Is this Ship Covered? The Intersection of Law, Geography, and Management of Sunken Military Craft

by

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The legal framework protecting historic shipwrecks and other underwater cultural heritage in the United States is largely fragmented and not always effective. Factors that may influence the legal protection afforded a shipwreck can include the type of ship, the location of the ship, the history and age of the ship, and the ship's country of origin. Management of historic shipwrecks may be spread across both federal and state agencies and without formal protocols that establish leadership. Many of these shipwrecks are also foreign in origin and protection for those resources is frequently determined by what some consider outdated and inapposite rules of law.

Fortunately, the need to protect and properly manage historic shipwrecks has received increased recognition in legislative bodies and in the courts. One of the stronger pieces of federal legislation protecting shipwrecks is the Sunken Military Craft Act, which covers sunken military ships and aircraft around the globe. Under the act,

warships, naval auxiliaries, and vessels owned and operated by a government on military noncommercial service at the time of sinking are protected from unauthorized disturbance. Considering the protective benefits afforded those sunken military craft covered by the act, the research presented here was designed to assess what types of vessels fall under the definition of protected vessels. To that end, the author consulted caselaw, applicable legislation, legal authorities, and the historical record as it applied to two types of vessels—Liberty ships operating during World War II and the privateers active during the Revolutionary war and War of 1812. The evaluation concluded that the two vessel types may be covered under the act depending on the particular voyage or activity in which the vessel was engaged at the time of sinking. The research and analysis presented is also intended to inform future evaluations of ambiguous classes of vessels to determine if they meet the statutory definition of included vessels.

Many historic shipwrecks face continual threats from human factors, such as commercial fishing, recreational diving, commercial salvage, and offshore energy infrastructure. The application of federal and state legislation designed to protect historic shipwrecks from these and other hazards will often depend on the particular location of the resource. To assess the risks faced from anthropogenic hazards, the author created a risk model that incorporated the threats and protections confronted by shipwrecks in federal and state waters off the coast of North Carolina. The assessment involved production of a GIS through which each shipwreck included in the analysis would be assigned a value, which was output to a Shipwreck Vulnerability Index. Particular attention was paid to foreign shipwrecks, and the analysis presented herein

includes discussion of the management issues facing foreign sunken military craft located in US waters.

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by

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To my family:

For everything, always

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LIST OF ABBREVIATIONS

ASA	Abandoned Shipwreck Act
BOEM	Bureau of Ocean Energy Management
CPUCH	Convention on the Protection of the Underwater Cultural Heritage
D.L.R.	Dominion Law Reports
DON	Department of the Navy
EEZ	Exclusive Economic Zone
GIS	Geographical Information System
NCDNCR	North Carolina Department of Natural and Cultural Resources
N.C.G.S.	North Carolina General Statutes
NCUAB	North Carolina Underwater Archaeology Branch
NEPA	National Environmental Policy Act
NHHC	Naval History and Heritage Command
NHPA	National Historic Preservation Act
NMSA	National Marine Sanctuaries Act
NOAA	National Oceanic and Atmospheric Administration
NRHP	National Register of Historic Places
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act
SMC	Sunken Military Craft
SMCA	Sunken Military Craft Act
UCH	Underwater Cultural Heritage
UN	United Nations

UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific, and Cultural Organization
US	United States
U.S.C.	United States Code
USD	United States Dollars
WSA	War Shipping Administration

DEFINITION OF TERMS

Abandonment: In this document, refers to whether the owner of a vessel has divested its interests in the vessel after it has wrecked. Abandonment may be there express or implied. An express abandonment requires an affirmative act on the part of the owner signaling a clear intent to divest its interest in the shipwreck. An implied abandonment may be determined by a court based on several factors, such as the length of time the vessel has been wrecked or whether the owner has made an attempt to locate or salvage the vessel.

Charter party: A contract under maritime law through which a party hires a vessel for either a voyage or voyages or for a specified period of time.

Coastal state: In this document, the sovereign entity possessing jurisdiction over the waters and sea bottom adjacent to its territorial limits.

Commission: *see Letter of Marque and Reprisal*.

Finds, law of: In maritime law, a legal concept through which a court assigns title to the finder of a shipwreck that is considered legally abandoned under the tenet *finders, keepers.* A claim brought in admiralty court against a shipwreck will generally be determined by either the law of finds or the law of salvage.

Flag state: The sovereign nation under which a vessel is registered.

Letter of marque and reprisal: A license, or commission, issued by a sovereign government that sanctioned the capture of a ship (or "prize") under the flag of a foreign government against whom the sanctioning government was at war.

Privateer: Also referred to as "private man-of-war." In this document, privateers were vessels operating under a *letter of marque and reprisal* received from a state or federal government that permitted the capture of enemy vessels or neutral vessels carrying supplies for an enemy belligerent. The owner, officers, and crew of a privateer were entitled to a percentage of the value of a captured prize and its cargo.

Prize: A vessel belonging to an enemy belligerent or vessel carrying supplies for an enemy belligerent captured by a privateer or vessel operating under a valid commission or *letter of marque and reprisal.* Rights to captured prizes and its cargo were adjudicated in a legally approved prize court, which divided a portion of the proceeds from the sale of the prize and its cargo among the privateer owner, officers, and crew.

Salvage, law of: An ancient doctrine of maritime law that encourages the saving of life and property in distress. Under the law of salvage, the successful salvor receives a maritime lien against the salved vessel and cargo for the value of the salvage services. To make a successful claim for salvage in federal admiralty court, the salvor must satisfy three elements: (1) a maritime property must be at risk from a marine peril; (2)

the salvage services must be voluntarily rendered; and (3) the salvage operation must be successful.

Salvor: A party or parties possessing a successful claim for salvage against a shipwreck. The successful salvor obtains a maritime lien against the ship and its cargo for the value of the services performed during salvage of the shipwreck. A salvor does not receive title to the shipwreck and the value of the salvage award is determined by a federal admiralty court in the US.

CHAPTER 1

1.1 INTRODUCTION AND OVERVIEW

The United States does not possess a comprehensive legislative regime for the protection and management of underwater cultural heritage (UCH). Laws exist that protect submerged cultural resources that fall within protective boundaries prescribed by law, such as the Abandoned Shipwreck Act of 1987 (ASA) and National Marine Protection, Research, and Sanctuaries Act of 1972 (commonly referred to as the National Marine Sanctuaries Act [NMSA]); or that place management in the hands of a specified governmental organization or department, such as the Sunken Military Craft Act of 2004 (SMCA) and Section 110 of the National Historic Preservation Act of 1966 (NHPA); or that protect submerged cultural resources through a required review process in which impacts to a resource, or potential resource, are evaluated, such as the National Environmental Policy Act of 1969 (NEPA) and Section 106 of the NHPA (see Appendix A for the text of relevant provisions of referenced laws). In those instances where no applicable law protecting a submerged cultural resource exists, rights to acquire title or interests to the resource may depend on what is considered outdated and ineffective judge-made law (i.e., the law of savage and finds)—the application of which may vary considerably across jurisdictions.

Occasionally, submerged cultural resources may be subject to overlapping jurisdictions, such as a US Navy shipwreck that lies within the boundaries of a federally-managed national marine sanctuary. Gerstenblith (2008:730–731) notes that the laws governing protection of cultural heritage in the US are divided among federal, state, and

local governments and may be divided among agencies “even at the same level of government.” The result, the author continues, is “therefore somewhat a patchwork quilt of statutes and regulations and there are many gaps through which historic properties may fail” (Gerstenblith 2008:731). As it stands, the current legislative regime is a makeshift assemblage of disparate laws that often fails to adequately protect submerged cultural resources in US-controlled waters.

Citing the report of the US Commission on Ocean Policy, Claesson (2009:699) notes that the US lacks legislation providing a mechanism for federal ownership of submerged cultural resources beyond state territorial waters. Among the other limitations suggested by Claesson that impede successful federal management of UCH in the US, the author lists 1) “problematical and ill-defined” jurisdiction over UCH in coastal, territorial, and Exclusive Economic Zone (EEZ) waters; 2) ineffective and “poorly instituted” legislation governing UCH protection; and 3) a dearth of interstate coordination on UCH protection (2009:699).

The laws enacted to protected cultural resources, whether on land or submerged, are generally designed to limit disturbance or damage from human activities, although occasionally the law is not specifically directed at protecting cultural resources. In the underwater environment, threats to cultural resources include damage from recreational divers, commercial fishing, looting, and commercial salvage. The damage sustained by submerged cultural resources may be either intentional or accidental. For instance, commercial fishing operations may attempt to avoid impacting exposed shipwrecks because such accidental impacts might extensively damage their own fishing gear. The novice recreational diver may inadvertently bump or scrape against a shipwreck due to

insufficient mastery of buoyancy control. Conversely, the commercial salvage of a historic shipwreck is designed to extract perceived objects of value for eventual sale and often as quickly as possible in order to maximize returns. Regardless of intent, these and other anthropogenic threats can cause irreparable damage to historic shipwrecks, which represent a finite resource.

