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Status of the U.S. Academic Research Fleet as Public Vessels under U.S. and International Law

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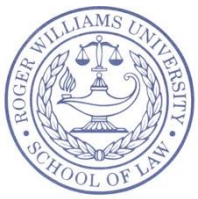

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Executive Summary

Oceanographic Research Vessels (ORVs) of the U.S. Academic Research Fleet (ARF) are a subset of the Federal Oceanographic Fleet. Vessel scheduling and operations are coordinated in accordance with systems and standards created and maintained by the University-National Oceanographic Laboratory System (UNOLS).

Federally-owned vessels within the ARF include ORVs owned by the National Science Foundation (NSF) and the Office of Naval Research of the Department of Defense (ONR). The NSF and ONR contract with UNOLS members for the operation of the federal ORVs using Cooperative Agreements (NSF) and Charter Party Agreements (ONR). These agreements provide for the conduct of oceanographic research on behalf of the U.S. Government. The research conducted aboard these vessels is coordinated through the UNOLS Ship Scheduling System. The scheduling process results in an annual schedule for each vessel, which is approved by the relevant Federal agencies and is binding on the operator. Changes to the annual schedule must also be approved by the relevant agency.

The legal requirements governing ARF vessel operations and management depend on whether these vessels are "public vessels." A variety of legal regimes, both in the U.S. and under international law, treat "public vessels" differently from other vessels. While federally owned vessels of the ARF have not been operated as "public vessels" to date in most respects, reconsideration of this stance is warranted and could have substantial economic implications.[1]

U.S. laws and regulations define "public vessel" or an analogous term in more than 20 separate locations (Appendix A). International conventions related to maritime law, including the United Nations Convention on the Law of the Sea and International Maritime Organization conventions, include exceptions for vessels that are consistent with U.S. definitions of "public vessel." Definitions and exceptions under domestic and international law are not identical, so a vessel may be a "public vessel" (or eligible for an exception)

[1] Evaluation of the economic implications of public vessel status would depend upon a range of factors, such as which definitions of "public vessel" apply to federally-owned ARF vessels; whether and the extent to which academic institutions continue to comply with certain legal regimes as a matter of comity; and the particular costs that apply to individual academic institutions or vessels. Consideration of these economic factors is beyond the scope of this study, which focuses exclusively on the legal standards governing the status of these vessels.

under some laws and regulations but not others. However, all definitions share common elements: all include language restricting (1) which governments qualify; (2) whether vessels must be owned by those governments or if they may be demise chartered; (3) whether the government must operate the vessel; and (4) whether the vessel must be in non-commercial service.

Federally owned vessels within the ARF satisfy all four of these elements. They are owned by the federal government and used for the non-commercial purpose of oceanographic research, and therefore are public vessels under any definition that does not require operation by the government. ARF vessels also appear to meet the remaining definitions because they are "operated by" the government as that term has been interpreted by the courts under the Public Vessels Act (PVA) and Suits in Admiralty Act (SAA).

Courts agree that "government ownership and *use as directed by the government for a public purpose* suffice without more to make a ship a public vessel" under the PVA—even if the ship is operated by a private corporation.[2] Claims under the SAA, which is inter-related and construed with the PVA, involve an additional determination to determine whether the private operator of a public vessel is an "agent" of the United States so as to make the government exclusively liable for claims.[3] The courts will find that a private operator is an agent when the government retains "overall direction and control over the operation of the vessel."[4] A public vessel chartered to an agent and subject to "extensive operation or direction [] by government personnel" is "operated by the government."[5]

In the one case date examining the status of a federally-owned ORV operated by a university, *Nelsen v. Research Corporation of the University of Hawaii*, the court determined that the vessel was a public vessel, but declined to find an agency relationship because the

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[2] Petition of United States, 367 F.2d 505, 509 (3d Cir. 1966) (emphasis added) ("[W]e would have thought it too clear for serious argument that a ship owned by the United States and used as directed by the Navy for the transportation of military supplies is 'a public vessel of the United States.'").

[3] 46 U.S.C.A. § 30904. Cases discussing agency often do so in the context of both the SAA and PVA. *See, e.g.,* Saffrhan v. Buck Steber, Inc., 433 F. Supp. 129, 133 (E.D. La. 1977) ("[W]hen a public vessel is operated by a private corporation under contract with the United States, the private operator becomes the agent of the United States"); Dearborn v. Mar Ship Ops., 113 F.3d 995, 997 (9t Cir. 1997) ("[W]here a remedy lies against the United States, a suit against an agent of the United States 'by reason of the same subject matter' is precluded").

[4] Dearborn v. Mar Ship Operations, 113 F.3d 995, 999 (9th Cir. 1997).

[5] Trautman v. Buck Steber, 693 F.2d 440, 444 (5th Cir. 1982) ("control by the United States is the crucial element in determining whether a case falls within the jurisdiction provided by [the SAA]."), quoting J.W. Petersen Coal & Oil Co. v. U.S., 323 F. Supp. 1198, 1205-06 (N.D. Ill. 1970); *see also* Dearborn v. Mar Ship Op., 113 F.3d 995, 997-98 (9th Cir. 1997) ("[I]n order to find that a charterer is an agent of the United States, 1) the United States must exercise significant control over the charterer's activities—either day to day control or overall control and direction of the mission, and 2) the charterer must be engaged in conducting the business of the United States."), quoting Petition of U.S., 367 F. 2d at 509.

government did not exert control over the vessel operations.[6] ARF vessel operations are distinguishable from *Nelsen* because the federal government exerts substantial oversight, direction, and control over ARF vessel operations.

UNOLS institutions are required to use the ORVs for: (1) federally-supported oceanographic research, which is selected and funded by ONR and NSF; or (2) research funded by a state or other public entity and approved by the federal agency owner. Each vessel's annual schedule must be developed through the UNOLS Ship Scheduling Committee and the resulting schedule and operations budget are subject to approval by its agency owner and the cognizant Federal agency funding operations. UNOLS members do not pay any rental for the vessels, and instead are funded by the federal agencies based on a daily rate that includes indirect and overhead costs. Changes to the schedule, as well as certain repairs and other unanticipated events, require agency approval. With the advent of remote vessel tracking capability, federal agencies have the ability to track vessel status and positioning on a day-to-day basis. And when in foreign waters, ARF vessels accept public vessel status and its associated protections and benefits.

