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**The standard that should be used by the U.S. coast guard in regard to its provision of boarding vessels arriving to the U.S. coasts**

Silvia Garcia Ausin

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CASE WESTERN RESERVE  
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MEMORANDUM FOR THE UNITED STATES COAST GUARD

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ISSUE: THE STANDARD THAT SHOULD BE USED BY THE U.S. COAST GUARD IN REGARD TO ITS  
PROVISION OF BOARDING VESSELS ARRIVING TO THE U.S. COASTS

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**LL.M. Student, November 2015**

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## CONTENTS

<b>TABLE OF AUTHORITIES</b> .....	2
Statutes and Rules .....	2
Cases .....	2
Law Review and Articles .....	3
Websites .....	4
<b>I. INTRODUCTION</b> .....	5
<b>A. Issue</b> .....	5
<b>B. Summary of Conclusions</b> .....	5
a. Limits of the intelligence-community participation in boarding vessels. ....	5
b. Crewmember’s resource if the intelligence community oversteps its authority. ....	6
c. Authority to board vessels: U.S. Coast Guard or U.S. Customs and Border Protection..	7
d. Risk for the agency for permitting the involvement. ....	7
<b>II. FACTUAL BACKGROUND</b> .....	9
<b>A. Factual background of the U.S. Coast Guard</b> .....	9
a. Primary law enforcement authority.....	9
b. Coast Guard’s Missions .....	10
<b>B. 14 U.S.C. 89 (a): Boarding Vessels</b> .....	11
a. U.S. Coast Guard Jurisdiction .....	12
b. Failure to permit the boarding.....	13
c. Advance Notice of Vessel Arrival .....	14
<b>C. The Coast Guard enters the Intelligence Community</b> .....	15
a. Coast Guard’s responsibilities.....	15
<b>III. SUBSTANTIVE LEGAL DISCUSSION</b> .....	17
<b>A. What are the limits of intelligence-community participation in boarding vessels carrying such passengers?</b> .....	17
a. The individual’s Fourth Amendment right and the legitimate government interests ....	17
b. Limits in boarding vessels and the expectation of privacy .....	19
<b>B. What is the crewmember’s recourse if the intelligence community oversteps its authority?</b>	21
<b>C. Does it matter whether the boarding is done under USCG authority or U.S. Customs and Border Protection authority?</b> .....	22

**D. Is there any risk to the agency for permitting the involvement?..... 23**  
**a. Recommendation for the United States Coast Guard..... 24**  
**CONCLUSION..... 26**

## **TABLE OF AUTHORITIES**

### **Statutes and Rules**

1. 14 United States Code § 89 (a) - Law enforcement.
2. Intelligence Authorization Act for Fiscal Year 2002, signed by President George W. Bush.
3. 14 United States Code § 1 – Establishment of Coast Guard.
4. 14 United States Code § 141 – Cooperation with other agencies, States, territories, and political subdivisions.
5. George Bush: "Executive Order 12807 - Interdiction of Illegal Aliens," May 24, 1992.
6. Ports and Waterways Safety Act (PWAS) Authority (33 USC 1221 et seq.)
7. 18 United States Code § 2237 (a) (1) – Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information.
8. Appendix G, Federal Laws and Conventions Authorizing U.S. Coast Guard Activities.
9. Code of Federal Regulations Title 19, Section 4.1 (a).

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<http://www.uscg.mil/international/affairs/publications/mmscode/english/chap3.htm>)
46. Office of the Director of National Intelligence (website:  
<http://www.dni.gov/index.php/intelligence-community/members-of-the-ic#top>)

## **I. INTRODUCTION**

### **A. Issue**

This memorandum addresses the standard that should be used by the U.S. Coast Guard in regard to its provision of boarding vessels arriving to the U.S. coasts.<sup>1</sup> This memo looks at the history of the U.S. Coast Guard, hereinafter USCG, and its relationship with the Intelligence Community. It discusses the differing law enforcement powers that the agency has in order to enforce Federal laws on, under, and over waters where the U.S. has jurisdiction. Additionally this memo examines the threats that the country faces and the advantages and disadvantages for permitting the involvement of the Intelligence Community in the USCG missions. In brief, the main problem that we have faced is what are the limits of the intelligence community's participation boarding vessels and what are the risks and resources that the agency has.