Fortunately, protections do exist and they can be successful in protecting UCH. One of the most geographically expansive and robust federal laws enacted to protect submerged cultural resources is the SMCA of 2004. Through the SMCA, federal protection is extended to every US sunken military craft (SMC)—wherever located and whenever lost. The SMCA, through its implementing regulations, provide various enforcement measures and a permitting system designed to promote the responsible research and visitation of the military's shipwrecks and aircraft. Although the SMCA applies to SMC for all military agencies, the US Navy has been the most proactive of the agencies in management of its resources. Although its geographical breadth is limited, the NMSA also offers effective protection of resources within its boundaries through the provision of penalties that discourage violations. Indeed, a potential salvor was successfully prosecuted under the act for causing environmental damage to sanctuary property while searching for resources to illegally exploit in the Florida Keys National Marine Sanctuary (NMS). *See, U.S. v. Fisher,* 977 F. Supp. 1193 (S.D. Fla. 1997). The NMSA was also used to prosecute divers in the Channel Islands NMS that used hammers and chisels to loot artifacts from two shipwrecks. *Craft v. National Park Service*, 34 F. 3d 918 (9th Cir. 1994). As will be examined later, the ultimate disposition of a shipwreck may depend on where it lies, the vessel type, the vessel owner or

operator, or the particular voyage or mission on which it was engaged at the time of sinking.

1.2 RESEARCH QUESTIONS AND SUMMARY OF CHAPTERS

The research presented in the following chapters was initially borne out of a question regarding whether Liberty ships (discussed in greater detail in Chapter 2) could or would be covered under the SMCA. The issue arose after a federal agency publicly solicited offers to salvage the wreck of a Liberty ship that was torpedoed by a German U-boat during World War II and sank in foreign waters. Clearly not a vessel that would fall unquestionably under the SMCA (such as a US Navy warship), it remained debatable whether the shipwreck was eligible for protection under that law. Although not a warship by contemporary standards, could the wreck of a Liberty ship nonetheless satisfy one of the other definitions of covered vessels, i.e., a ship owned or operated by a government in a noncommercial capacity at the time of sinking? Or a naval auxiliary? And what evidence can be presented to make that determination?

Coverage for a vessel, or class of vessels, under the SMCA is significant since the act provides one of the strongest protections against unauthorized disturbance. As will be described in subsequent sections, protection under the SMCA freedom from exploitation for profit by commercial salvors or by looters seeking artifacts. Given the role of the SMCA in protecting domestic and foreign naval vessels in US waters, one of the research questions for this dissertation is what types of vessels satisfy the definition of SMC and what types of evidence can be assembled to make that determination. Chapter 2 attempts to answer that question by evaluating Liberty ships and the role they played in the US war effort during World War II. The chapter looks at the history of the

ship, the laws applicable to public vessels and the merchant mariners that operated the ships, and the legal cases that evaluated those laws.

Chapter 3 is similar in scope as it also attempts to determine whether another class of vessels—the privateers operating during the Revolutionary War and War of 1812—would be covered under the SMCA. Although by definition privately owned and thus not "owned or operated by a government," could a case still be made that these ships were effectively operated by the government and thus covered under that definition? Alternatively, should privateers be considered warships under contemporary standards of the time. Chapter 3 looks at the history of the privateer and, like the Liberty ship, the vital role it played in supplementing the US Navy. While focused primarily on the historical record of privateers, the chapter likewise looks at relevant caselaw and the opinions of legal scholars from that time to answer that question.

While Chapter 4 also considers the protection of SMC, it involves a different theme from the preceding chapters. Considered the Graveyard of the Atlantic, the sea bottom off North Carolina is the final resting place of hundreds to thousands of shipwrecks—many of which met their fate during conflict. The waters off North Carolina (and indeed every state) are divided into multiple jurisdictional zones that are based on either international law or domestic laws and regulations. Each zone may have different provisions applicable to the shipwrecks within its boundary that may ultimately affect their management, or the risks confronted. Accordingly, the research questions presented in Chapter 4 are how does the location of a shipwreck affect its management and protection under applicable legislation? And relatedly, how do the risks confronted by shipwrecks differ according to their location within a particular boundary or

jurisdictional zone? To answer that question, Chapter 4 details the development of a risk model using different environmental and human variables. The risk variables are input into a Geographical Information System (GIS) to aid the analysis and the evaluation of how location may determine a site's ultimate disposition.

The research questions presented in Chapters 2 through 4 necessarily involve the application of various laws and conventions. Therefore, the following section briefly summarizes the laws and conventions affecting disposition of UCH, particularly shipwrecks, which form the framework under which these questions will be analyzed (see also Appendix A).

1.3 Overview of the Laws and Conventions Impacting UCH

The various laws and conventions that affect the management and protection of UCH have been presented in previous works (Dromgoole 1999, 2013; Workman 2008; Forrest 2010; Catsambis 2012). Street (2006:468) maintains that there are three legal regimes under which rights to UCH in the US are determined: the general maritime law, the ASA, and the NMSA. While those three regimes are certainly implicated in many instances, the rights to access, disturb, or alienate UCH in federal or state waters is often determined by other laws.

For instance, the SMCA is the primary legislative mechanism protecting US SMC and naval auxiliaries, especially those commissioned by the US Navy. Section 106 of the NHPA is significant as it mandates that potential adverse effects to cultural resources are considered for any federal undertaking. Similarly, Section 110 of the NHPA requires federal agencies to establish historic preservation programs and to identify, evaluate, and protect historic properties. On the international front, the United

Nations Convention on the Law of the Sea (UNCLOS) established jurisdictional zones in which certain activities of the coastal state are prescribed or proscribed. Because certain provisions of the UNCLOS have been accepted as customary international law, those provisions related to jurisdictional zones and the sovereign immunity of warships may also affect management of UCH in US waters.

1.3.1 United Nations Convention on the Law of the Sea

The UNCLOS entered into force in 1994. UNCLOS was arguably the first international agreement containing provisions that deal specifically with maritime archaeology. Articles 149 and 303 of UNCLOS are the only articles that address UCH and contain only general principles regarding its protection (Forrest 2010:329). Article 149 addresses archaeological sites that fall within the "Area," which encompasses "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" (UNCLOS, Part I, Art. 1, § 1(1)). Article 149 states:

> All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State of cultural origin, or the State of historical and archaeological origin.

The Article is rather vague and was included mostly to placate the Greek and Turkish delegations, which sought to establish some form of international protection for underwater sites (O'Keefe and Nafziger 1994). Several issues arise in its interpretation due to the vagueness of Article 149.

First, there are no guidelines for the determination of the country of origin for a sunken vessel. One comment discussing the issue has noted that several possibilities exist as to its meaning—the country of origin could signify the flag state of the vessel,

the state where the vessel was outfitted, or the state from which the crew comes (O'Keefe and Nafziger 1994:398).[1] The Convention likewise fails to include a definition of what objects are "of an archaeological and historical nature." Finally, there is no authoritative body or dispute resolution mechanism set up under the article. Elia (2000:44) notes that while UNCLOS imposes a duty on all nations to protect UCH, the convention does not provide a mechanism or authority through which international management of UCH can be achieved. He maintains that the UNCLOS provisions focusing on UCH protection "betray both a lack of serious concern for the subject as well as some fundamental misunderstandings of the nature and scope of underwater archaeology and preservation" (Elia 2000:44).

The Convention is noteworthy in that it at least attempts to provide a mechanism for the preservation of historic shipwrecks in international waters, but Article 149 is of little practical significance (Arend 1982:800). Originally, it was hoped by some that the Seabed Authority would have the power to resolve proprietary and other disputes that arose under the article (Arend 1982:799). Had that mechanism for enforcement and settlement been adopted, the Convention might have had a crucial role in protecting the UCH outside of coastal state jurisdiction. As one commentator has noted, however, the article's "only positive aspect is that it recognizes, at least rhetorically, the importance of archaeological and historical objects as part of 'the common heritage of mankind'" (Arend 1982:800-801). According to Elia (2000:43), however, "legal protection of underwater cultural heritage is virtually non-existent, and the current international legal

[1] The "flag State" is the State in which a vessel is registered.

regime for the protection and management of submerged and other archaeological sites is confused and controversial" and "wide open for unregulated treasure hunting."

A second relevant provision in UNCLOS is Article 303, titled "Archaeological and historical objects found at sea," provides:

> 1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
>
> 2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
>
> 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

The provisions cite Article 33, which contains the rules related to jurisdictional rights within the contiguous zone. Thus, Article 303 confers coastal states some authority to regulate recovery of UCH within its contiguous zone. The rights of flag States versus coastal States is discussed in the next subsection.

Rights of Coastal States

Under UNCLOS, a coastal State's control over the activities and resources within its jurisdictional waters vary according to the zone in which they are located. Elia (2000:44) writes that a State's UCH legislation must comply with the rights and limits established for different jurisdictional zones as provided under UNCLOS. Generally, coastal States have unlimited rights over resources within its territorial seas, which extend 12 miles from the State's baseline (measured as the mean lower low water datum) (see **Figure 1.1**). The territorial seas are essentially an extension of the coastal State's jurisdiction over its terrestrial lands.