The overall agency control and direction over ARF vessel operations contrasts with the limited authority of UNOLS institutions, which must comply with agency direction on the use of the vessels and cannot use the vessels for other purposes except in narrow circumstances (e.g., state-funded oceanographic research, training cruises) with explicit agency consent.[7] Their responsibilities include day-to-day vessel operation, maintenance, and management, including but not limited to manning, insurance, maintenance, and complying with safety procedures (procedures which were developed by UNOLS with agency approval). All of these activities, as well as major overhaul costs, must be included in the daily vessel rate, which is in turn paid for by federal agencies and other (federally-approved) users.

Based on the structure and function of the UNOLS system, federally-owned ORVs appear to be public vessels under the PVA and SAA. The federal government exerts substantial

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[6] Nelsen v. Res. Corp. Univ. Haw., 752 F. Supp. 350 (D. Haw. 1990); Nelsen v. Research Corporation of University of Hawaii, 805 F. Supp. 837. 846-48 (D. Haw. 1992).

[7] The degree of agency control and direction differs to some extent between NSF and ONR. For example, current NSF cooperative agreements include more requirements for explicit approval and reporting than do ONR charter party agreements. ONR explicitly limits uses other than Federal oceanographic research to state-funded oceanographic research and training cruises, while NSF simply requires that UNOLS vessel activities be determined though the UNOLS ship scheduling system, such that other activities could be conducted with agency consent. Despite these differences, the agency vessel owner exercises overall direction over vessel activities of both ONR- and NSF-owned vessels.

oversight, direction, and control over the operation of these vessels, such that UNOLS members use the vessels on behalf of and for their federal owners.

The General Counsel of the Department of Transportation has determined that it is in the best interests of the United States to interpret statutory and regulatory definitions of "public vessel" consistently with the traditional understanding of "public vessel" arising from these admiralty decisions.[8] However, it is possible that a court would decline to do so, instead concluding that an ARF vessels is operated *for* the government, but not *by* it. If so, the ARF vessels would be public vessels under all definitions that do not require government operation, but would not be public vessels under statutes where government operation is required. This would create a patchwork, where UNOLS vessels must comply with some, but not all, regulatory requirements applicable to "public vessels" under U.S. and international law (Table 1).

Table 1. Government operational requirements under selected areas of U.S. and international law.

Government operation **not required** for public vessel definition	Government operation **required** for public vessel definition
• Public Vessels Act / Suits in Admiralty Act • NTSB / Coast Guard marine casualty investigation • Ports and Waterways Safety Act • Oil Pollution Act – Financial responsibility for water pollution • Clean Water Act – Marine sanitation & pollution control devices (DOD-owned vessels only) • MARPOL / Act to Prevent Pollution from Ships • UNCLOS – Immunities • International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 • SOLAS-Cargoes, navigation, and Security	• Vessels and seamen (46 U.S.C. Title II) • Marine casualties and investigations; lifesaving systems • Oil Pollution Act (including fund, non-tank vessel response plan) • Clean Water Act - Oil and Hazardous Substances, marine sanitation devices • Resource Conservation and Recovery Act • UNCLOS - Territorial Sea and Contiguous Zone • SOLAS-Management for the safe operation of ships

Regardless of a clear determination as to what it means to "operate" a vessel under applicable statutes and regulations, federal owners of ARF vessels may wish to clarify the status of these vessels as expressed in their cooperative and charter party agreements.

[8] Memorandum from Stephen H. Kaplan, General Counsel, Department of Transportation, to Steven S. Honigman, General Counsel, Department of the Navy (Dec. 6, 1993) (considering implications for possible prosecution of the contract master of a Military Sealift Command vessel and determining that "MSC vessels do not lose their status as public vessels for the purposes of the pollution and other laws at issue, merely because they are operated by contractors.").

Modification of existing contractual language between Federal Agencies and UNOLS members could strengthen the conclusion the vessels are operated by the government by more explicitly establishing the government's control and direction of vessel activities.

1 University-National Oceanographic Laboratory System (UNOLS)

The University-National Oceanographic Laboratory System (UNOLS) is a group of academic oceanographic institutions established to advise Federal Agencies and facilitate the coordinated use of oceanographic facilities, which include ORVs.[9] UNOLS is governed and operated pursuant to its charter, which sets out, among other items, the operation of the Ship Scheduling Committee and designation of National Oceanographic Facilities, defined as facilities available for use of scientists from any institution and used as recommended by UNOLS committees that exercise oversight such as the Deep Submergence Science Committee (DESSC) or by the UNOLS Council.[10]

UNOLS members operate ships within the ARF, which are owned by the U.S Government, U.S. states, and non-governmental institutions (university/research centers).[11] Federally owned ARF vessels fall into two categories: those owned by the National Science Foundation (NSF) and those owned by the Office of Naval Research of the Department of Defense (ONR). The NSF and ONR contract with UNOLS university members for the operation of these ARF vessels using Cooperative Agreements (NSF) and Charter Party Agreements (ONR).

The NSF and ONR cooperative and charter party agreements specify the relationship between the vessel owners and the universities and the conditions under which the vessels are to be used, maintained, and insured in support of federally funded science at sea. While the specific terms and structure of these agreements differ, both provide for the conduct of Federally-funded oceanographic research on behalf of the U.S. Government—research to be funded not only by the vessel owner, but also by other Federal agencies and programs (and, potentially, by non-federal public agencies). The research conducted aboard these vessels is first determined through the approval process of the supporting Federal Agencies (e.g. Peer Review Award process at NSF) and then assigned to specific vessels with coordination through the UNOLS Ship Scheduling System as directed by the agencies, either in practice (ONR) or by the terms of the relevant agreement (NSF).

The UNOLS Ship Scheduling System is operated by the UNOLS Ship Scheduling Committee (SSC) pursuant to Annex I to the UNOLS Charter. The Committee conducts an annual schedule development process, "executed so as to assure effective ship and facility support to federally-funded investigators, efficient and economic operating schedules for individual ships and the UNOLS fleet and to provide timely information for fleet management to

[9] UNOLS Charter § 1

[10] UNOLS Charter, at Annex I, Annex II § 1.