### **B. Summary of Conclusions**

#### **a. Limits of the intelligence-community participation in boarding vessels.**

The United States Coast Guard has not any limit at the time to board any vessel which is arriving to the U.S. coast and it is on U.S. jurisdictional waters according to the general law enforcement authority to board vessels which states that "*The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests*".<sup>2</sup>

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<sup>1</sup> What are the limits of intelligence-community participation in boarding vessels carrying such passengers? What is the crewmember's recourse if the intelligence community oversteps its authority? Does it matter whether the boarding is done under USCG authority or U.S. Customs and Border Protection authority? Is there any risk to the agency for permitting the involvement?

<sup>2</sup> 14 U.S. Code § 89 (a) - Law enforcement.

Regardless of this absence of jurisdictional limits, the USCG has some limits at the time to perform these inspections in the vessel, related with the areas that the officers could examine and the “expectation of privacy”.

Courts have determined that the expectation of privacy at sea is not the same as on land. This means that the inspections performed by the boarding officers could extend to any area of the vessel where a safety and documentation inspection would be reasonable,<sup>3</sup> because the expectation of privacy is lower at sea.

The right balance between freedom and security is worth debating recently. The USCG as a member<sup>4</sup> of the U.S. Intelligence Community and a component of the Department of Homeland Security, performs certain operations classified as homeland security missions. These missions are associated with the collection, analysis, processing and dissemination of intelligence in support of operational USCG’s labors. But when boarding vessels, USCG has to take into account that boarding officers and inspectors of the Coast Guard are not intelligence actors; they are enforcement actors.

**b. Crewmember’s resource if the intelligence community oversteps its authority.**

The crewmembers of the arrival vessel could report a complaint to the U.S. Coast Guard if the boarding was not conducted properly.

If the boarding is not done in order to conduct a documentation and safety inspection and the USCG acts beyond this limit, a district court will investigate the boarding, evaluate the legality

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<sup>3</sup> The district court stated: "One reason for this lower expectation of privacy at sea is that the Coast Guard is statutorily authorized to board a United States vessel and conduct a documents and safety inspection pursuant to 14 U.S.C. § 89(a)."

<sup>4</sup> Intelligence Authorization Act for Fiscal Year 2002, signed by President George W. Bush.

of the action, and establish if there is a balance between the individual's right to privacy and the interest of preventing criminal conduct and a real threat.

**c. Authority to board vessels: U.S. Coast Guard or U.S. Customs and Border Protection.**

It matters whether the boarding is done under U.S. Coast Guard authority or U.S. Customs and Border Protection authority at the time to inspect certain areas of the vessels.

Both agencies are in charge of the protection of the U.S. territory and its citizens and in order to properly perform their missions, U.S. Coast Guard and U.S. Customs and Border Protection have the authority to board vessels.

The inspections performed by the USCG boarding officers could extend to any area of the vessel where a safety and documentation inspection would be reasonable; while the inspections performed by the officers of the Customs and Border Protection extend to all travelers' closed containers without any level of suspicion. This authority extends to all physical containers, regardless of size or the possible presence of personal, confidential or embarrassing materials. Pursuant to this authority, Customs may also open and search incoming international mail.

**d. Risk for the agency for permitting the involvement.**

The main risks for the agency for permitting the involvement comes from 1) the narrow boundary that exists between the government's interest and the individual's privacy right, 2) the inexistence of a regulation which determines the scope of the 14 USC 89 (a), and 3) the possibility of public leaking of classified documents.

There is no a list of activities that the boarding officers can do once they are onboard of a vessel. The reason why crewmembers of the arrival vessel could report a complaints saying that

the boarding was not conducted properly, could be because there is no a list of activities that the boarding officers can do once they are onboard of a vessel.

Another example of risk for the agency could be the overstepping of their authority at the time to inspect a vessel or the collection of information. This risk is closely related with the possibility of public leaking of classified documents. There are several examples of this kind of problem the American agencies have faced in the last years. The American Civil Liberties Union (ACLU) has filed several suits against different federal agencies seeking information on surveillance programs. For instance, ACLU cases against the National Security Agency (NSA) have revealed that during the last 13 years NSA has overstepped the limits of its surveillance authority, observing communications between U.S. citizens or involving U.S. organizations.

