that a *Huron* analysis is unlikely to prevail today because of the extent of federal regulation in the maritime sphere).

¹³⁶ See *United States v. Cardona Sandoval*, 6 F.3d 15 (1st Cir. 1993) (holding that the search of a small vessel with drug sniffing dogs after it had been brought to port for safety reasons was in violation of the Fourth Amendment); *but see United States v. Lopez*, 761 F.2d 632 (11th Cir. 1985) (holding that defendants on a small vessel did not have a reasonable expectation of privacy in a secret compartment in the hull of their ship and thus Coast Guard's search was legal).

¹³⁷ See generally Pamela E. Antonopoulos, *Crew Members of Small Vessels Have Greater Privacy Interests Under Fourth Amendment to Challenge Unreasonable Searches—United States v. Cardona Sandoval*, 6 F.3d 15 (1st Cir. 1993), 28 SUFFOLK U. L. REV. 866 (1994) (discussing circuit split regarding small vessels and Fourth Amendment protections).

IV. PROPOSING A SOLUTION: THE SMALL VESSEL SECURITY ACT

This section of the Comment proposes a solution to the issue of small vessel security as it relates to the threat of terrorist attack and transnational organized crime: a statute referred to as the Small Vessel Security Act (“SVSA” or “Act”) in this Comment. This section argues that Congress should enact legislation explicitly authorizing and commanding the USCG to promulgate the following regulations: (1) all operators of motorized vessels in the United States who intend to use their vessel beyond the limits of the territorial sea of the United States are required to maintain a boating license similar to the Transportation Worker Identification Credential (“TWIC”); (2) the USCG must require the installation of a small vessel tagging system on those motorized vessels wishing to travel beyond the limits of the territorial sea, similar to the Harbor Craft Transponder System (“HARTS”) implemented in Singapore; and (3) the USCG and each state with access points to waters beyond the territorial sea of the United States must enter into MOAs to ensure cooperation between state and federal authorities in enforcing the licensing and tagging requirements of the first two provisions of the Act. If Congress were to enact this type of statute, it would be a major step towards combating the threat of a terrorist attack and transnational criminal activity from small vessels.

A. Maintenance of a Boating/Operator License

The SVSA would require that all operators of motorized vessels wishing to travel beyond the limits of the territorial seas of the United States maintain a boating operator license. This license would be similar to the TWIC, which provides a biometric credential to maritime workers requiring unescorted access to secure areas of port facilities, outer continental shelf facilities, and vessels regulated under

the Maritime Transportation Security Act of 2002.¹³⁸ All USCG credentialed Coast Guard mariners must also obtain a TWIC.¹³⁹ Under the SVSA, the boating license credential would be the same biometric credential needed for the TWIC. The chief practical reason for implementing this type of credential is that it is something the federal government has done before and, therefore, its costs are known and the resources to produce it have previously been employed.

In response to implementing this requirement for small vessel operators who wish to travel beyond the limits of the territorial sea, some may argue that the costs will simply outweigh any security benefit. The Transportation Security Administration (“TSA”) and Federal Emergency Management Agency (“FEMA”) received funding amounting to \$420 million from 2002 through 2010 to implement the TWIC program, and the agencies estimated in 2011 that they would need between \$694.3 million and \$3.2 billion over the next 10 years to continue implementing the program.¹⁴⁰ In addition, this estimate did not include costs associated with biometric card readers or related access control systems.¹⁴¹ The maritime transportation industry also bore a substantial cost from purchasing TWICs – an estimated \$185.7 million to \$234 million as of 2011.¹⁴² Although these numbers may seem outlandish for implementing a security program, it is likely that they would be far lower for the SVSA. Most American recreational vessels do not travel beyond the limits of the territorial sea and thus would not be subject to the regulations (unlike the TWIC which, as of May 2014, had issued nearly two million TWIC cards).¹⁴³ Also, since

¹³⁸ TWIC, TRANSP. SEC. ADMIN., <https://www.tsa.gov/for-industry/twic> (last visited Oct. 14, 2016) [hereinafter TWIC CREDENTIAL].

¹³⁹ *Id.*

¹⁴⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-657, TWIC SECURITY REVIEW: INTERNAL CONTROL WEAKNESSES NEED TO BE CORRECTED TO HELP ACHIEVE SECURITY OBJECTIVES 46 (2011).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ TWIC CREDENTIAL, *supra* note 138.

the capability to produce the cards already exists, it will be far easier to roll out the cards for the SVSA as opposed to the TWIC credential. Further, the benefits to law enforcement would be tremendous. It would allow maritime law enforcement to know instantly whether someone detained aboard a vessel entering back into the American territorial waters was correctly credentialed, since the ID would have a biometric component. Moreover, the credential would be far more difficult to counterfeit than a traditional driver's license because of the biometric component.