[11] UNOLS Vessels, at https://www.unols.org/ships-facilities/unols-vessels.

funding agencies, UNOLS ship operators and the research vessel user community."[12] NSF and ONR Program Managers and Science Officers select projects for funding, and prospective researchers submit ship time requests (STRs) to operating institutions and/or UNOLS for these projects. Based on these requests, vessel operator scheduling representatives submit proposed schedules for the vessels they operate to the UNOLS SSC. The Committee meets throughout the year to develop and finalize ship schedules. The process of developing tentative and final schedules through the Committee is an iterative and interactive process that includes input, direction, and/or concurrence by ONR and NSF,[13] as well as from operating institutions and the Principal Investigators of funded projects. The process results in an annual calendar year schedule for each vessel, which is approved by the relevant agency and is binding on the operator. Changes to the annual schedule must also be approved by the agency(ies).

UNOLS members operating Federally-owned vessels are required to comply with all legal requirements applicable to ORVs under U.S. law. In undertaking this compliance responsibility, they have heretofore applied standards applicable to vessels other than "public vessels." If these vessels are "public vessels" as defined in law, changes to vessel operations could yield substantial economic benefits. This study considers whether and under what conditions ARF vessels are "public vessels" and the implications of public vessel status.

2 Status of Academic Research Fleet Vessels as "Public Vessels"

A variety of legal regimes, both in the U.S. and under international law, treat "public vessels" differently from other vessels. The question of whether a particular vessel is a "public vessel" depends on whether that vessel falls under the definition of "public vessel" in a given statute. This section considers definitions of public vessels under U.S. and international law and whether and how they apply to ARF vessels. This discussion clarifies which of ARF vessels may be considered public vessels under which legal regimes.

2.1 Definitions under U.S. statutes and regulations

U.S. statutes and regulations define "public vessel" or an analogous term in 22 separate locations, not including definitions that cross-reference another definition. These definitions are not identical, so a vessel may be a "public vessel" under certain laws and

[12] UNOLS Charter, Annex I § 3.

[13] ONR and NSF characterize their participation in the ship scheduling process differently; however, in both cases, agency approval of the final schedule is required.

regulations, but not others. However, most definitions are variations on a common theme. All definitions include language restricting (1) which governments qualify; (2) whether vessels must be owned by those governments or if they may be demise chartered; (3) whether the government must operate the vessel; and (4) whether the vessel must be in non-commercial service. These differences are illustrated in Appendix A, which identifies the elements of selected definitions across each of these four elements under domestic law. A complete listing of definitions with relevant language is provided in Appendix A:

- All definitions but one provide that any U.S. government-owned vessel can be a public vessel. Some, but not all, provide that a vessel owned by a U.S. state (or in some cases a local government) can be a public vessel. Vessels owned by foreign nations may be public vessels under most, but not all, definitions. In a few cases, such as Naval Sea Defense Areas and health and safety regulations for longshoring, the definition uses a generic reference to "a government."
- Most definitions provide that a public vessel must be either owned or demise (bareboat) chartered by the government. In some cases, a public vessel must be owned by the government and cannot be chartered.
- Definitions often require the government to operate the vessel as well as to own it. In other cases, the definition does not include an operational requirement.
- In most definitions, a public vessel must be used in non-commercial service.

The relevant definitions and related provisions can be divided by subject area and by relevance to UNOLS. Important definitions are found in U.S. admiralty statutes (title 46), the Oil Pollution Act of 1990 (OPA), and the International Convention for the Prevention of Pollution from Ships (MARPOL), as incorporated into U.S. law through the Act to Prevent Pollution from Ships.[14] The full text of these selected provisions follows.

- Title 46: "public vessel" means a vessel that—(A) is owned, or demise chartered, and operated by the United States Government or a government of a foreign country; and (B) is not engaged in commercial service."[15]
- OPA: "'public vessel' means a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce."[16]

[14] 33 U.S.C. §§ 1901-1905.
[15] 46 U.S.C. § 2101.
[16] 33 U.S.C. § 2701.

- MARPOL: "The present Convention shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service."[17]

The language in these provisions illustrates some of the differences across regulatory frameworks. Title 46 and OPA definitions differ primarily with respect to whether vessels owned or chartered by U.S. States can qualify as public vessels. MARPOL, on the other hand, differs from the other two definitions by requiring only that a vessel be owned *or* operated by the government to qualify for the exemption from the convention.

Differences across definitions have important implications for ARF vessels. A discussion of these implications follows, separated by element:

Which governments qualify:

- Federally-owned ARF vessels are "owned" by the U.S. government and thus may be public vessels under most definitions. However, only ONR-owned vessels may be "public vessels" with respect to the marine sanitation and pollution control device exemption under the Clean Water Act, which is limited to vessels owned by the Department of Defense.[18]
- ARF vessels owned by U.S. states qualify for consideration as public vessels only under legal frameworks that include such state-owned vessels under their definitions.
- ARF vessels owned by research institutions do not qualify unless those institutions are part of a state or foreign government. Specific consideration of the ownership structure of these vessels would be required to assess their individual status.

Ownership vs. charter:

- Most ARF vessels for which public vessel status is in question are owned by the government and chartered to institutional operators. These vessels can qualify as public vessels.
- Vessels chartered by the U.S. government from private owners for oceanographic research (e.g., the *RVIB Nathaniel Palmer*) are not public vessels under legal frameworks that require government ownership of public vessels. Most public vessel definitions, however, provide that vessels demise chartered to a government may be public vessels. Affected ARF vessels can qualify as public vessels under these legal frameworks provided that the charter agreements in use are demise or

[17] MARPOL, art. 3(3).
[18] 33 U.S.C. § 1322.

bareboat charters rather than voyage charters, time charters, or another arrangement.