Extending 12 to 24 miles from the coastal State's baseline is the contiguous

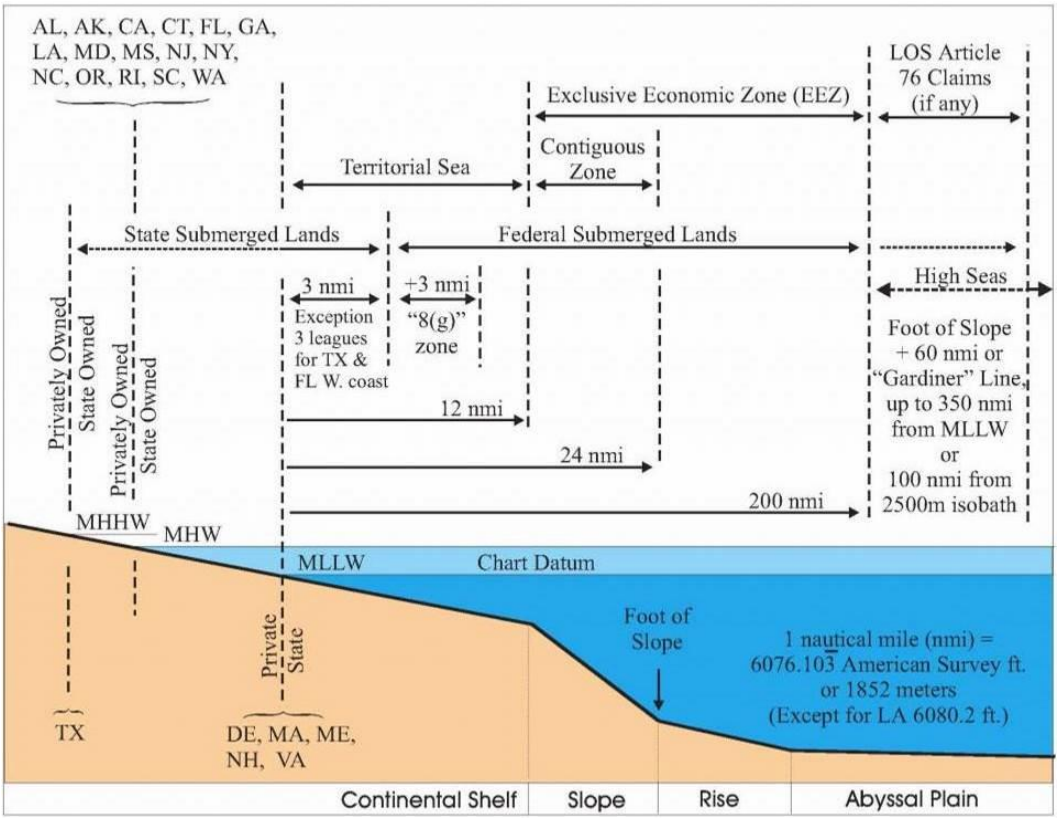

Figure 1.1. Diagram showing jurisdictional boundaries in United States (National Oceanic and Atmospheric Administration [NOAA] General Council 2019).

zone. Within the contiguous zone, Article 33 of UNCLOS provides that the coastal

State “may exercise the control necessary to… prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.” Lastly, the EEZ extends from 24 to 200 miles from the coastal State’s baseline. Rights of the coastal State within its EEZ are limited, but under Article 56 do include the rights of exploring and exploiting, conserving and managing the natural resources located there, the right to regulate marine scientific research, and the right to protect and preserve the marine environment.

Sovereign Immunity of Warships

The sovereign immunity of warships has become an established rule of international law (Aznar-Gomez 2003, 2010; Forrest 2010, 2012; Roach and Smith 2012; Dromgoole 2013; Vadi and Schneider 2014). Article 32 of the UNCLOS provides that, with limited exception, “nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.” Article 29 of the UNCLOS defines warship as “a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.” While the United States has not ratified the UNCLOS, many of its provisions are considered customary international law and, as such, are binding on all States.[2]

[2] Forrest (2010:52) notes two requirements for the formulation of customary international law: (1) there must be a consistent State practice in support of the rule; and (2) the State practice must be accompanied by a sense of legal obligation or legal entitlement.

Roach and Smith (2012) discuss sovereign immunity of warships under international law. The authors note that sovereign immunity of warships

> traditionally refers to immunity from exercise of enforcement, i.e. their immunity from arrest, attachment, or execution in the territory of any foreign state. It also refers to the immunity of public vessels on the high seas from the prescriptive jurisdiction of any State other than the flag State. In the territorial sea, public vessels are only immune from the jurisdiction of the port or coastal State to enforce its laws against them (Roach and Smith 2012:535).

Thus, warships enjoy special protections not necessarily afforded other state-owned vessels. Roach and Smith (2012:542) state that "[w]arships on the high seas, and elsewhere, have complete immunity from the jurisdiction of any state except the flag state."

Under customary international law, only warships on governmental non-commercial service are entitled to this immunity. If the warship is on *commercial* service, then they are not entitled to the same sovereign immunity. This distinction is important because some have argued that wrecks from previous centuries may not be immune from salvage because they were fulfilling a commercial duty at the time of sinking. This was one of the arguments presented on Odyssey Marine Exploration's behalf during the dispute over their claim to salvage the *Nuestra Señora de las Mercedes,* a 36-gun Spanish frigate sunk by the British Royal Navy in 1804 off the coast of Gibraltar.

Sovereign Immunity of Sunken Military Craft

Confusing the management of foreign SMC in US waters is the uncertain status of *sunken* warships under international law. As explained in the previous section, the sovereign immunity of warships has become an accepted international norm. Notwithstanding the long-standing rule that warships and vessels on governmental non-

commercial service enjoy sovereign immunity, the question is whether the *wreck* of such a vessel is afforded the same protections. As with so many other issues involving UCH protection, arguments are provided on both sides. As Dromgoole (2013) points out, the sovereign immunity of sunken warships was not addressed in the UNCLOS. At the outset, it bears repeating that the sovereign immunity is discussed here as it applies to state vessels on governmental noncommercial service (see, e.g., Roach and Smith 2012).

Dromgoole (2013:19) notes that "little consideration has been given to the question of whether the jurisdiction of a flag state extends to the *wreck* of a flagged vessel." According to Dromgoole, the rights of the flag state over its previously sovereign immune but now sunken state warship remains in doubt and contends that the generally accepted consensus, at least at this point, is that the wreck does not enjoy sovereign immunity. Dromgoole's conclusion must be reconciled with other authorities, notably Roach and Smith (2012:542), who state that "[a]s a general rule, sunken military craft, and their associated artifacts, are now presumed to remain the property of the flag state, and are not subject to salvage without the authorization of the flag state, and, in some cases, additionally the coastal state."[3]

Rand Pixa (2004), formerly Chief Counsel for the US Maritime Administration, stated that

> sovereign rights, including all the rights of ownership, extend over sovereign property so long as the sovereign or its successor so intends. The consequence of that is that sunken sovereign ships should not be

[3] A couple of terms used frequently in this section are flag state and coastal state. The flag state is the sovereign nation that owns a particular wreck. The coastal state is the sovereign nation within whose coastal waters a wreck lies. For example, for a Spanish vessel wrecked off the coast of Florida, Spain would represent the flag state and the United States would represent the coastal state.

> treated in the same manner as those that are privately owned in that the former are not subject to unintended abandonment, the law of finds, or unconsented salvage indefinitely after their loss because, unlike private ships, their sovereign owners or their successors carry on indefinitely.

Arguing against the extension of sovereign immunity are those that claim once a ship is wrecked the rationale behind sovereign immunity no longer exists (Roach and Smith 2012:553–554). Specifically, commentators on that side of the argument maintain that the justifications supporting sovereign immunity for State craft no longer exist because the wreck is no longer a ship (Dromgoole 2013:137). Discussing the rationale associated with sovereign immunity of warships, Vadi and Schneider (2014:226-227) state that "[w]ith regard to *sunken* military vessels, the question is whether these norms remain applicable…. The literature and case law are divided on this issue."

As detailed above, the definition of warship in UNCLOS includes the requirements that the vessel be under the command of a commissioned officer and manned by a crew that is under regular armed forces discipline. It follows, critics of expanded sovereign immunity argue, that a sunken vessel cannot no longer meet the criteria and thus the immunity no longer applies (Vadi and Schneider 2014; Roach and Smith 2012). However, an additional claim against unauthorized recovery of SMC is the fact that the wreck remains government property. As stated by Roach and Smith (2012:554), "because sunken warships remain the property of the government of the flag State until abandoned, the accepted rule is that the immunities of government property continue to apply to SMC." Roach and Smith (2012:549) do admit, however, that "[h]ow far back the current rules described in this section apply to newly discovered ships sunk before 17th century is uncertain and evolving."

An additional argument supporting a general prohibition against disturbing sunken warships is that frequently lives were lost during the wrecking event. As such, the wreck site represents the final resting place, or "maritime grave," of the crew that served aboard them. Nevertheless, Bederman and Spielman (2008) argue that a wreck's status as a maritime grave is insufficient to defeat a "valid" claim for salvage. Roach and Smith (2012) argue that whether the wreck site may represent a war grave is immaterial. Roach and Smith (2012:546) state that, regardless of whether the wreck is a war grave, "[n]o State or person can attempt to salvage SMC, wherever located, without the express permission of the sovereign flag State." Roach, a former Naval JAG and Legal Adviser for the Department of State, writes that international law "recognizes that State vessels and aircraft, and their associated artifacts, whether or not sunken, are entitled to sovereign immunity" (Roach 1996:351).