B. Small Vessel Tagging: Implementing Singapore's HARTS

Singapore provides an example of effective vessel regulation for the purposes of national security. Singapore has a heightened interest in securing its ports and waterways because its strategic location and natural deep water ports have made it a global maritime transportation hub.¹⁴⁴ The straits of Malacca and Singapore are some of the busiest shipping routes in the world, with more than 60,000 vessels passing through the straits annually.¹⁴⁵

After the terrorist attacks of 9/11, with this interest in mind, Singapore began taking steps to enhance the security of its ports by further regulating vessels of all kinds.¹⁴⁶ In 2002, after the new International Ship and Port Facility Code ("ISPS Code") was adopted, Singapore moved quickly to implement the standards.¹⁴⁷ In 2005, recognizing the threat of a small boat terrorist attack, Singapore began requiring that all small vessels have HARTS, similar to the Automatic

¹⁴⁴ Robert Beckman, *Singapore Strives to Enhance Safety, Security, and Environmental Protection in its Ports and in the Straits of Malacca and Singapore*, 14 OCEAN & COASTAL L.J. 167, 168 (2009).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 176-77.

¹⁴⁷ *Id.* at 177.

Identification System (“AIS”) already required on larger vessels.¹⁴⁸ The HARTS requirement now applies to all motorized harbor and pleasure crafts in Singapore’s waters.¹⁴⁹ The HARTS transmits a signal identifying its position, course, and speed to the Maritime and Port Authority of Singapore (“MPA”).¹⁵⁰ Importantly, when first implemented, the Singapore government paid for the equipment and installation costs on small vessels, which significantly increased support for the measure from the recreational boating industry.¹⁵¹ The cost of 120 Singapore dollars, about 85 American dollars, is now borne by the owner of the vessel.¹⁵² The MPA now focuses its security efforts on vessels without identification.¹⁵³

This review of Singapore’s HARTS regime illustrates how the simple use of an AIS-like transmitter can increase security at a relatively low cost to the owner. Moreover, it also demonstrates how this type of regime could be beneficial to the USCG and state law enforcement, because it would allow them to focus on vessels without proper identification and lower overall security costs in the long run.

In implementing the HARTS requirement in the United States, it would be wise to implement a nearly identical regime to Singapore, with the exception that it would only require the operators of small vessels who wish to travel beyond the territorial seas of the United States to obtain the credential. The reason for this major difference is twofold: (1) As discussed extensively in Part I of this

¹⁴⁸ *Singapore Beefs up Maritime Security; Installs Transponders on Small Vessels*, AGENCE FRANCE PRESSE, (July 1, 2005), www.singaporewindow.org/sw05/050701a1.htm. [hereinafter *Singapore Beefs up Maritime Security*].

¹⁴⁹ *Harbor Craft Transponder System*, MAR. AND PORT AUTH. OF SINGAPORE, <http://www.mpa.gov.sg/web/portal/home/port-of-singapore/port-operations/licensing-of-craft/harbour-craft/harbour-craft-transponder-system-harts> (last updated Jan. 7, 2016) [hereinafter HARTS System].

¹⁵⁰ *Singapore Beefs up Maritime Security*, *supra* note 148.

¹⁵¹ *Id.*

¹⁵² HARTS System, *supra* note 149.

¹⁵³ *Id.*

Comment, the threat from a small vessel attack or transnational criminal activity is likely to involve an offshore component; and (2) the costs associated with implementing this type of regulatory regime on all small motorized vessels would be far greater for the United States than Singapore. However, there are several aspects of Singapore's regime that the United States should certainly implement.

First, the federal government should cover the costs of the implementation for a period of time after the SVSA takes effect. This would limit the backlash from the recreational boating industry for implementing new regulations and make compliance with the new law as easy as possible for recreational boaters who wish to travel beyond the territorial sea limits.

Second, the implementation of these requirements would also need to be delayed for a reasonable period of time so that owners of motorized vessels would have sufficient time to comply with the new regulations. In Singapore, the process of full implementation took about three years and the process may take even longer in the United States given the larger geographic area involved and the number of potential vessels that may be required to comply with the new regulations.¹⁵⁴

However, the enhanced security that implementing HARTS brings to American law enforcement would be just as beneficial, if not more so, as it has been in Singapore. With the focus on untagged vessels without proper identification that either leave or enter the territorial sea of the United States, the USCG and state law enforcement would have a greater ability to thwart criminal activity and potential national security threats while lowering costs in the long run. Also, even if vessels engaged in potentially threatening activity were in compliance with tagging requirements, it would allow law

¹⁵⁴ Teo Chee Bang, Chang Keng Nee & Sunny Lee Chwee Thiam, *Introducing Harbour Craft Transponder System (HARTS) in the Port of Singapore*, 29 PORT TECH. INT'L 47, 49 (2012).

enforcement to obtain their location far more quickly than under the current regime, where most small vessels cannot be tracked at all.