Operational requirement:

- ARF vessels are "operated by" the government despite their day-to-day management by non-governmental entities if those entities are agents of the government. The legal meaning of "operated" in admiralty law is different from and broader than its common meaning. Under admiralty law, "government ownership and *use as directed by the government* exclusively for a public purpose suffice[s] without more to make a ship a public vessel.[19] The government is the operator of a vessel where it retains a sufficient level of control and direction over vessel operations. The government has determined that this traditional definition of "operated" extends to statutory "public vessel" definitions in environmental law.[20] As ARF vessel operations are substantially under Federal control, these vessels are best considered to be "operated by" the government. This issue is more fully examined in section 2.2.

Non-commercial service:

- Public vessel definitions almost uniformly require that covered vessels be those used in non-commercial service. This distinction draws a long-standing division between vessels in merchant fleets and those used for governmental purposes. Oceanographic research supported by government funding falls squarely in the definition of non-commercial service, and all ARF vessels are expected to meet this requirement.

2.2 Judicial interpretation of "public vessel" operations

The courts have not been called upon to date to interpret the meaning of any statutory or regulatory definition of public vessel. However, courts have interpreted the meaning of "public vessel" under admiralty law. These cases have defined "public vessel" for the purposes of admiralty liability, including whether private contractors are agents of the government when operating such vessels on its behalf for a public purpose. Under

[19] Petition of U.S., 367 F.2d 505, 509 (3d Cir. 1966) (emphasis added).

[20] Memorandum from Stephen H. Kaplan, General Counsel, Department of Transportation, to Steven S. Honigman, General Counsel, Department of the Navy, at 5-7 (Dec. 6, 1993) (considering implications for possible prosecution of the contract master of a Military Sealift Command vessel and determining that "MSC vessels do not lose their status as public vessels for the purposes of the pollution and other laws at issue, merely because they are operated by contractors.").

admiralty law, a vessel owned by the government and whose day-to-day operations are handled by a private contractor, subject to overall government control and direction, is a public vessel that is operated by the government.

As a sovereign, the United States is immune from suit for damages except where the United States has waived immunity. The United States government provided a limited waiver of its immunity in admiralty for claims associated with public vessels under the Public Vessels Act ("PVA") and the Suits in Admiralty Act ("SAA").[21] "[T]ogether, the sovereign immunity waivers of the PVA and SAA [] cover all relevant admiralty claims involving public vessels. Claims seeking relief for damages caused directly by a public vessel, or by the negligent operation thereof, fall under the PVA. The SAA covers all remaining admiralty claims, including those simply 'involving public vessels.'"[22] The PVA allows a civil action to be brought *in personam* against the United States "for damages caused by a public vessel of the United States."[23] Neither the PVA nor the SAA expressly defines "public vessel of the United States," and no other definition of "public vessel" expressly applies to the Act.[24]

In the absence of a statutory definition, a few courts have been called upon to determine whether a vessel is a public vessel under the PVA. While some cases have determined that government ownership or bareboat charter is enough to make a vessel public,[25] all agree on the broader principle that "government ownership and *use as directed by the government for a public purpose* suffice without more to make a ship a public vessel" – even if the ship is operated by a private corporation.[26] For example, in *Santos v. RCA Service Corp*., the court held that a Navy-owned vessel manned, operated, maintained, and repaired by a private company in support of weapons testing was a public vessel because it had a military function.[27] One court has specifically determined that a Navy-owned oceanographic

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[21] In 2006, the United States Code updated the SAA and the PVA: 46 U.S.C. §§ 30901-309** (formerly 46 U.S.C. § 741) and 46 U.S.C. §§ 31101-31113 (formerly 46 U.S.C. § 781).

[22] Uralde v. United States, 614 F.3d 1282, 1286 (11t Cir. 2010). (emphasis in original) (internal citation omitted)

[23] 46 U.S.C. § 31102.

[24] While the term "vessel of the United States" in the PVA applies to all of Title 46, the definition of "public vessel" in section 2101 expressly applies only to subtitle II of Title 46, and thus does not govern the interpretation of the PVA.

[25] Doyle v. Bethlehem Steel Corp., 504 F.2d 911 (5th Cir. 1974); Blanco v. U.S., 775 F.2d 53 (2d Cir. 1985).

[26] Petition of United States, 367 F.2d 505, 509 (3d Cir. 1966) (emphasis added) ("[W]e would have thought it too clear for serious argument that a ship owned by the United States and used as directed by the Navy for the transportation of military supplies is 'a public vessel of the United States'. However, we must deal briefly with the contention that the manning and operation of the vessel by Mathiasen, a private corporation, make it something other than a public vessel, presumably a merchant ship. We find no case which supports this view.").

[27] Santos v. RCA Service Co., 603 F. Supp. 943, 946-48 (E.D.LA. 1985). *Accord* Bradley v. U.S., 151 F.2d 742 (2d Cir. 1945) (vessel carrying coal for munitions public vessel); Geo. W. Rogers Const. Co. v. U.S., 118 F. Supp. 927 (S.D.N.Y. 1954) (vessel chartered to U.S. and carrying fuel for Navy is public vessel); Roeper v. U.S., 85 F. Supp. 864 (E.D.N.Y. 1949) (vessel transporting military supplies public vessel).

research vessel under charter to a university for operations is a public vessel under the PVA, and that conducting oceanographic research constitutes a public purpose.[28] As the court noted, "the fact that defendant manned, equipped, and maintained the KILA does not alter the conclusion that it used the KILA as a public vessel to conduct oceanographic research as contemplated by the charter agreement."[29]

Claims under the SAA involve an additional determination to determine whether the private operator is an "agent" of the United States so as to make the government exclusively liable.[30] A public vessel chartered to an agent and subject to "extensive operation or direction [] by government personnel" is operated by or for the government.[31] An agent is "one who is 'employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf.' . . . [I]n order to find that a charterer is an agent of the United States, 1) the United States must exercise significant control over the charterer's activities—either day to day control or overall control and direction of the mission, and 2) the charterer must be engaged in conducting the business of the United States."[32]

The courts consider whether the government maintains sufficient control and direction over a vessel to establish an agency relationship on a case-by-case basis. These determinations include close consideration of terms set forth in the contract or agreement establishing the relationship between the government and private operator. However, an evaluation of specific terms will be less important than whether the government retains "overall direction and control over the operation of the vessel."[33] Thus, in *Petition of United*

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[28] Nelsen v. Res. Corp. Univ. Haw., 752 F. Supp. 350, 353 (D. Haw. 1990).