## **II. FACTUAL BACKGROUND**

### **A. Factual background of the U.S. Coast Guard**

“The Coast Guard, established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy”<sup>5</sup>. Considered as a unique agency for having a broad maritime law enforcement mission, the Coast Guard’s authority differs from the other four federal service academies.

#### **a. Primary law enforcement authority**

“The Coast Guard is our ocean and border water police and patrol force. If that service is not empowered to enforce the laws of the United States along our shores and in boundary waters, those laws are unenforceable [sic], since there is no other agency of this Government equipped to enforce them”.<sup>6</sup>

The five fundamental sources of the Coast Guard enforcement authority are the 1) Maritime Law Enforcement (MLE), 2) Protection and Security of Vessels, 3) Harbors and Waterfront Facilities, 4) Assistance, 5) Customs, and 6) Coast Guard Investigative Service (CGIS).

Over the last two decades – mid and late 1990 to recent days- the Courts have fully endorsed the Coast Guard authority to enforce the law as a necessity to prevent the country from external threats such as the flood of illegal drugs or terrorist attacks, like the September 11<sup>th</sup>, 2001

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<sup>5</sup> 14 U.S.C. 1 – Establishment of Coast Guard.

<sup>6</sup> 80 CONG. REC. 9166 (1936) (letter from C.M. Hester, Assistant General Counsel, Treasury Dept., to Sen. Copeland) (advocating passage of a bill to define the jurisdiction of the Coast Guard).

attacks. It is therefore apparent that the Coast Guard's necessity to board arriving vessels and its primary law enforcement authority to do so is derived from 14 USC 89.<sup>7</sup>

The USCG is considered as "the nation's premier maritime law enforcement agency".<sup>8</sup> For this reason, Coast Guard boarding officers are not restricted at the time of stopping suspect vessels in U.S. jurisdictional waters; in contrast, highway patrol or local police officers have restrictions and they have to follow the reasonable articulable suspicion requirement established by the Supreme Court.<sup>9</sup> Additionally, in order to achieve better performance of their mission, the Coast Guard is allowed to assist other agencies and other agencies are also allowed to assist the Coast Guard.<sup>10</sup>

#### **b. Coast Guard's Missions**

The Coast Guard is the only armed service in charge of direct law enforcement action<sup>11</sup> on, under, and over jurisdictional U.S. waters and high seas, even though it is the smallest of the five

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<sup>7</sup> 14 U.S.C. 89 (a): "The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of the laws of the United States."

<sup>8</sup> Statement of Admiral J. William Kline, Commandant, U.S. Coast Guard. This expertise at stopping and boarding vessels was put to the test in the Persian Gulf during operations Desert Shield and Desert Storm, as Coast Guard boarding teams working from Navy ships conducted the majority of boarding to enforce the United Nations embargo against trade with Iraq. See John M. Broder & Paul Houston, *Iraqi Ship Is Seized by U.S., Cargo Diverted*, L-A. TIMES, Sept. 5, 1990, at 1; William P Coughlin, *Gaps Seen in Iraq Blockade; Boarding Officer Cites Sampling*, BOSTON GLOBE, Nov. 22, 1990, at A7. The concept of Coast Guard personnel conducting operations from Navy warships was implemented in 1986 as an added method of increasing maritime drug interdiction efforts. See 10 U.S.C. § 379 (1988).

<sup>9</sup> *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding that under the Fourth Amendment's reasonable search and seizure requirements, police may stop a motorist only if they have an "articulable and reasonable suspicion" that the motorist is in violation of a law).

<sup>10</sup> 14 U.S.Code 141 – Cooperation with other agencies, States, territories, and political subdivisions.

<sup>11</sup> The responsibilities of the Coast Guard, including its law enforcement duties, are outlined by statute:

federal services academies. The enforcement of state, Federal and international laws by the USCG is performed in order to ensure the United States' security and to protect human health and marine environments. Three of the main missions performed by the USCG are those related with migrant interdiction<sup>12</sup>, drug interdiction and the control of vessel movement.<sup>13</sup>

#### **B. 14 U.S.C. 89 (a): Boarding Vessels**

One of the main mission of the U.S. Coast Guard is to enforce Federal laws in jurisdictional waters of the United States to perform this mission the USCG has authority to board and inspect vessels, because the boarding of a vessel is designed to enforce these laws and prevent possible threats.