Roach (1996) emphasizes the historical importance of these craft, as well as the significance they represent as the final resting place for those that served on them. He cites the UNCLOS as support for this contention and also notes that several agreements for the protection of specific shipwrecks have been executed between interested States. This sentiment is echoed by Vadi and Schneider (2014:225-230), where they conclude that

> the presumption of the maintenance of sovereign immunity will be strong due to the cultural concerns and – provided that human remains were found onboard – humanitarian concerns. Finally, policy arguments of international comity will weight strongly in favor of state immunity with regard to both historic sunken military vessels and more recent wrecks.

The Issue of Abandonment

When discussing sovereign immunity of sunken warships and other state-owned vessels, an important concept is that of abandonment. When an owner abandons a

shipwreck, that entity effectively relinquishes its property rights to the shipwreck, i.e. the abandoning entity is no longer the owner of the shipwreck. Because the sovereign immunity that may attach to a shipwreck is dependent upon its continued ownership by a sovereign government, abandonment of a shipwreck by its sovereign owner terminates its sovereign immunity. Consequently, any protections the shipwreck might possess from its sovereign immunity status are likewise forfeited.

The abandonment of a shipwreck that was previously protected has a couple of implications. Primarily, abandonment may determine whether recovery of SMC is performed under the law of salvage or the law of finds under general maritime law, with the latter applying in instances where the shipwreck is determined to have been abandoned. Although neither of these regimes is favorable to the historic preservation professional, salvage law possesses a few advantages that make it the preferred choice. Additionally, under the ASA, whether a wreck is deemed abandoned or not will determine whether authority to manage the wreck rests with the coastal state in whose submerged lands the wreck lies.

There are two types of abandonment: express or implied. Express abandonment signifies that the flag state has made some form of affirmative statement or gesture indicating its intent to abandon the property. Implied abandonment, on the other hand, is based on the notion that a flag state's intent to abandon its property can be implied, usually by a long passage of time or an absence of effort to locate or recover the vessel (Roach and Smith 2012:544).

Bederman (2000) maintained that the practice in international tribunals and in the US courts was that abandonment could be implied to determine whether a sunken State

vessel still possessed sovereign immunity. This would, of course, allow salvors to recover SMC without prior authorization from the flag state. More recently, commentators suggest that the law is moving away from acceptance of implied abandonment (Roach and Smith 2012:544). According to Roach and Smith (2012:542), if SMC

> are sunk or otherwise lost at sea, the government is not presumed to have abandoned its title to them. Title to sunken warships is lost only through capture during wartime (before sinking) or through express action of the flag State. When authorized by the sovereign, any salvage of an archaeologically significant site should be conducted in accordance with accepted marine archaeological protocols.

Dromgoole (2013:146-7) discusses the requirement that a State expressly abandon its sunken warships before disturbance is allowed and maintains that express abandonment may eventually become customary international law. Similarly, Vadi and Schneider (2014) acknowledge the shift towards a requirement for express abandonment for SMC. Discussing the case of *Nuestra Señora de las Mercedes*, the authors note that the

> Court of Appeals also made reference to a note of the US Department of State which declared that "the doctrine of express abandonment is consistent with the customary norm of international law that title to sunken warships may be abandoned only by express act of abandonment" (Vadi and Schneider 2014:231).

1.3.2 The UNESCO Convention on the Protection of the Underwater Cultural Heritage

Although not applicable to protection of UCH in US waters, it bears briefly mentioning the United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Protection of the Underwater Cultural Heritage (CPUCH).

Although not ratified by several of the major maritime powers, such as the US or United Kingdom, it has been ratified by several colonial-era maritime powers (e.g., Spain and France). CPUCH was borne out of the recognition that existing mechanisms were inadequate for the protection of UCH. In 1984, the International Law Association was engaged by the Director-General of UNESCO to conduct "a study of the technical and legal aspects of an instrument on the underwater cultural heritage" (Varmer 1999:320). The work of the International Law Association would lead to the negotiation and drafting of the. Acknowledging the shortfalls in the current regime, the preamble to the Convention states that there was a "need to codify and progressively develop the law in conformity with international rules and practice, including provisions in the 1982 United Nations Convention on the Law of the Sea" (O'Keefe and Nafziger 1994:404).

The Convention's goal was to establish and protect an "underwater cultural heritage," which is defined as "all underwater traces of human existence including … wreck[s] such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context" (O'Keefe and Nafziger 1994:405). The General Principle of the Convention, found in Article 3, is that "States party shall take all reasonable measures to preserve underwater cultural heritage for the benefit of humankind" (O'Keefe and Nafziger 1994:408). The drafters were guided by several goals, including the extension of basic legal protections beyond the territorial seas, the encouragement or delegation of State responsibility in the protection of the UCH, and the aim to avoid and resolve disputes arising over jurisdiction and management of the UCH (Varmer 1999:320).

One of the controversial provisions of the Convention is the ability of States to establish a “cultural heritage zone” (Allain 1998:767). The Chair and Rapporteur stated that the creation of a new territorial jurisdiction was based on: 1) the “ineffective and insufficient” protection given to objects of an archaeological and historical nature by article 303 of the LOS Convention; 2) practice as reflected by the handful of states which have legislated in the domain of maritime wrecks beyond their contiguous zone; and 3) the compatibility with the zone outlined in the 1992 Convention on the Protection of Archaeological Heritage. Development of the cultural heritage zone was based on a perceived need to establish a regime that afforded protection to the area which fell outside territorial waters but, in some instances, was still not considered the high seas.

The Convention has several detractors. One such commentator criticized the CPUCH on the grounds that it is inconsistent with international practice (Bederman 1999). The Convention has also been criticized by many of the major maritime powers, which authorizes the “creeping jurisdiction” of coastal States through the establishment of the cultural heritage zone to the limits of the Continental Shelf. It is apparent that no international consensus has been reached on the value of protecting historic shipwrecks and other submerged cultural resources versus the incursions such protections might make into more traditional commercial pursuits.

1.3.3 Federal Legislation

The following sections contain brief summaries of the federal laws having some authority over the management of shipwrecks in US waters. The following list is not exhaustive but includes those laws considered to have the most significance for protection of UCH in state and federal waters for the purposes of the research

presented herein. The analysis presented later in Chapter 4 will assess the risk from human impacts for those shipwrecks falling under the jurisdiction of the following laws.

The National Historic Preservation Act of 1966, 54 U.S.C. §§ 300101 et seq.

Under Section 106 of the National Historic Preservation Act (NHPA), federal organizations and agencies are required to consider the impacts that a federal undertaking may have on historic properties. A federal undertaking is a project or activity that is funded or permitted by an agency of the federal government. Section 110 further requires federal agencies to preserve and manage historic properties under their jurisdiction or those properties that may be affected by an activity "subject to the control or jurisdiction of the agency" (Varmer 2014:54).

The reach of the NHPA can be significant because of the vast number of projects funded or permitted by the federal government. Much of the maritime archaeological work conducted by private cultural resource management firms is due to the requirements of the NHPA. Marine remote sensing surveys are conducted to determine whether potential submerged cultural resources are located within an area of potential effects. When potential resources are detected, cultural resource management firms will then perform additional investigation to determine the National Register of Historic Places (NRHP) eligibility of suspected resources or recommend that potential resources be avoided in order to avoid any adverse effects. Thus, while Section 106 does not provide an active mechanism for protection of UCH, many marine archaeological investigations are responsible for recommending protection for submerged cultural resources that are identified.

Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 et seq.

With the passage of the ASA by Congress, the federal government took a step in providing a framework for regulation of shipwrecks found within its territorial waters. The Act initially confers title for abandoned shipwrecks to the federal government, which in turn vests title with the state in whose submerged lands the vessel is found (a state's submerged lands extend 3 miles from its baseline, except for Texas and the west coast of Florida). Abandoned shipwrecks are defined as those (1) embedded in submerged lands of a state; (2) embedded in coralline formation protected by a state on submerged lands of a state; and (3) on submerged lands of a state and included or determined eligible for inclusion in the NRHP. 43 U.S.C. § 2105(a). Each state is given the right to establish legislation affecting the disposition of abandoned vessels contained within its waters.

The most important aspect of the ASA from a cultural heritage protection standpoint is that the act specifically excludes application of the law of salvage and the law of finds to shipwrecks that are defined as abandoned under the act. 43 U.S.C. § 2106(a). One caveat to note is that the act only applies to abandoned vessels embedded in submerged lands of the state—title to shipwrecks on US public lands or Indian lands remains with the federal government or respective Indian tribe. The act further requires that states provide reasonable access to the public for recreational exploration and encourages the development of underwater parks to facilitate that access.

National Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431 et seq.

Under the NMSA, the Secretary of Commerce is given authority to designate areas of the marine environment which are of special national significance and to manage the areas as the National Marine Sanctuary System. 16 U.S.C. § 1431(b)(1). Areas worthy of designation are those possessing conservation, recreational, ecological, historical, scientific, educational, cultural, archeological, or esthetic qualities of either national or international significance. 16 U.S.C. § 1431(a)(2). The act stipulates that it is illegal to destroy, cause the loss of, or injure any resource within the boundaries of a designated boundary. 16 U.S.C. § 1436(1). The unauthorized salvage or disturbance of a shipwreck would thus constitute a violation of the NMSA. Varmer (2014:35) states that the NMSA "provides the most comprehensive protection of natural and cultural heritage in all of the maritime zones except the high seas and seabed Area beyond national jurisdiction."