[29] *Id*.

[30] 46 U.S.C.A. § 30904. Cases discussing agency often do so in the context of both the SAA and PVA. *See, e.g.,* Saffrhan v. Buck Steber, Inc., 433 F. Supp. 129, 133 (E.D. La. 1977) ("when a public vessel is operated by a private corporation under contract with the United States, the private operator becomes the agent of the United States"); Dearborn v. Mar Ship Ops., 113 F.3d 995, 997 (9t Cir. 1997) ("where a remedy lies against the United States, a suit against an agent of the United States 'by reason of the same subject matter' is precluded").

[31] Trautman v. Buck Steber, 693 F.2d 440, 444 (5th Cir. 1982), quoting J.W. Petersen Coal & Oil Co. v. U.S., 323 F. Supp. 1198, 1205-06 (N.D. Ill. 1970); *see also* Santos, 603 F. Supp. at 946-47 ("Even if the vessels are not public vessels, [] they were operated for the United States within the meaning of [the SAA].");

[32] Dearborn v. Mar Ship Op., 113 F.3d 995, 997-98 (9th Cir. 1997), quoting Petition of U.S., 367 F. 2d at 509; *accord* Trautman v. Buck Steber, 693 F.2d 440, 444 (5th Cir. 1982) (""control by the United States is the crucial element in determining whether a case falls within the jurisdiction provided by [the SAA]."); *J.W.* Petersen Coal & Oil Co. v. United States, 323 F. Supp. 1198, 1205-06 (N.D.IL. 1970) ("a time charter where the Government directs the vessel's overall functions even though the owner may control the operation of the vessel's personnel and equipment rather than a single purpose contract entered into with an independent contractor would be required to make the vessel 'operated for the United States.").

[33] Dearborn v. Mar Ship Operations, 113 F.3d 995, 999 (9th Cir. 1997).

States, the private operator was an agent despite responsibility for manning, victual and navigating the vessel because it was conducting government business "solely in the public use or in the protection of the National interest or economy.[34] Other cases reached similar conclusions.[35] On the other hand, the one court to consider the agency status of an operator of a Federally-owned oceanographic research vessel determined that the university was not an agent of the government because the "KILA was not operated for the United States or subject to its control. No one outside of the University of Hawaii ever gave directions or orders concerning either the day-to-day or overall operation, maintenance or manning of the KILA."[36]

Judicial interpretations of the PVA and SAA strongly indicate that ARF vessels are public vessels under the PVA and that UNOLS members are agents of the government under the SAA. The high degree of operational control and direction that Federal agencies retain over the use of ARF vessels suggests strongly that UNOLS members are the agents of the government, and therefore that the government operates these vessels through its agents.

The General Counsel of the Department of Transportation has concluded that it is in the best interests of the United States to interpret statutory definitions of "public vessel" consistently with these holdings.[37] The conclusion that ARF vessels are public vessels operated by the government is consistent with both judicial holdings and this government policy. However, a court decision would be required to confirm this determination with certainty. A court could reasonably conclude that decisions interpreting admiralty law are not dispositive of the definition of "public vessel" under statutes and regulations where that term has been explicitly defined by Congress. Such a holding would involve the court determining that the vessels may be operated *for* the government, but not *by* it.[38] If so,

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[34] 367 F.2d 505, 509 (3d Cir. 1966)

[35] Santos v. RCA Service Co., 603 F. Supp. 943, 946 (E.D.LA. 1985) (determining that RCA was not an agent words like "mans, operates, maintains and repairs" indicated RCA operated the government vessels.); Smith v. Mar Inc., 877 F. Supp. 62, 66 (D.R.I. 1994) (holding that MAR was an agent though directed to operate and maintain vessels, keep government informed of cost overages, and keep strict schedule and log activity because the government maintained substantial control over the number of man hours, determined minimum qualifications for some crew members, and set operating hours and tasks to be performed); *Tarver v. United States*, 785 F. Supp. 607, 612 (S.D.MS. 1991) (holding that Pan Am was an agent of the United States because it acted in accordance with directions and orders issued by the United States government and the business was conducted solely for the United States).

[36] Nelsen v. Research Corporation of University of Hawaii, 805 F. Supp. 837. 846-48 (D. Haw. 1992); *see also* Padro v. Vessel Charters, Inc., 731 F. Supp. 145, 148-49 (S.D.N.Y. 1990) (VCI not an agent of the United States because the crew was the responsibility of the VCI and liability did not pass to the United States);.

[37] DOT Memo.

[38] The SAA exempts from arrest or seizure any vessel "operated by of for" the United States. 46 U.S.C. § 30908. The inclusion of "or for" in this section contrasts with its absence in definitions of "public vessel in the Oil Pollution Act, Subtitle II of 46 U.S.C., and other locations. Courts could reasonably conclude based on this

Federally-owned ARF vessels would be public vessels under all definitions that do not require government operation, but would not be public vessels under statutes where government operation is required. This would create a patchwork, where ARF vessels must comply with some, but not all, regulatory requirements applicable to "public vessels" under U.S. and international law.

2.3 Definitions under international law

"Public vessel" is not a term used in international maritime law. However, international agreements do make exceptions for vessels that would seemingly fit definitions of "public vessel" used in domestic law. More precisely, the international regulations create a more inclusive definition of what vessels may be excepted from the international regulations. This study considers relevant provisions under key international agreements.

One of the most overarching agreements regarding the use of the sea was the 1982 United Nations Convention on the Law of the Sea (UNCLOS), covering "virtually all ocean space and its uses, including vessel navigation and over flight, resource exploration and exploitation, conservation and pollution, fishing, and shipping.[39] Although the U.S. has not ratified this convention, in 1983 President Reagan outlined a policy in which "The United States would recognize the rights of other states in the waters off their own coasts, as reflected in the LOS Convention, so long as the rights and freedoms of the United States and others under international law were recognized by these coastal states."[40]

The United Nations created the International Maritime Organization in 1948.[41] The IMO has organized 30 conventions on a number of issues, including the International Convention for the Safety of Life at Sea (SOLAS), 1974; International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997 (MARPOL); and, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) as amended, including the 1995 and 2010 Manila Amendments.[42]

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contrast that Congress intended to remove vessels operated for the government from the relevant definitions of "public vessel."