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Primary Duties The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain and operate icebreaking facilities on, under, and over waters other than the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities. 14 U.S.C. § 2 (1988). Congress recently designated the Department of Defense as the lead agency of the federal government for intelligence gathering and detection of drug smuggling. See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1004, 104 Stat. 1629 (1990), as amended by Pub. L. No. 102-190, § 1088, 105 Stat. 1484 (1991). The Coast Guard is the only armed service with arrest authority. See 10 U.S.C. § 375 (Supp. 11 1991) ("Restriction on direct participation by military personnel").

<sup>12</sup> Executive Order 12807 – Interdiction of Illegal Aliens. May 24, 1992.

<sup>13</sup> Ports and Waterways Safety Act (PWSA) Authority (33 USC 1221 et seq.): The PWSA authorizes the Coast Guard to control vessel traffic in areas subject to the jurisdiction of the United States which are determined to be hazardous or under other hazardous circumstances.

To board a vessel the USCG need not have a clear suspicion that a violation of Federal laws is being committed. According to the U.S. laws and the support of the courts, Coast Guard officers may board any U.S. vessel anywhere, any time, and 14 USC 89 authorizes the stop of a foreign vessel and according to the court “this authority it is not limited on its face to American flag vessels” because U.S. jurisdiction extends to any offense which had an effect in the U.S. The court also establishes that before boarding a vessel outside territorial waters, the Coast Guard has to have reasonable suspicion that the vessel was subject to American law.<sup>14</sup>

**a. U.S. Coast Guard Jurisdiction**

*“The U.S. Coast Guard is authorized to enforce, or assist in the enforcement of, all U.S. Federal laws applicable on, over, and under the high seas and waters subject to the jurisdiction of the United States”.*

According to the National Oceanic and Atmospheric Administration nautical charts and according to the International Law of the Seas, every country has jurisdiction on, over, and under waters subject to its jurisdiction.

The term “territorial waters” is used to describe any jurisdictional waters, which includes three different zones:

- Territorial sea (12 nautical miles from the low-water line along the coast which is the line which serves as baseline)
- Contiguous zone ( 24 nautical miles from the low-water line along the coast which is the line which serves as baseline )

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<sup>14</sup> United States v. Wright-Barker, 784 F.2d, 161, 176 (3d Cir. 1986) (adopting a reasonable suspicion standard for high seas boardings); United States v. Green, 671 F.2d 46, 53 (1st Cir.) (Same), cert. denied, 457 U.S. 1135 (1982).

- Exclusive zone (200 nautical miles from the low-water line along the coast which is the line which serves as baseline)

Therefore, the U.S. Coast Guard could perform its missions if the vessels are on “waters subject to U.S. jurisdiction”, which means in jurisdictional waters and waters where the U.S has been authorized by an agreement with another country to take law enforcement action toward U.S. or foreign vessels.

Once the USCG has checked that the arriving vessel is in U.S. jurisdictional waters, the boarding will be done “at anytime, anywhere to conduct a documentation and safety inspection”, determining the necessity of the boarding case-by-case. Generally USCG makes this decision according to the activities of the vessel and personnel, the location of the vessel, and the nationality of the vessel.<sup>15</sup>

#### **b. Failure to permit the boarding**

14 USC 1 established that the Coast Guard is a “military service and a branch of the armed forces of the United States at all the times.” This means that Coast Guard officers are armed while boarding vessels in their labor of enforcing the law, as part of their uniforms.

USCG vessels have to be properly identified by the distinctive stripe “U.S. Coast Guard” and the personnel will be in uniform, displaying Coast Guard insignia and operating from a Coast Guard vessel.

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<sup>15</sup> Chapter 3 U.S. Coast Guard.

According to the 18 USC 2237<sup>16</sup> failure to permit the boarding will be subjected to a maximum penalty of 500 dollars, and resisting a boarding officer is punishable by up to 10,000 dollars fine and could be punishable with 5 years prison.

**c. Advance Notice of Vessel Arrival**

The USCG requires that every vessel which is in U.S. jurisdictional waters and it is arriving to the U.S coast has to file an Electronic Notice of Arrival/Departure.<sup>17</sup>

After the events of September 11, 2001, the U.S. Department of Homeland Security (DHS) was established to better protect U.S. coasts. As part of this change, USCG's National Vessel Movement Center (NVMC) and the Ship Arrival Notification System (SANS) changed the advanced arrival notice time requirement from 24 hours to 96 hours.