Of the thirteen national marine sanctuaries, nine are located in whole or in part outside the limits of US territorial waters, including the Monitor National Marine Sanctuary off the North Carolina coast (Varmer 2014). Although not a national marine sanctuary, the Papahānaumokuākea Marine National Monument in the Northwest Hawaiian Islands extends out to the limits of the EEZ. Elia (2000:48) also notes 1992 amendments to the NMSA extended the law's reach beyond the contiguous zone out to the limits of the EEZ. Under UNCLOS, a coastal State's right to enforce its laws regarding UCH is restricted to the limits of its contiguous zone, however. Street (2006:475) maintains that extension of a marine sanctuary past the contiguous zone,

through which the US would assert authority over disposition of UCH located there, would be a violation of Article 303 of UNCLOS.

Sunken Military Craft Act of 2004, 10 U.S.C. §§ 113 et seq.

The Department of the Navy (DON) possesses responsibility for managing more than 17,000 submerged aircraft and vessels around the globe. Protection of SMC was facilitated through passage of the SMCA of 2004, 10 U.S.C. 113, which promotes protection for sunken military vessels and aircraft by prohibiting their unauthorized removal and disturbance. The authority to protect military craft is derived, in part, from the Property Clause of the US Constitution, which maintains that the US government retains title to government property unless it expressly divests its interest. SMCA policy dictates a preference for in situ preservation for SMC unless disturbance presents a clear benefit to the US Navy. Authority for the SMCA is also derived from international law, where the sovereign immunity of warships has become an accepted principle. The SMCA is, to some extent, the federal manifestation of this principle. Indeed, the applicability of the SMCA is not limited to US vessels. Under the SMCA, a foreign government may solicit the US government for an arrangement through which its SMC can enjoy the same protections as US vessels. Indeed, the SMCA provides that such arrangements are encouraged. Promotion of such agreements is not surprising considering numerous US SMC are located in foreign waters. While individual agreements with other countries have been made to protect specific shipwrecks, e.g., RMS *Titanic* and CSS *Alabama*, no comprehensive agreements covering the entirety of

a foreign sovereign's SMC in US waters have been executed. The adoption of the revised SMCA regulations may ultimately prompt such negotiations.

The rights of foreign SMC to benefit from the same permitting and non-disturbance regime as that of US Navy SMC is significant for a couple of reasons. The first reason falls under the general notion, at least among cultural heritage professionals, that protection of UCH benefits everyone. The historical view among cultural heritage professionals is that commercial salvage of historic vessels destroys the archaeological context from which important data regarding the ship and cargo can be derived. The second reason supporting protection is the belief that protection of foreign SMC in US waters will encourage foreign States to adopt similar protections for US SMC in foreign waters. This is significant since, as noted in the implementing language for the SMCA regulations, it is estimated that more than half of all US Navy SMC are located in foreign waters.

Apart from the SMCA itself, proper application of the act may implicate, at a minimum, general maritime law, customary international law, UNCLOS, CPUCH, multiple federal statutes and regulations (e.g., ASA, NHPA, NEPA), and the federal court decisions applying those laws. The interaction of these multiple laws and conventions is inherently complex and management of shipwrecks may be affected by overlapping jurisdictions.

The ultimate disposition of SMC can also frequently be politically sensitive for a number of reasons, not the least of which is that sunken warships may represent war graves for the men and women that lost their lives while in service to their country. Sunken warships might also be of particular historical significance or have carried

property that is significant as part of the flag state's cultural heritage. Many of the wrecks lost during wartime (and occasionally in peaceful periods) carried unexploded ordnance or large quantities of fossil fuels. Activities that threaten these wrecks could unintentionally pose an environmental threat and/or public health hazard and thus expose the US Navy to potential liability. Additionally, especially with more recent shipwrecks, the SMC may possess secret or technologically advanced information that the flag state does not want to pass into foreign hands.

Under the SMCA and implementing regulations, the US Navy restricts activities directed at SMC. The DON, through the Naval History and Heritage Command (NHHC), recently enacted revisions to the existing regulations found at 32 C.F.R. Part 767. The revised regulations aim to ensure consistency with other laws that protect cultural resources, such as the NHPA and Archaeological Resources Protection Act. The regulations outline which activities are prohibited under the SMCA and also expands protection to non-historic sites, i.e., wrecks that are less than 50 years old.

The existing regulations did possess a permitting program through which applicants could propose activities directed at Navy SMC for prior authorization. One significant addition to the current regulations is the establishment of a special-use permitting program to enable minimally intrusive activities on SMC. Under the existing regulations, any activity directed at SMC, however minimal, was unauthorized without filing a standard permit, which entailed the same application and reporting requirements for any activity regardless of the degree of disturbance. Special Use permits pose fewer requirements during both the permitting process and during operations directed at SMC to the minimally invasive nature of the activity. As stated on the NHHC (2016) website,

“Special Use permits may apply to … activities [that] may include sampling or data-collection for corrosion studies, the development of a documentary, or any activities directed at non-historic sunken military craft.”

The other significant addition to the proposed regulations is the formal establishment of penalties for violations of the SMCA. While penalties for violations are contemplated under the SMCA, the current regulations provide only that the Director of Naval History or an appropriate designee “may, amend, suspend, or revoke a permit in whole or in part, temporarily or indefinitely, if in his/her view the permit holder has acted in violation of the terms of the permit or of other applicable regulations, or for other good cause shown” (32 C.F.R. 767.11). The regulations provide that penalties up to 100,000 USD may be imposed for each violation of the SMCA and that each day upon which a violation occurs is considered a separate violation. Violators can also be held responsible for damage to the wreck itself, the costs for such as things as storage, restoration, and curation of SMC, and the costs of retrieving information of an archaeological, historical, or cultural nature. Lastly, the proposed regulations establish in rem liability for any vessel used during violation of the SMCA.

Through the current regulations, NHHC maintains authority to administer the permitting program and evaluate permit applications based on the stated guidelines. Permit applications require persons to identify the research objectives, methods, and significance of the proposed work. Applicants must also discuss conservation plans when relevant, possible environmental impacts, outreach and education plans, and the members and qualifications of the research team. Additionally, the regulations detail

administrative procedures for the assessment of civil penalties and/or liability for damages for violations of the SMCA.

One of the primary provisions protecting SMC is the prohibition against the application of the law of salvage and the law of finds under the SMCA. Over the years, admiralty courts have applied the traditional rules of maritime law to settle disputes over rights to excavate and profit from historic shipwrecks. Historically, federal courts in the United States have adjudicated proprietary claims to wrecks under either the law of salvage or the law of finds. The law of finds essentially dictates that the finder of an abandoned wreck can claim legal title to the wreck. Under salvage law, the finder does not obtain title to the wreck but instead receives a monetary award for the value of the salvor's services in recovering the wreck (Schoenbaum 1994). Continued application of the laws of finds of salvage to determine rights to historic wrecks has been criticized for use of what is considered antiquated rules of law, or at least inappropriate for application in this context (McQuown 2000). A discussion of the general maritime law, and specifically the laws of salvage and finds, is presented in the following section.

1.3.3 General Maritime Law

In the absence of federal or state legislation, general maritime law will often determine ownership and/or salvage rights to a historic shipwreck in the United States. The use of maritime law to settle disputes over shipwrecks has many detractors and several of the arguments against this continued practice will be presented. Historically, federal courts have appealed to salvors as favorable venues in which to assert their claims, sometimes regardless of where the wreck is located. Two federal district court rulings in Florida within the last decade may signal a transition from traditionally salvor-

friendly decisions, however. *See*, *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 1126 (M.D. Fla. 2009), *aff'd* 657 F.3d 1159 (11th Cir. 2011); *Global Marine Exploration, Inc. v. The Unidentified, Wrecked and (For Finders-Right Purposes) Abandoned Sailing Vessel*, No. 6:16-cv-01742-KRS (M.D. Fla.) (*Ribault* fleet). Nevertheless, the application of general maritime law will continue until or unless it is expressly foreclosed through superseding federal legislation.

Over the years, admiralty courts have applied the traditional rules of maritime law to settle disputes over rights to excavate and profit from historic shipwrecks. Under the general maritime law, rights to shipwrecks are adjudicated under either the law of salvage or the law of finds. Historically, courts have most frequently determined those rights according to the law of salvage because title to the shipwreck does not divest to the salvor as it does under the law of finds. Consequently, the admiralty courts retain some semblance of management authority over the recovery of the wreck and/or its associated artifacts because the court ultimately decides the size of the salvage award. In more recent years, such authority has encouraged courts to consider the archaeological integrity of the recovery when determining its award. Under the law of finds, the discovering party obtains title to the wreck and its contents and is thus allowed to dispose of the shipwreck in any manner the party chooses.

With new exploratory technology, many of the shipwrecks now being found lie outside the territorial waters of the coastal states. Beyond the jurisdictional reach of federal or state legislation, traditional maritime law dominates. However, increasing criticism has been weighed against the continued use of what is considered antiquated rules of law, or at least inappropriate for application in this context (McQuown 2000).

Forrest (2010:288) states that the "policy underpinning the laws of salvage and finds is to return lost property back into the stream of commerce, maximizing the economic potential of that property." However, the courts' traditional determination that the economic potential of a shipwreck and/or its cargo can only be realized through salvage assumes a rather narrow view of UCH. Nevertheless, Street (2006:477) maintains that the law of salvage is the only legal mechanism currently existing through which the United States can manage UCH outside of the contiguous zone.