[39] Biliana Cicin-Sain & Robert W. Knecht, The Future of U.S. Ocean Policy: Choices for the New Century 259 (2nd Ed. 2000).

[40] *Id.*

[41] Int'l Mar. Org., *Convention on the International Maritime Organization*, http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Convention-on-the-International-Maritime-Organization.aspx (last visited Jun. 22, 2017)

[42] Int'l Mar. Org., *List of Conventions*, http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Default.aspx (last visited Jun. 22, 2017)

None of UNCLOS or the IMO Conventions cited above use the term "public vessel." However, their texts do include exceptions that apply to state vessels, such as any "warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service."[43] Several conventions use similar language in multiple locations within their text, and in some cases show slight differences in vessel coverage from section to section.

The exceptions used in international law include the familiar elements of the U.S. definitions of "public vessel," including: (1) which governments qualify; (2) whether the vessels must be owned by those governments; (3) whether the government must operate the vessel; and (4) whether the vessel must be in non-commercial service. A primary difference between U.S. law and the international agreements is that the latter do not include vessels under demise charter to a government. International law provisions, like their counterparts in domestic law, differ within and across conventions, as shown in Appendix B.

- The exceptions vary the term used to describe the entity claiming ownership. The three terms used are "government", "A state", and "Contracting government." In all cases, these provisions refer to national governments. In most cases where "Contracting government" is used, the U.S. fits the description.[44]
- The majority of definitions do not require that the vessel be owned *and* operated by the government. Only two articles in UNCLOS and one regulation in SOLAS require operation.
- All definitions require non-commercial service.

Although the definitions differ, even sometimes within the same convention, there is a general similarity between conventions.

- UNCLOS: "warships and other government ships operated for non-commercial purposes"[45]
- SOLAS: "warships, naval auxiliaries and other ships owned or operated by a Contracting Government and used only on Government non-commercial service"[46]
- MARPOL: "warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service"[47]

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[43] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 494
[44] Int'l Mar. Org., *Status of Conventions*,
http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx
[45] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 409
[46] SOLAS Ch. V Reg. (1) 1.1
[47] MARPOL, art. 3(3).

- STCW: "warships, naval auxiliaries or other ships owned or operated by a State and engaged only on governmental non-commercial service"[48]

The provision in UNCLOS varies from the other three conventions in that it emphasizes the operational requirement. However, other sections in UNCLOS do not emphasize this point, and do not vary significantly from SOLAS, MARPOL, and STCW, and SOLAS does have one regulation that emphasizes the operational component and therefore aligns itself with the UNCLOS definition.

Which governments qualify:

- Federally-owned ARF vessels are "owned" by the U.S. government and thus would fall under all the conventions to which the United States is a Contracting State.
- ARF vessels owned by U.S. states would not qualify under any of the conventions, as no U.S. state is a Contracting State to any of the IMO conventions.[49]
- ARF vessels owned by research institutions do not qualify unless those institutions are a department of a foreign government.

Ownership v. Charter:

- None of the provisions in the IMO regulations or UNCLOS clearly outline a charter relationship; however, some of the regulations do not specify vessel ownership and therefore maybe include vessels under charter.

Operational requirement:

- Most definitions do not require that vessels be operated by the government. Federal-owned ARF vessels are likely to fall within such provisions under IMO and UNLCOS agreements.
- Some definitions do require that vessels be operated by a government. The operation requirement drives a discussion concerning what "operated" means under international law. Under UNCLOS, any dispute over the interpretation of the convention would be adjudicated by the International Tribunal for the Law of the Sea.[50] Since its inception, 25 cases have been submitted to the tribunal.[51] None of these cases address the definition of "operate." Even though there are no cases resolving this issue, under customary international law and under U.S. law the

[48] STCW art. III (a)
[49] Int'l Mar. Org., *Status of Conventions*,
http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx
[50] Int'l Trib. For the Law of the Sea, *The Tribunal*, https://www.itlos.org/the-tribunal/
[51] Int'l Trib. For the Law of the Sea, *Cases*, https://www.itlos.org/cases/

common understanding of "operate" would apply. It is likely that these principles would be consistent with U.S. judicial holdings under admiralty law.

Non-commercial service:

- All of the Conventions listed in this paper require non-commercial service. Government funded Oceanographic research would be considered non-commercial service.

3 Implications of ONR and NSF agreements for Academic Research Fleet vessel status

Based on the structure and function of the UNOLS system, Federally-owned ORVs appear to be public vessels under all relevant legal frameworks, including under statutory, judicial, and international law. The Federal government exerts substantial oversight, direction, and control over the operation of these vessels, such that UNOLS members use the vessels on behalf of and for their Federal owners. Modification of existing contractual language between Federal agencies and UNOLS members could strengthen this conclusion by more explicitly establishing the government's control and direction of vessel activities.

The interpretation that ARF vessels are public vessels operated by the government through UNOLS member institutions is founded on the Federal oversight and approval of all aspects of UNOLS vessel activities. UNOLS institutions are required to use the ORVs for: (1) Federally-supported oceanographic research, which is selected and funded by ONR and NSF; or (2) research funded by a state or other public entity and approved by the Federal agency owner. Even in cases where limited state funding is provided for cruises and equipment, they may only be scheduled after all federal requests are satisfied. Each vessel's annual schedule and budget must be developed through the UNOLS Ship Scheduling Committee and is subject to approval by its agency owner. UNOLS members do not pay any rental for the vessels, and instead are funded by the Federal agencies based on a Federally-approved daily rate that includes indirect and overhead costs. Changes to the schedule, as well as major repairs, overhauls, and other unanticipated events, require agency approval. Indeed, since the advent of remote vessel tracking capability, Federal agencies track vessel status and positioning on a day-to-day basis. And when in foreign waters, ARF vessels accept public vessel status and its associated protections and benefits.