The Coast Guard uses this information in order to more easily control vessel traffic, develop plans, and enforce Federal laws. For this reason owners and operators of arriving vessels must to comply with the regulations. Title 33 Code Federal Regulations 146-160 establish the requirements for this information under the name of "Navigation and Navigable Waters".

Once the owner or the operator has filed the Notice of Arrival, the notice must be submitted to the National Vessel Movement Center (NVMC) by internet or email. The reason why this Center is the one who receives the information is because it conforms USCG and CBP requirements, so the operator of the arriving vessel will have to submit the required information only once. The NVMC receives more than 250 submissions every day. After the review of the information, the

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16 18 U.S.C § 2237 (a) (1) - Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information: It shall be unlawful for the master, operator, or person in charge of a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to knowingly fail to obey an order by an authorized Federal law enforcement officer to heave to that vessel.

<sup>17</sup> [Electronic copy provided in accompanying USB flash drive at Source 47].

submitter will receive the confirmation that the information received was acceptable, or an email detailing the discrepancies.

The submission of the Notice of Arrival does not exempt the ship from a possibility that the USCG may board the vessel before its arrival in order to conduct a documentation and safety inspection.

### **C. The Coast Guard enters the Intelligence Community**

The Intelligence Community defines itself as “*a federation of executive branch agencies and organizations that work separately and together to conduct intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States.*” The U.S. Coast Guard, as a law enforcement and armed service agency, qualifies for designation as an IC member under this definition depending on the interpretation of “*conduct of intelligence activities.*”

The relationship between the IC and the Coast Guard was emphasized during the 1980s because of the development of the counterdrug smuggling missions and the USCG became a member of the Intelligence Community the 28<sup>th</sup> of December, 2001. Recently, the relationship between these two agencies has been strengthened due to the new international threats that every country has to face up.

#### **a. Coast Guard’s responsibilities**

The Coast Guard's broad responsibilities are:

- Maritime Safety: protecting citizens from the sea.
- Maritime Security: protecting America from threats delivered by the sea.
- Maritime Stewardship: protecting the sea itself.

“The Coast Guard's persistent presence in the maritime domain, due to its diverse mission sets and broad legal authorities, allows it to fill a unique niche within the Intelligence Community.

Because of its unique access, emphasis, and expertise in the maritime domain Coast Guard Intelligence can collect and report intelligence that not only supports Coast Guard missions, but also supports national objectives.

Coast Guard Intelligence strives to create decision advantage to advance U.S. interests by providing timely, actionable, and relevant intelligence to shape Coast Guard operations, planning, and decision-making, and to support national and homeland security intelligence requirements.”<sup>18</sup>

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<sup>18</sup> Office of the Director of National Intelligence (website: <http://www.dni.gov/index.php/intelligence-community/members-of-the-ic#top>)

### **III. SUBSTANTIVE LEGAL DISCUSSION**

#### **A. What are the limits of intelligence-community participation in boarding vessels carrying such passengers?**

##### **a. The individual's Fourth Amendment right and the legitimate government interests**

###### **i. Coast Guard's primary law enforcement authority**

*14 U.S.S § 89*: “The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which United States has jurisdiction, for the prevention, detection, and suppression of violations of the laws of the United States for such purposes, commissioned, warrant and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operations of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance...”.

The USCG has the authority to board any vessel subject to jurisdiction of the United States, at any time, and any place.

###### **ii. United States Constitution**

*Amendment IV, United States Constitution*: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fourth Amendment to the U.S. Constitution, as part of the Bill of Rights, protect the citizens against unreasonable searches and seizures.

### **iii. Issue**

The U.S. Constitution, through the Fourth Amendment, protect the citizens from the threat of unreasonable and unwarranted searches and seizures by the government, and all those that are deemed unreasonable under the law. However, the Fourth Amendment is not a guarantee against any searches, seizures, and inspections.