The Law of Salvage

Application of salvage is generally favored over the law of finds because "salvage law's purposes, assumptions, and rules, directed toward the protection and preservation of maritime property, are more consonant with societal needs and interests (Schoenbaum 1994:799-800). A federal litigant must satisfy three elements to support a successful claim for salvage: 1) a maritime property must be at risk from a marine peril; 2) the salvage services must be voluntarily rendered; and 3) the salvage operation must be successful (Forrest 2010; McQuown 2000; Schoenbaum 1994).

Of the elements required to satisfy a successful claim for salvage of an historic shipwreck, perhaps the most hotly debated factor is whether a vessel that is already submerged, in some instances for hundreds of years, can be classified as "in peril." Courts have held that the peril need not be imminent, only subject to *potential* damage (Schoenbaum 1994:800). Courts have found that the potential damage may arise from the actions of the elements, or ironically, through the actions of treasure hunters (Schoenbaum 1994:800). In *Cobb Coin Co. v. Unidentified, Wrecked, and Abandoned*

Sailing Vessel, 549 F. Supp. 540, 557 (S.D. Fla. 1982), the court even added the possibility of destruction or theft by pirates as a sufficient marine peril. Salvors and other legal commentators argue that shipwrecks are in peril insofar as failure to timely excavate a shipwreck will inevitably result in its complete deterioration through either natural and/or anthropogenic causes (Bryant 2001).

Historically, most courts have been willing to find the existence of a peril sufficient to support a claim for salvage (McQuown 2000:312; Gerstenblith 2008:817). One such detractor has stated that the law of salvage was originally intended for distressed vessels and application to a submerged vessel can only be done by broad interpretation or outright legal fiction (Nafziger 2000:82). O'Keefe (1999:227–228) notes that, in an effort to establish a legal basis to support claims of salvage for historic shipwrecks, the courts "have strayed very far from the original concept of salvage relating to a real and immediate danger." Gerstenblith (2008:817) also writes that it a "fiction" to conclude that "a commercial salvor is operating to rescue the property on behalf of its owner."

The irony, which has been noted by critics of the salvage of UCH, is that it is the salvage operation itself that typically endangers the shipwreck. In reality, once a shipwreck has been submerged of sufficient duration that it achieves a state of equilibrium with its surrounding environment, the salvage of the shipwreck constitutes a marine peril. Archaeologists argue that the shipwrecks remain relatively stable after an initial period of deterioration (Gregory 1995; Ward et al. 1999) and that the most significant 'peril' faced by historic shipwrecks is unprofessional excavation by private salvors. In *Ontario v. Mar-Dive Corp*., [1996] 141 D.L.R. 4th 577, this fact was

appreciated in a decision by a Canadian court involving a salvage claim for a vessel found resting on the bottom of Lake Erie. The government contended that salvage of the vessel threatened to expose it to further deterioration. The court agreed, stating that "salvage efforts can upset the equilibrium achieved over time in underwater historic sites and actually create peril by exposing the objects to new environmental stimuli which can accelerate deterioration."

Although courts still seem willing to assert a legal fiction to support a claim for salvage, courts have become more willing to recognize the archaeological and historical value that is lost during salvage. Ostensibly under the requirement that the salvage be completed successfully, courts have used salvor compliance with archeological methods and other interests when calculating an appropriate award (Nafziger 2000:83). The US Fourth Circuit Court of Appeal, in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 974 F.2d 450, 468 (4th Cir. 1992), counseled that "the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salved" should be considered when determining an appropriate salvage award. Among these qualifications are compliance with the public interest, reliance on scientific expertise when making salvage decisions, the manner of its execution, and conformity of salvage and post-salvage activity with standards of scientific integrity (Nafziger 2000:83). If the salvage operations fail to meet appropriate archaeological standards, a court may decide to reduce the amount of the claim.

One final argument on the application of salvage law to shipwrecks bears mentioning. McQuown (2000:321–322) contends that the courts and commentators, in rationalizing the use of salvage law, have

> start[ed] from the wrong premise. In deciding that either the law of salvage or finds applies, one must first accept the faulty premise that historic shipwrecks are still maritime property within the meaning of admiralty law. This is absurd. At some point a shipwreck stops being the remains of a commercial vessel, and becomes an archaeological site.

The author continues by stating that courts in other jurisdictions have refused to apply salvage law on the basis that the wreck is no longer a vessel but a site (McQuown 2000:322–323).

The Law of Finds

The law of finds has been used by admiralty courts to determine title to shipwrecks that have been abandoned. The law of finds applies in instances where the original owner of a *res*, i.e., a shipwreck, is found to have abandoned the property. In a maritime setting, this has been found to occur where a ship has been deserted "without hope of recovering it… and without intention of returning to it…." (O'Keefe and Nafziger 1994:396). As noted in an earlier section, abandonment of property may be either express or implied. An express intent to abandon usually requires a declaration by the owner "surrendering the wreck to the hull underwriters or to a government" (Sweeney 1999:194). Abandonment may also be implied "from the long passage of time without any efforts to locate or raise the wreck" (Sweeney 1999:194). The law of finds also has

an additional requirement—effective possession of the property.[4] Once the finder "reduces the property to his or her possession," he or she "acquires title against all the world." (O'Keefe and Nafziger 1994:396).

Several problems exist when fulfilling or adjudicating the requirements to support a claim under this theory. First, it may difficult to establish when a vessel has been abandoned. The implied abandonment argument is often made for shipwrecks that have been submerged for hundreds of years. If the vessel being litigated did not belong to a State, it would be difficult if not impossible to locate the original owner. In these instances, the implied abandonment argument would hold water. The argument is more tenuous when the shipwreck is a State vessel, however, because the owner is easily identifiable. A sovereign government, such as Spain, could, and has, made the argument that there was never any express or implied abandonment of its shipwrecks and thus title to the shipwreck was never lost. *See, Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F. 3d 634 (4th Cir. 2000). When storms or reefs capsized the numerous Spanish vessels traversing the Atlantic, the technology did not exist for recovery of those vessels. It was only in the second half of this century that a government had a legitimate possibility to recover lost vessels and thus the law of finds should only apply to a shipwreck when expressly abandoned.

[4] More recent decisions have determined that constructive possession of a wreck will satisfy this requirement.

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Global Marine Exploration, Inc. v. The Unidentified, Wrecked and (For Finders-Right Purposes) Abandoned Sailing Vessel, No. 6:16-cv-01742-KRS (M.D. Fla.)

Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 675 F. Supp. 1126 (M.D. Fla. 2009), *aff'd* 657 F.3d 1159 (11th Cir. 2011)

Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels, 221 F. 3d 634 (4th Cir. 2000).

U.S. v. Fisher, 977 F. Supp. 1193 (S.D. Fla. 1997)

CHAPTER 2

ABSTRACT

Through the Sunken Military Craft Act of 2004, Congress established formal authority for the protection of classes of vessels defined in the Act. Among the vessels covered are naval auxiliaries and vessels that were owned and operated by a government and on military noncommercial service at the time of its sinking. The article examines these two vessels classes, as defined under the Act, from a legal and historical perspective through a case study of Liberty ships. Primarily operated by the US Merchant Marine during World War II, the wrecks of Liberty ships arguably qualify for protection as sunken military craft under both definitions. Through analysis of the definition as applied to Liberty ships, the article intends to provide a general framework under which other ambiguous types of vessels can be assessed for protection as sunken military craft.

2.1 INTRODUCTION

The Sunken Military Craft Act of 2004 (SMCA), 10 U.S.C. § 113, was enacted by Congress to provide federal protection to the nation's sunken military vessels and aircraft. Under the SMCA, protection is extended to any "sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank." While certain vessels quite obviously meet the definition of sunken military craft (SMC), i.e., warships, other types require further analysis to determine whether they are eligible for protection. This article is to examine

the last definition of covered vessels under the act—vessels owned or operated by a government on military noncommercial service—from a legal perspective and with evidentiary support from the historical record. The intent of this article is to provide a critical assessment of the definition through which the eligibility of other purported SMC may be similarly evaluated to determine coverage under the act.

To that end, this article will use the Liberty ships operating during World War II as a case study for an evaluation of the SMCA definition of covered vessels (**Figure 2.1**). Liberty ships potentially qualify for protection under the SMCA as both "naval auxiliary vessels" and a "vessel that was owned or operated by a government on military noncommercial service when it sank," although it is only the latter term that will be considered in this article. The methodology will involve discussion of the legislative history of the SMCA, as well as other legislation that potentially inform the analysis of

Figure 2.1. American Liberty ship being loaded with supplies in Boston (National Archives).

the definition. For example, as will be discussed further below, federal legislation such as the Merchant Marine Act, Public Vessels Act, and Suits in Admiralty Act are instructive when interpreting the SMCA definitions of protected vessels. The methodology will also include research into cases determining the legal status of Liberty ships or similar vessels operating during World War II—and the officers and crew that manned them—to determine how contemporary courts appraised their service during the war.