The far-reaching agency control of ARF vessel operations contrasts with the limited authority of the institutional operators. As detailed in Appendix C, these institutions must comply with agency direction on the use of the vessels and cannot use the vessels for other

purposes except in narrow circumstances (e.g., state-funded oceanographic research, training cruises) with explicit agency consent. Their responsibilities are limited to day-to-day vessel operation, maintenance, and management, such as manning, insurance, maintenance, and complying with safety procedures (procedures which were developed by UNOLS with agency approval). All of these activities, as well as major overhaul costs, must be included in the daily vessel rate, which is in turn paid for by Federal agencies and other (federally-approved) users.

The structure and practice inherent in the operation of the ARF vessel system indicates that Federally-owned oceanographic research vessels are public vessels operated by the government through UNOLS members as agents of the government under admiralty law. Some provisions of existing contracts may complicate that determination, however. In particular, the charter party agreement currently used by ONR contains provisions that attempt to deny the public vessel character of these vessels. For example, while the operating institution has the "right to use the Vessel in the performance of oceanographic research for the Government," the agreement denies that this service on behalf of the government creates an agency relationship.[52] The institution is also authorized to use the vessel for non-federal use up to 25% of the time, which suggests that the vessel is not used exclusively for governmental purposes—albeit with the limitations that such activities must be for publicly-funded oceanographic research and require prior ONR approval. The NSF Cooperative Agreement does not include an analogous usage requirements, but it achieves the same result by requiring the operator to use the UNOLS Ship Scheduling System and Agency approval of the resulting schedule.

Similar language was held not to create an agency relationship in *Nelsen*. In those cases, the court determined that the vessel was a public vessel, but declined to find an agency relationship between the government and university. The vessel at issue in *Nelsen* was not an ARF vessel or designated as a UNOLS vessel and therefore was not subject to the substantial operational control and direction of the U.S. government in the same manner as ARF vessels operated by UNOLS institutions. *Nelsen* therefore can be distinguished from the UNOLS system, because the government exerts much more control over ARF vessels than over *Kila*. However, courts examining ONR contracts may not find an agency

[52] Charter Party Agreement between ONR and Woods Hole Oceanographic Institution (N00014-97-L-0107), at § 3(f) ("In performing any work authorized or approved under this Charter Party, the Charterer shall not act as or be considered an agent for the Government, and no provision of this Charter Party is intended to, nor shall be deemed to, establish or create an agency relationship between the parties hereto."). Specific terms of other ONR agreements may differ.

relationship because such a relationship has been explicitly disclaimed.[53] Even in such a holding, however, ARF vessels would likely be considered public vessels.

NSF's cooperative agreements present a useful contrast to ONR charter party agreements that may inform revisions to ONR agreements. NSF agreements use a simple structure that directs the operating institution to "operat[e], maintain[], and manag[e]" vessels in accordance with general and specific terms and conditions. One such term requires all vessel activities to be scheduled through the UNOLS Ship Scheduling System, thereby providing for agency oversight without the use of prescriptive terms. Modification of ONR agreements to more closely follow the NSF model could avoid future uncertainty as to vessel status.

[53] This question would be based on the requirement of mutual consent to create an agency relationship, as the issue of whether the vessel is operated by the institution on behalf of the government would likely be beyond dispute in such a case. Thus, while a finding of no agency relationship could limit government liability under the Suits in Admiralty Act, it would not affect a determination that the vessel is a public vessel under other laws and regulations.

Appendix A: Public vessel definitions under U.S. laws and regulations

Topic	Citation	Ownership status	Operation	Owner identity	Use
Vessels and seamen	46 U.S.C. § 2101.	owned or demise chartered	and operated	by the United States Government or a government of a foreign country	is not engaged in commercial service
Merchant Marine Officers and Seamen	46 C.F.R. § 10.107	owned or demise chartered	and operated	by the United States Government or a government of a foreign country	is not engaged in commercial service
Public Vessels Act	--				
Marine casualties and investigations	46 C.F.R. § 4.03-40	is owned, or demise chartered	and operated	by the U.S. Government or a government of a foreign country (*some exceptions)	is not engaged in commercial service
NTSB marine casualty investigation	46 C.F.R. § 4.40-5	owned		by the United States (*some exceptions)	
Lifesaving Systems	46 C.F.R. § 199.30	owned, or demise chartered	and operated	by the U.S. Government or a government of a foreign country (*some exceptions)	Is not engaged in commercial service
Ports and Waterways Safety	33 C.F.R. § 160.202	owned or demise-(bareboat) chartered		by the government of the United States, by a State or local government, or by the government of a foreign country	and that is not engaged in commercial service
Oil Pollution Act	33 U.S.C. § 2701	owned or bareboat chartered	And operated	by the United States, or by a State or political subdivision thereof, or by a foreign nation,	except when the vessel is engaged in commerce

Topic	Citation	Ownership status	Operation	Owner identity	Use
Offshore Oil Spill Pollution Fund	33 C.F.R. § 135.5	is owned or chartered by demise,	and operated	by the United States, a State or political subdivision thereof, or a foreign government	is not engaged in commercial service
Financial Responsibility for Water Pollution and OPA 90	33 C.F.R. § 138.20	owned or bareboat chartered		by the United States, or by a State or political subdivision thereof, or by a foreign nation	except when the vessel is engaged in commerce
Clean Water Act - Oil and Hazardous Substances	33 U.S.C. § 1321	owned or bareboat-chartered	and operated	by the United States, or by a State or political subdivision thereof, or by a foreign nation	except when such vessel is engaged in commerce
Nontank vessel response plans	33 C.F.R. § 155.5020	owned or bareboat-chartered	and operated	by the United States, or by a State or political subdivision thereof, or by a foreign nation	except when such vessel is engaged in commerce
Clean Water Act – Marine sanitation and pollution control devices	33 U.S.C. § 1322	owned	or operated	by the Department of Defense, other than a time or voyage chartered vessel	
Marine Sanitation Device	33 C.F.R. § 159.3	owned or bare-boat chartered	and operated	by the United States, by a State or political subdivision thereof, or by a foreign nation	except when such vessel is engaged in commerce
MARPOL	Art. 3(3)	any warship, naval auxiliary or other ship owned	or operated	by a State [nation]	and used, for the time being, only on government non-commercial service