Boardings are one of the main missions that the USCG performances in order to enforce state, Federal and international laws to ensure the United States' security and to protect human health and marine environments. For that reason, the USCG has the authority to board any vessel (in U.S. jurisdictional waters), at any time and any place, including on any land under the control of the United States, as needed to complete any mission.. Moreover, the USCG does not need a warrant, a probable cause, or a suspicion that a violation already exists aboard the vessel to board the vessel.

The USCG main purpose is to prevent violations, therefore to determine whether a particular type of inspection is considered reasonable, the individual's Fourth Amendment right and the legitimate government interests have to be balanced.

The first Congress, which was the one that enacted the Bill of Rights, also passed the Revenue Service Act of 1790. The 14 USC 89 – Coast's Guard primary law enforcement authority- has its roots in this statute, which states in part: "all collectors, naval officers, surveyors, inspector and the officers of the revenue cutters...to go on board ships in any part of the United States... for the purpose of demanding manifests... examining and searching the said ships, and the officers shall have free access to the cabin and every other part of the vessel...". By enacting this Statute shows that the authority of the USCG to board vessels is consistent with the Fourth Amendment.

## **b. Limits in boarding vessels and the expectation of privacy**

The extent to which an individual is protected by the Fourth Amendment depends, in part, on the location of the search or seizure.<sup>19</sup>

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<sup>19</sup> Searches and seizures:

- *House*: Searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573 (1980).

Exceptions when a warrantless search may be lawful:

If an officer is given consent to search; *Davis v. United States*, 328 U.S. 582 (1946)

If the search is incident to a lawful arrest; *United States v. Robinson*, 414 U.S. 218 (1973)

If there is probable cause and exigent circumstances; *Payton v. New York*, 445 U.S. 573 (1980)

If the items are in plain view; *Maryland v. Macon*, 472 U.S. 463 (1985).

- *Person*: When an officer observes unusual conduct which leads him reasonably to conclude that criminal activity may be afoot, the officer may briefly stop the suspicious person and make reasonable inquiries aimed at confirming or dispelling the officer's suspicions. *Terry v. Ohio*, 392 U.S. 1 (1968)
- *Schools*: School officials need not obtain a warrant before searching a student who is under their authority; rather, a search of a student need only be reasonable under all the circumstances. *New Jersey v. TLO*, 469 U.S. 325 (1985)
- *Cars*:

Where there is probable cause to believe that a vehicle contains evidence of a criminal activity, an officer may lawfully search any area of the vehicle in which the evidence might be found. *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

An officer may conduct a traffic stop if he has reasonable suspicion that a traffic violation has occurred or that criminal activity is afoot. *United States v. Arvizu*, 534 U.S. 266 (2002).

An officer may conduct a pat-down of the driver and passengers during a lawful traffic stop; the police need not believe that any occupant of the vehicle is involved in a criminal activity. *Arizona v. Johnson*, 555 U.S. 323 (2009).

The use of a narcotics detection dog to walk around the exterior of a car subject to a valid traffic stop does not require reasonable, explainable suspicion. *Illinois v. Cabales*, 543 U.S. 405 (2005).

Special law enforcement concerns will sometimes justify highway stops without any individualized suspicion. *Illinois v. Lidster*, 540 U.S. 419 (2004).

An officer at an international border may conduct routine stops and searches. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

A state may use highway sobriety checkpoints for the purpose of combating drunk driving. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

A state may set up highway checkpoints where the stops are brief and seek voluntary cooperation in the investigation of a recent crime that has occurred on that highway. *Illinois v. Lidster*, 540 U.S. 419 (2004).

However, a state may not use a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

Minnesota v. Carter, 525 U.S. 83 (1998) states that “to claim Fourth Amendment protection, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable”.

Once on board and during the performance of the inspection, it has to be taken into account the balance between government interest and the individual’s right of privacy to determine if the inspection is reasonable<sup>20</sup>. In United States v. Thompson the Court determined that “generally the expectation of privacy at sea is lower than on land and that the decreased expectation extends to any area of the vessel where a safety and documentation inspection would reasonably take a Coast Guardsman.”<sup>21</sup> However, Courts have determined that there are certain areas aboard commercial vessels where a reasonable expectation of privacy exists,<sup>22</sup> thus Coast Guard personnel can examine virtually the entire vessel, especially if they are searching for the main-beam or

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<sup>20</sup> See Howard S. Marks, The Fourth Amendment: Rusting on the High Seas?, 34MERCER L. REV. 1537 (1983) (arguing that vessel boardings for safety and documentation inspections are often merely a pretext to searches for evidence of drug trafficking and that the Fourth Amendment should apply); Note, High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea, 93 HARV. L. REV. 725 (1980) (advocating regular and mandatory dockside safety inspections rather than boardings at sea, and arguing for judicial enforcement of the Fourth Amendment for any searches).