Section 2.2 of the article entails a brief history of the Liberty ship and its importance to the overall military effort during World War II. Section 2.3 discusses the "owned and operated by a government" component of the types of covered vessels and whether Liberty ships conceivably meet this criterion. As with the remaining criteria, however, satisfaction of the owned and operated component will need to be considered on a case-by-case basis and on the circumstances present at the time of the vessel's sinking. Section 2.4 will review the "noncommercial" component of the SMCA definition. The assessment includes examination of other federal laws that bear on the public versus private nature of transport vessels and their applicability to the instant analysis. References to relevant legislative history in order to determine congressional intent are discussed where appropriate. The "military" requirement of the definition will be assessed in Section 2.5. The crew complement and ordnance typically on board Liberty ships during World War II—specifically that the ships carried guns and navy personnel—offer a factual foundation for the military nature of the voyages undertaken by Liberty ships. Lastly, Section 2.6 presents examples of two Liberty ships sunk during World War II and applies the considerations from preceding sections to analyze their

qualifications under the “military noncommercial” requirement of the third definition of covered vessels under the SMCA.

2.2 A Brief History of the Liberty Ship

The success of the German Navy in attacking Allied merchant shipping necessitated the quick production of vessels to replace the tonnage lying scattered across the ocean floor. Codenamed *Paukenschlag*, or *Roll of Drums*, by Admiral Doenitz, the Germans sought to overwhelm the Allies’ supply lines by attacking merchant vessels in the North Atlantic shipping lanes (and throughout the rest of the Atlantic Ocean). The operation began in earnest with the first sinking of a merchant vessel by a German U-boat off the coast of Cape Cod in January 1942. In the early years of the war, the German U-boats were especially effective in destroying merchant vessels in the Atlantic Ocean, including numerous ships off the East Coast of the United States (**Figure 2.2**). Elphick (2001:180) notes that “in November 1942, the month in which the Allies suffered their highest shipping losses of the war, [losses] amount[ed] to approximately 860,000 tons… of which over 700,000 tons was a result of submarine actions.”

The importance of successfully supplying the Britain and other Allies with much needed materials to the Allies cannot be understated, with one author calling it a matter of “national survival” (Kennedy 2000:155). Cargo ships crossing the Atlantic were frequently carrying products and materiel essential to the Allied nations’ successful prosecution of the war, the loss of which could devastate their chances to ultimately

Figure 2.2. Merchant ship losses by U-boat, January–July 1942 (Veterans Affairs Canada).

prevail. The German operation to destroy merchant shipping and the Allies' attempts to eliminate the German threat came to be known as the Battle of the Atlantic and it was one of the most critical battles of World War II. Indeed, Prime Minister Winston Churchill would write that

> The Battle of the Atlantic was the dominating factor all through the war. Never for one moment could we forget that everything happening elsewhere, on land, at sea, or in the air, depended ultimately on its outcome (Elphick 2001:179).

It was thus imperative for Allied success that the numerous supply vessels lost to German submarines be replaced as quickly as possible. Fortunately, although reluctant to formally enter the war as a belligerent, the United States was not caught completely offguard at the outbreak of hostilities in Europe. Anticipating the war to come, the Merchant Marine Act was enacted by Congress in 1936 to, at least in part, facilitate the rebuilding of the United States' flagging merchant marine (Williams 2014:14). In 1941, under the emergency powers granted to him in times of national crises, President Roosevelt would initiate a massive shipbuilding program to counter the heretofore successful German operation.

It was ultimately decided that one of the most efficient methods of replacing the necessary cargo tonnage was through mass production of vessels based on a single design. The design was designated EC2-S-C1, where "E" stood for Emergency, "C2" for the length of the vessel (between 400 and 500 feet), "S" for Steam, and C1 for design C1 (Elphick 2001:66). The design would become the template for a class of cargo vessel designated the "Liberty ship," The typical Liberty ship was 10,800 DWT and measured 442 feet in length with a 57-foot beam and was powered by two 2,500 hp reciprocating steam engines (**Figure 2.3**).

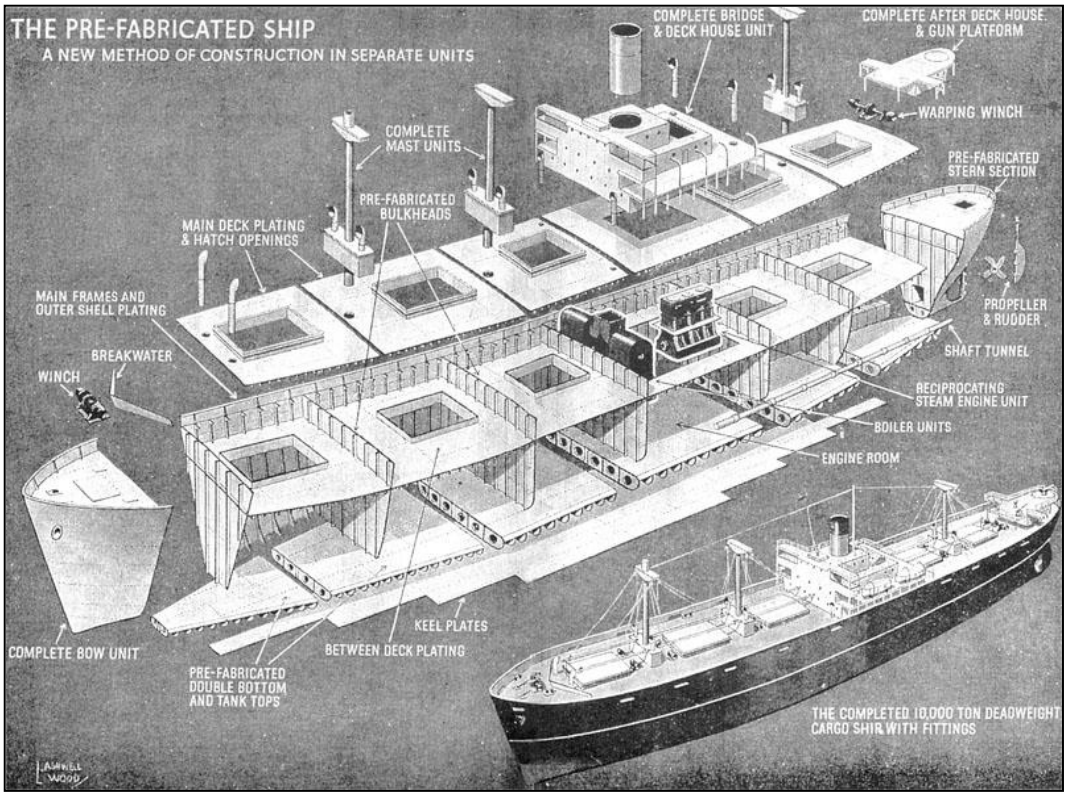

Figure 2.3. General schematic of a Liberty ship (Smithsonian Institution).

The first Liberty ship, SS *Patrick Henry*, rolled off the docks in December in 1941. By the end of 1942, 510 additional Liberty ships would be constructed (Elphick 2001:184). The pace of production was so rapid that by February 1943 the production of new tonnage would outstrip the tonnage lost to German submarines (Elphick 2001:184). The average time for construction of a new Liberty ship was 41.5 days, with the record for a fully outfitted ship taking only 10 days (Antenen 1945:9). The quick production can be attributed to prefabrication and new welding techniques (as opposed to riveting, which required more time during construction but was stronger structurally) (Antenen 1945). By the end of the war, over 2,700 Liberty ships would be constructed

at 18 shipyards (both private and publicly owned) throughout the country (Thornton and Thompson 2001; Williams 2014) (**Figure 2.4**).

The Liberty ship would become the “maritime workhorse” of the Allied powers (Antenen 1945; Elphick 2001). Referring to the operation of Liberty ships during the war and once famously referring to them as “Ugly Ducklings,” President Roosevelt stated that Liberty ships “formed a bridge across the Atlantic” (Elphick 2001:179). However, the Liberty ship’s role was not limited to merely carrying cargo across the Atlantic. Elphick (2001:179) writes that “from the time of Operation ‘Torch’ in North Africa in November 1942, whenever and wherever Allied armies made landings, the Liberty ship was there, sometimes involved in the very landing operations themselves.” For example, twenty-two Liberty ships participated in the seminal operation of the war, the Allied landings on D-Day (Elphick 2001:310). Although not referring solely to Liberty ships, General Eisenhower would state in 1944 that when “final victory is ours there is

Figure 2.4. Liberty ships lined along dock at Boston pier (National Archives).

no organization that will share its credit more deservedly than the American merchant marine" (Elphick 2001:12).

2.3 OWNED OR OPERATED BY A GOVERNMENT

The Liberty ships constructed during World War II were a response to the serious decline in shipping tonnage resulting from the successful campaigns of the German U-boats. Funding for the shipbuilding program was borne by the US government and the program was managed by the US Maritime Commission, which was led by Admiral Emory Land. In 1942, the War Shipping Administration (WSA) was created and would oversee and control all facets of merchant shipping in the United States. Admiral Land was also head of the WSA and would thus be in charge of both the construction and operation of all merchant ships in the US.

Of the 2710 Liberty ships produced, roughly 300 would be loaned to Allied nations through the Lend-Lease program (Elphick 2001). Under the program, merchant ships were bareboat chartered to respective foreign governments with the proviso that they would be returned to the US following the war. The ships bareboat chartered to the Allies would be manned and controlled by officers and crew of the respective governments. At the beginning of the Lend-Lease program, the charter terms were not especially onerous. Elphick writes that the original charter terms for ships supplied to Allied nation required they pay one USD per month. Eventually, the charter party terms were modified to make them more favorable to the US as the Allied's prospects for victory in Europe increased (Elphick 2001).