Topic	Citation	Ownership status	Operation	Owner identity	Use
Control of NOx, Sox, and PM Emissions from Marine Engines	40 C.F.R. § 1043.20	warships, naval auxiliary vessels, and other vessels owned	or operated	by a sovereign country	when engaged in noncommercial service
Resource Conservation and Recovery Act	42 U.S.C. § 6939d	owned or bareboat chartered	and operated	by the United States, or by a foreign nation	except when the vessel is engaged in commerce
Designation of hazardous substances	40 C.F.R. § 116.3	owned or bareboat-chartered	and operated	by the United States, or a State or political subdivision thereof, or by a foreign nation	except when such vessel is engaged in commerce
Dumping of Medical Wastes	33 U.S.C. § 2502	a vessel of any type whatsoever . . . that is owned, or demise chartered,	and operated	by the United States Government	and is not engaged in commercial service
Transportation of municipal and commercial waste	33 C.F.R. § 151.1006	is owned, or demise chartered	and operated	by the United States Government or a government of a foreign country	is not engaged in commercial service
Transportation	49 C.F.R. § 171.8	owned by and being used in the public service		of the United States	It does not include a vessel owned by the United States and engaged in a trade or commercial service or a vessel under contract or charter to the United States.
Coast Guard-NTSB Marine Casualty Investigation	49 C.F.R. § 850.5	owned		by the United States (* limited exception)	
Naval Defense Sea Areas	32 C.F.R. § 761.5	owned by or belonging to		a government	not engaged in commercial activity
Safety and Health Regulations for Longshoring	29 C.F.R. § 1918.2	owned	and operated	by a government	not regularly employed in merchant service

Appendix B: Public vessel exceptions under international law

Topic	Citation	Ownership status	Operation	Owner identity	Use
UNCLOS-Territorial Sea and Contiguous Zone: Responsibility of flag state for damages	Art. 31	warship or other government ship	operated	--	for non-commercial service
UNCLOS-Territorial Sea and Contiguous Zone: Immunities	Art. 32	warships and other government ships	operated	--	for non-commercial service
UNCLOS-High Seas: Immunities	Art. 96	ships owned	or operated	by a State	and used only on government non-commercial service
UNCLOS-Protection and Preservation of the Marine Environment: Sovereign Immunity	Art. 236	warships, naval auxiliary, other vessels or aircraft owned	or operated	by a State	and used, for the time being, only on government non-commercial service
SOLAS-Safety of navigation	Ch. V Reg. (1) 1.1	warships, naval auxiliaries and other ships owned	or operated	by a Contracting Government	and used only on Government non-commercial service
SOLAS-Carriage of cargoes and oil fuels	Ch. VII Reg. (15) 1.1	warships, naval auxiliary or other vessels owned	or operated	by a Contracting Government	and used, for the time being, only on government non-commercial service
SOLAS-Management for the safe operation of ships	Ch. IX Reg. (2) 2	--	government operated	(not a ownership requirement)(possible charters could be included)	used for non-commercial purposes

Topic	Citation	Ownership status	Operation	Owner identity	Use
SOLAS-Special measures to enhance maritime security	Ch. XI Reg. (2) 3	warships, naval auxiliaries or other ships owned	or operated	by a Contracting Government	and used only on Government non-commercial service
MARPOL-International Convention for the Prevention of Pollution from Ships, 1973	Art. 3 (3)	warship, naval auxiliary or other ship owned	or operated	by a State	and used, for the time being, only on government non-commercial service
MARPOL-ANNEX I Chapter 8- Prevention of Pollution during transfer of oil cargo between oil tankers at sea	Reg. 40 (5)	warship, naval auxiliary or other ship owned	or operated	by a State	and used, for the time being, only on government non-commercial service
STCW-International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978	Art. III (a)	warship, naval auxiliaries or other ships owned	or operated	By a State	and engaged only on governmental non-commercial service

Appendix C: Selected terms of UNOLS Vessel Agreements

	NSF Cooperative Agreement[54]	ONR Charter Party Agreement[55]
Scheduling	Institution must participate in the UNOLS Ship Scheduling System. NSF must participate in the coordination of programs and projects for the vessel with other NSF and other federal agency programs.	Institution has "the right to use the Vessel in the performance of oceanographic research for the Government." Up to 25% use for state-funded work allowed with prior approval; training cruises allowed up to 30 days per year. Institution must give priority to work as directed by ONR, which has the right to review and approve the annual operating schedule.
Funding	Institutions funded by NSF annually in an amount derived from the time each vessel used for NSF-funded and scheduled programs. Institution must provide proposed and final operations proposal and budget.	Institution may receive operating funds for the vessel, including for operations and maintenance, from federal agencies for oceanographic research, as well as from other sources, including its own funds, state funds, or private funds.
Crew	Institution responsible for manning and crew; must report on changes to key personnel	Institution responsible for manning and crew
Insurance	Institution must maintain P&I insurance. Proof of insurance must be provided to NSF.	Institution must maintain P&I insurance. Institution cannot carry insurance for casualty loss or damage, except salvage and towage, and must carry full marine hull insurance when performing work other than federally directed research. Institution not liable for casualty loss or damage, except in specific instances.
Safety and maintenance	Institution must comply with UNOLS safety standards, maintain the vessel, including its hull and machinery, and maintain the appropriate certificates and stability booklet. NSF has right to inspect, conduct general oversight and monitoring of vessel activities, and approve of permanent equipment acquisition.	Institution must comply with UNOLS safety standards, maintain vessel including its hull and machinery, and maintain appropriate certificates at the highest classification and rating available, and maintain the stability booklet. ONR has the right to inspect the vessel, and to direct major equipment upgrade and replacement work. Institution can make structural alterations, including installation of its own machinery, with notice to and approval by ONR.

[54] This column is based on the terms of a past agreement between NSF and Columbia University (OCE-0072976). Specific terms of other NSF agreements may differ.

[55] This column is based on the terms of a past agreement between ONR and Woods Hole Oceanographic Institution (N00014-97-L-0107). Specific terms of other ONR agreements may differ.