<sup>21</sup> United States v. Thompson 928 F.2d 1060 (1st Cir.), *cert. denied*, 112 S. Ct. 270 (1991). As justification, the court stated: "One reason for this lower expectation of privacy at sea is that the Coast Guard is statutorily authorized to board a United States vessel and conduct a documents and safety inspection pursuant to 14 U.S.C. § 89(a)." *Id.* at 1064; *see also* United States v. Meadows, 839 F.2d 1489, 1491 n.2 (11th Cir. 1988) ("Indeed, the authority to board and conduct such an inspection is so absolute that it can scarcely be argued that one has a reasonable expectation of privacy in the common areas of a ship that would be plainly visible during such an inspection.").

<sup>22</sup> United States v. Williams, 617 F.2d 1063, 1086 (5th Cir. 1980) (en banc) ("We are assuming that there may be areas in the holds of vessels where someone could have a legitimate privacy interest.").

documentation where the search extends to “every area of the vessel to which a person can physically gain access”.<sup>23</sup>

**B. What is the crewmember’s recourse if the intelligence community oversteps its authority?**

The crewmembers of the arrival vessel could report a complaint to the U.S. Coast Guard if the boarding was not conducted properly, and a district court will investigate the inspection. This question is related to the Fourth Amendment to the U.S. Constitution, and the protection of the citizens against unreasonable searches and seizures.

In *State v. Colosimo*,<sup>24</sup> John M. Colosimo after being convicted for refusal to allow inspection of a boat “challenged his conviction arguing he was unlawfully stopped by the conservation officer, the officer did not have probable cause to inspect the boat and the request to inspect the boat was an unlawful seizure.”

If the boarding is not done in order to conduct a documentation and safety inspection and the USCG acts beyond this limit, a district court will investigate the boarding, evaluate the legality of the action, and establish if there is a balance between the individual’s right to privacy and the interest of preventing criminal conduct and a real threat.

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<sup>23</sup> A large percentage of maritime seizures of contraband have resulted from a plain view or plain smell discovery occurring while a boarding officer was looking for a vessel's documentation number. See, e.g., *United States v. Watson*, 678 F.2d 765, 766 (9th Cir.), cert. denied, 459 U.S. 1038 (1982); *United States v. Demanett*, 629 F.2d 862, 865 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981); *United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir. 1980) (en banc).

<sup>24</sup> *State of Minnesota v. John Mark Colosimo*, 669 NW 2d 1 (2003).

**C. Does it matter whether the boarding is done under USCG authority or U.S. Customs and Border Protection authority?**

	<b>United States Coast Guard</b>	<b>United States Customs and Border Protection</b>
<u>It matters whether the boarding is done under U.S. Coast Guard authority or U.S. Customs and Border Protection authority at the time to inspect certain areas of the vessels.</u>		
<b>Missions</b>	The USCG is in charge of defending maritime borders and enforcing Federal laws in jurisdictional U.S. waters.	Customs and Border Protection is responsible for the protection of the nation’s border, focusing its labor in the control of American Seaports.
<b>Primary law enforcement authority to board vessels</b>	14 UCS 89 (a), <sup>25</sup> states in part that “the USCG may make inspections of any arriving vessel in order to enforce the law and prevent the country from any kind of threats.”	19 CFR 4.1 (a), <sup>26</sup> establishes that “the port director could supervise every vessel in port if he considers it necessary.”
<b>Boarding vessels</b>	The inspections performed by the USCG boarding officers could extend	The inspections performed by the officers of the Customs and Border

<sup>25</sup> Appendix G, Federal Laws and Conventions Authorizing U.S. Coast Guard Activities.