C. *MOAs between States and the USCG*

The final prong of the SVSA will seek to enhance the effectiveness of implementing the HARTS by requiring that each state enter into MOAs with the USCG to ensure that federal, state, and local law enforcement can use the system effectively. A MOA is a tool frequently used by government agencies that lays out ground rules for positive cooperation to meet an agreed upon goal (in this case, implementing the HARTS effectively and enhancing maritime security generally).¹⁵⁵ The final portion of the SVSA would specifically require each state to enter into a MOA with the USCG, within a certain period of time following the Act's passage, in order to implement the HARTS system and effectively share the information that the HARTS system would provide law enforcement. Several states have already entered into MOAs for cooperative maritime law enforcement, with Maine being the first to do so.¹⁵⁶

Major John C. Fetterman, Vice President of the National Association of State Boating Law Administrators and a veteran maritime patrolman in Maine, pushed for states to enter into MOAs with the USCG at the 2007 Small Vessel Security Summit.¹⁵⁷ He explained that entering into these agreements would promote a comprehensive maritime law enforcement strategy across jurisdictional boundaries and noted other benefits that the MOA had provided Maine, including the ability to identify as a sub-grantee

¹⁵⁵ U.S. DEP'T OF HOMELAND SEC., REPORT OF THE DHS NATIONAL SMALL VESSEL SECURITY SUMMIT, 69 (2007) (noting that MOAs are already used by some states for the enforcement and safety of security zones) [hereinafter SMALL VESSEL SECURITY REPORT]; Patrick Hill, *supra* note 29, at 81 (recommending the use of MOAs for extending patrol and presence capabilities of maritime law enforcement).

¹⁵⁶ SMALL VESSEL SECURITY REPORT, *supra* note 155.

¹⁵⁷ *Id.*

under a comprehensive and standardized security program.¹⁵⁸ MOAs would be even more important in implementing the HARTS; they would be necessary to ensure that agreements were in place and that information from HARTS tracking could be easily shared between federal, state, and local law enforcement. The statute would allow for flexibility in the terms of the MOA between each state and the USCG, but would mandate certain minimum requirements, including the sharing of information under the newly implemented HARTS.

Finally, drafting and implementing these MOAs is a fairly low cost way of enhancing maritime security, as MOA forms have already been endorsed by the USCG for establishing a single Vessel Identification System (“VIS”) database for vessels that must currently register with the USCG.¹⁵⁹ Entering into new MOAs would simply extend these types of agreements to all motorized vessels that wish to navigate beyond the territorial seas of the United States, and would thus be monitored using the HARTS system.

D. A Suspicious Small Vessel: The SVSA in Action

An example illustrates how the SVSA could potentially benefit law enforcement. The USCG offers several examples of suspicious activities involving small vessels on its America’s Waterway Watch program webpage, which is designed to assist the boating public in identifying suspicious activity on the water.¹⁶⁰ One particular example demonstrates the potential benefits of the SVSA:

You work at a business that rents small boats by the hour. In the process of renting a boat for the day “to do some fishing,” two

¹⁵⁸ *Id.*

¹⁵⁹ See *Sample Memorandum of Agreement Between United States Coast Guard and State Regarding Exchange of Vessel Data*, AM. BAR ASS’N (2015), http://apps.americanbar.org/dch/thedl.cfm?/otherlinks_files/VIS_MOA.pdf.

¹⁶⁰ America’s Waterway Watch, *Suspicious Activity*, U.S. COAST GUARD (2012), http://americaswaterwaywatch.uscg.mil/Suspicious_Activity.html [hereinafter *Suspicious Activity*].

men ask about the “best fishing spots” on the bay and, pointing in the direction of the Navy Base to the north, ask if that might not be a good place to fish. You tell them, “No, the best fishing is in the South Bay area.” They fill out the paperwork, and pay you the required deposit and “full day” rate with a credit card. Neither of them seems all that interested in the terms of the contract, nor in the fact that they are not entitled to a partial refund if they return before the end of the day. You then help them load the boat with obviously brand-new fishing equipment and two large coolers, and take the time to remind them, “It might be a good idea to buy some bait.” After you check them out on operation of the boat, they leave the dock and head north in the direction of the Navy Base. The whole situation starts to seem strange to you, including the fact that the person's recently-issued driver's license provided as proof of identity, the bank credit card used for payment, and the license plate on their vehicle were from three different states.¹⁶¹

For purposes of our scenario, we assume that the men in question wish to travel in this recreational small vessel beyond the territorial seas of the United States and meet up with another vessel to obtain supplies for a terrorist attack.¹⁶² Under the current regulatory regime, the person renting out the vessel, the USCG, or other maritime law enforcement, can do little about a situation like the one described above. The USCG would deem the totality of the oddities in this situation as “suspicious activity,” but would have to rely on the person or company renting out the vessel to report it before they could take action.¹⁶³

In this scenario, the SVSA would provide several stopgap measures that would allow this suspicious activity to be investigated

¹⁶¹ *Id.*

¹⁶² This portion of the scenario has been added by the author to best illustrate all aspects of the Small Vessel Security Act. It is not included in the U.S. Coast Guard's scenario on American Waterway Watch Website.