<sup>26</sup> Code of Federal Regulations Title 19, Section 4.1 (a)

	<p>to any area of the vessel where a safety and documentation inspection would be reasonable.</p>	<p>Protection extend to all travelers' closed containers without any level of suspicion. This authority extends to all physical containers, regardless of size or the possible presence of personal, confidential or embarrassing materials. Pursuant to this authority, Customs may also open and search incoming international mail.</p>
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**D. Is there any risk to the agency for permitting the involvement?**

In a developing and changing world, with new threats and needs, the United States has to be capable of responding rapidly to the challenges of this changing world.

The use of new technologies and intelligence is essential in the fight against terrorist organizations, as well as in developing effective policies for intercepting illegal aliens, stopping smugglers, protecting maritime environments, or protecting the country from any other threat.

President’s 2004 Directive on maritime security highlights the importance of a “robust and coordinated intelligence effort [that] serves as the foundation for effective security efforts in the maritime domain.”<sup>27</sup> The development of better polices will reduce the UCGS’s interference with commerce, navigation, and in brief, freedom. Such policies have to be developed in order to create a balance between these private rights and government’s interests.

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<sup>27</sup> White House, National Security Presidential Directive 41/Homeland Security Presidential Security Directive 13, NSPD-41/HSPD-13 (Washington, D.C.: 21 December 2004), pp. 5–6.

The Coast Guard works with Department of Homeland Security Office of Intelligence and Analysis and other organs of the Department to provide intelligence support to Homeland Security. The Coast Guard Intelligence Program, in cooperation with other agencies, is trying to create an effective system among themselves in order to enhance maritime domain awareness.

**a. Recommendation for the United States Coast Guard**

The lack of a regulation which determines the scope of the 14 USC 89 (a), has caused problems to the USCG and complains from the crewmembers of the vessels which has been subject to an inspection stating that the inspection onboard has not been conducted properly.

In order to prevent this type of problems, the United States Coast Guard could develop a recommendation like the NTTP 3-07.11. This recommendation is a list of elements that should be looking for in a boarding vessel by the U.S. Navy. The recommended search elements which are prioritized as extracted from NTTP 3-07.11:

1. Cellular Telephone information
2. Crew Information
3. Ship's Registration
4. Communication and Navigation Equipment
5. Personal Documents
6. Ship's Logs
7. Managing Company Information
8. Ship's Cargo and Manifest
9. Financial Data and Movement History
10. Smuggling Activities
11. Owner's Information

12. Bill of Sale and other Legal Documents

13. Agent/Broker Information

14. Master's Safe Contents

15. Ship's Material Condition

Units which have a good plan for conducting their boarding operations will enhance the value of the boarding if they follow the recommendations of NTTP 3-07.11. Each of the aforementioned elements is designed to focus the efforts of the boardings conducted by Maritime Interception Operations (MIO) units. These boardings offer a unique opportunity to collect valuable real time intelligence in relatively high volume<sup>28</sup>.

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<sup>28</sup> The U.S. Navy's NTTP 3-07.11, Chapter 5 "Essential Elements of Information".

## CONCLUSION

*“The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of the laws of the United States”.*

The 14 United States Code 89 is the primary law enforcement authority of the United States Coast Guard. This article does not violate the individual’s Fourth Amendment right of protection “from the threat of unreasonable and unwarranted searches and seizures by the government, and all those that are deemed unreasonable under the law” because the Fourth Amendment is not a guarantee against any searches.

Boardings are one of the main missions of the USCG in order to enforce the laws and protect human life, maritime environments, and the United States in itself. Therefore, Congress has enacted several Statutes, for example the Service Act of 1970, to show that the USCG’S authority is consistent with the Fourth Amendment and individuals private rights.

In contrast, the crewmembers of the arrival vessels have the possibility to appeal to the courts if the inspection performed by the boarding officers was not conducted properly or if it was beyond the limits of a safety and documentation inspection and the judge will evaluate the legality of the action. To evaluate the action, the district court will take into account the expectation of privacy onboard the vessels and the reasoning why the boarding officers decided to board the vessels, even though the USCG does not need a warrant, a probable cause, or a suspicion that a violation already exists abroad the vessel to board the vessel.

In a developing and changing world, the United States has to be capable of responding rapidly to these challenges. The USCG will have to adapt and develop new policies in order to

prevent any illegal act. The main purpose of the increase of the relationship between the U.S. Coast Guard and the intelligence community and their efforts to help each other providing certain information about the arrival boats, is to try to provide the most accurate information about any vessel arriving to the United States.