¹⁶³ *Suspicious Activity*, *supra* note 160.

by maritime law enforcement without needing the person renting out the boat to recognize the suspicious activity and report it. First, the men attempting to rent the boat in this scenario would need to have the boater's license necessary to travel beyond the limits of the territorial sea. If they did not, and were detained for venturing beyond the limits of the territorial sea, they would be in violation of the SVSA immediately, and the USCG or other maritime law enforcement could perform a search and find the supplies they had obtained from another vessel. It is likely that if the SVSA were enacted and implemented, persons seeking to commit a terrorist attack or obtain supplies for a terrorist attack with a small vessel would likely not rent from a licensed operator bound to follow the law. However, this would further benefit law enforcement looking for potential attacks or criminal activity. If persons seeking to carry out terrorist attacks or criminal activity with small vessels are forced to buy their own vessels or obtain vessels through illegal means, it would allow law enforcement more chances to recognize the suspicious activity and thwart it before a terrorist attack or other illicit activity occurred.

Second, even if the men in the above scenario somehow fabricated the biometric boater's license, the vessel in question (if it was a rental) would not be equipped with a HARTS under the SVSA, which would identify the vessel's position, course, and speed to the relevant maritime law enforcement.¹⁶⁴ Therefore, if the men in the above scenario charted a course at high speed beyond the territorial seas of the United States, maritime law enforcement monitoring vessel activity in the area would be able to identify the suspicious behavior quickly.

In addition, the third prong of the SVSA would also be beneficial in this scenario. If the USCG were monitoring the HARTS under a MOA with the state in which the activity was occurring, the USCG could share the position, course, and speed information of the

¹⁶⁴ *Singapore Beefs up Maritime Security*, *supra* note 148.

suspicious vessel with state law enforcement. This type of information sharing would be of particular importance in cases where state or local law enforcement was better positioned to quickly reach the suspicious vessel in question.

As the analysis of the above the scenario demonstrates, the SVSA would provide many benefits to maritime law enforcement attempting to stop terrorist or translational criminal activities.

V. CONCLUSION: A FEDERAL SOLUTION TO A NATIONAL
THREAT

The question of small vessel security is, of course, a complex one. However, the SVSA proposed by this Comment would certainly be a step towards securing American waters and maritime borders from small vessel threats, whether from terrorist attacks or transnational criminal organizations trafficking in illicit contraband. As this Comment acknowledges, enacting such a statute would certainly face obstacles in the current political and regulatory climate. Proposing federal preemption in an area in which states have traditionally exercised exclusive domain is a policy that is sure to spark debates about the way the American federal system ought to operate. Moreover, the most pragmatic objection that is likely to be raised in response to the SVSA is a simple one: Why do we need this statute now if we haven't experienced a large scale small vessel attack in American waters? Although this objection is a reasonable one, if the United States were to approach national security law and policy in this manner, history tell us that vulnerabilities will occur and will be exploited. The three prongs of the SVSA present a workable regulatory framework to address the small vessel security threat while also taking into account state sovereignty, individual privacy, and the economic benefits that recreational boating brings to American coastal communities. The chances of this act or a similar one becoming law in the coming years may be unlikely, but small vessels can only remain unregulated for so long in a world where the threat is so well

documented. Where the common defense requires preemptive solutions, the United States must enact a federal solution to combat such a national threat. The SVSA is such a solution.





NATIONAL SECURITY LAW JOURNAL

Excerpt from Vol. 5, Issue 1 (Fall/Winter 2016)

Cite as:

Richard Q. Sterns, Comment, *Unregulated and Under the Radar: The National Security Case for Federal Regulation of Certain Small Maritime Vessels* 5 NAT'L SECURITY L.J. 162 (2016).

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ISSN: 2373-8464

The *National Security Law Journal* is a student-edited legal periodical published twice annually at the Antonin Scalia Law School at George Mason University in Arlington, Virginia. We print timely, insightful scholarship on pressing matters that further the dynamic field of national security law, including topics relating to foreign affairs, intelligence, homeland security, and national defense.

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