Although the ships loaned through the Lend-Lease program technically remained US property, the bareboat charter effectively placed ownership in the hands of the

respective Allied governments during the duration of the charter party. Under a bareboat, or demise, charter, “the charterer takes complete control of the vessel, mans it with his own crew, and is treated by law as its legal owner” (Schoenbaum1994:630). The bareboat charterer is considered the owner *pro hac vice* of the vessel during the duration of the charter party. Accordingly, any ship under bareboat charter to a foreign government would be considered *owned* by that government for the duration of the charter. It follows that if a Liberty ship or any other vessel was under a demise charter to an Allied nation at the time of sinking, then the ship would only be covered under the SMCA if that government sought protection for the shipwreck under the act.

Most of the Liberty ships constructed remained the property of the US government, however. Elphick (2001:17) writes that the majority of Liberty ships were operated by the US Merchant Marine, while many of the remaining vessels were chartered to the US Navy or Army. Gibson (1986:106-7) similarly notes that many merchant ships were chartered by the WSA directly to the Navy or War Departments, which department “would then take on full operational control including manning.” Regardless of whether the Liberty ship in question was operated by the merchant marine or directly by one of the military departments at the time of sinking, the government owned and operated criterion would be met under the SMCA.

2.4 NONCOMMERCIAL SERVICE

In addition to warships and naval auxiliary, the SMCA protects vessels that were owned or operated by a government on “military noncommercial” service at the time it sank. In instances where the vessel meets the government-owned or -operated

requirement, it remains necessary that the "military noncommercial" nature of the service be established.

A number of cases deal with the inquiry of what constitutes a commercial versus noncommercial vessel through interpretation of the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, and Public Vessels Act, 46 U.S.C. 781 *et seq.* These two laws establish tort liability for the United States and turn on whether or not the offending vessel was a "merchant" and thus commercial. Indeed, early versions of the bill establishing the SMCA defined covered vessels as those engaged in "government noncommercial service" or "any warship, naval auxiliary, or other public vessel within the meaning of the Public Vessels Act… and/or vessels operated by or for the United States within the meaning of the Suits in Admiralty Act…." National Defense Authorization Act for Fiscal Year 2005, S. 2229, 108th Cong. § 317 (2004). *See also*, H.R. 4200, 108th Cong. § 1021 (2004).

Accordingly, an examination of the courts' interpretations of these two acts is germane to the analysis of "military noncommercial" service. In general, the courts appear to favor an expansive definition such that any vessel either owned or operated by the United States government during wartime is considered noncommercial. The following cases are illustrative of what the federal courts consider a merchant vessel.

One of the seminal cases dictating the criteria for determining whether a vessel is public or commercial is *Calmar S.S. Corp. v. U.S.*, 345 U.S. 446 (1953). The Supreme Court noted the extensive amount of litigation involving this particular question and granted *certiorari* to resolve the issue. In *Calmar*, the vessel was privately owned but was transporting military supplies and equipment, ammunition, and high-octane

gasoline for use in war planes during World War II. *Id.* at 450. The district court found that, despite the fact that the vessel was transporting war materiel, she was owned and operated by a private company for the profit of the owner. The court stated that although "the cargo was public stores and munitions" the "public service did not alter the merchant character of the vessel." *Id.* at 449-450. The appellate court reversed the finding based solely on the fact that the ship was transporting war materiel. Relying on *The Western Maid*, 257 U.S. 419 (1922), the appellate court held that a vessel carrying such cargo is not employed as a merchant vessel and is thus public.

The Supreme Court disagreed and reversed the appellate court. The Court maintained that the nature of the cargo is not the determinative factor of whether a vessel is commercial or noncommercial. Instead, the Court reasoned that, for the sake of the Suits in Admiralty Act, an assessment should be based on the terms of the charter party. 345 U.S. at 451-452. Ultimately, the Court held that the vessel was "a privately owned vessel operated for hire for the United States, was 'employed as a merchant vessel' within the meaning of the Suits in Admiralty Act, although engaged on a war mission." *Id.* at 456. The Court also distinguished the holding in *The Western Maid* based on the fact that the vessel at issue in that earlier case was owned by the US Government. It is important to note that the Court's holding was significantly influenced by the fact that the vessel was privately owned.

In *The Western Maid* opinion, *supra*, the Supreme Court *did* find that the vessels at issue were noncommercial. The decision consolidated three separate cases involving collisions of vessels owned or operated by the United States during World War I. One ship was *The Western Maid* and was used to transport food for affected civilian

populations in Europe during World War I. The ship was the property of the United States and had been assigned to the War Department by the US Shipping Board. The *Liberty* was a pilot boat bareboat chartered to the US and manned by a crew from the US Navy and commissioned as a naval dispatch boat. The *Carolinian* was also bareboat chartered to the United States, was furnished with an Army crew, and used to transport troops to Europe.

The Court found that the US government was the owner *pro hac vice* of the *Liberty* and *Carolinian* because they were bareboat chartered and were engaged in government and public purposes at the time the incidents giving rise to the litigation occurred. *Id.* at 431. It was argued that *The Western Maid* was a merchant vessel since it was used to carry foodstuffs that might eventually be sold privately. Nevertheless, the Court stated that this argument "cannot disguise the obvious truth, that she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandizing than if she had carried a regiment of troops." *Id.* at 432. Accordingly, the Court held that all three vessels were engaged in public service and were not merchant vessels during the relevant periods.

A more recent case interpreting the public nature of vessels is *George W. Rogers Const. Corp. v. U.S.*, 118 F.Supp. 927 (S.D.N.Y. 1954), although the US was not at war at the time of sinking. The vessel involved in the litigation, *The Cayuse*, was owned by the United States through the US Maritime Commission. *The Cayuse* was operating under a voyage charter to the US Navy and was instructed to pick up a shipment of fuel oil in Aruba that was to be transported back to Norfolk, Virginia. The vessel negligently

damaged another ship and a bridge while en route to the Caribbean on November 11, 1947. The district court found that the vessel was crewed by public servants—the US Merchant Marine—and was engaged in a public service for the United States.

In support of its argument, the party challenging the noncommercial status of *The Cayuse* pointed out that the Navy paid freight charges to the US Maritime Commission and the vessel was thus operated for profit. Relying on *U.S. v. City of New York*, 8 F. 2d 270 (S.D.N.Y. 1923) and distinguishing the reasoning in *Calmar*, *supra*, the court noted the important distinction that *The Cayuse* was actually owned by the United States – unlike the vessel in *Calmar.* The court concluded that the payment of freight was not in itself sufficient to alter the noncommercial character of the voyage.

The court opined further that the "charter party test" enunciated in *Calmar* was confined to cases involving privately owned vessels transporting public cargo. Accordingly, the court found that

> A vessel owned absolutely by the United States through the Maritime Commission and operated by officers who are civil service employees of the United States and by a crew paid by the United States through its general agent, is a 'public vessel' within the purview of the Public Vessels Act … unless it is engaged in transporting cargo for hire for private shippers. *Id.* at 934.

In *Bradey v. U.S.*, 151 F.2d 742 (2d Cir. 1945), the vessel in question was transporting coal belonging to the US Army to Newport News, Virginia, where she was to pick up an additional cargo of munitions for transport to the European theater. The vessel was owned by the United States. The appellate court easily disposed of the question of whether the vessel was a "merchant," stating that it was "plainly" a public vessel (and thus governmental) within the meaning of the Public Vessels Act. *See also*, *Smith v. U.S.*, 346 F.2d 449 (4th Cir. 1965) (a Navy tanker "employed exclusively in

hauling petroleum products to various military bases for national defense" and "under the direction and control of the Military Sea Transportation Service" was a public vessel); *Neri v. U.S.*, 204 F.2d 867 (2d Cir. 1953) (tanker owned by the US and allocated to US Navy was public vessel during voyage to Persian Gulf in 1946); *Petition of United States*, 367 F.2d 505 (3d Cir. 1966) (ship owned by US and used as directed by Navy was a "public vessel" despite fact that the manning and operation of the vessel was by a private corporation).

Gibson (1986) similarly supports the proposition that merchant vessels chartered to the US government should be considered public vessels. Under the requisition authority granted through the Shipping Act of 1917, the President could take over vessels through Executive Order, which would then be transferred to the Army or Navy (Gibson 1986:31-32). The requisition authority stipulated that when

> the requisitioned vessel is engaged in the service of the War or Navy Departments, the vessel shall have the status of public ship and the masters, officers, and crew shall become the immediate employees and agents of the United States with all the rights and duties of such, the vessel passing completely into the possession of the masters, officers, and crew absolutely under the control of the United States (Gibson 1986:32).

2.5 MILITARY SERVICE

One more requirement would need to be met before Liberty ships are protected under the SMCA, which is that the vessel was on military service at the time of sinking. A number of factors point to the conclusion that Liberty ships were often engaged in a military capacity during World War II. The crew that served aboard Liberty ships—apart from the Armed Guard—would have been members of the merchant marine. The Merchant Marine Act passed in 1936 (46 U.S.C. §50101) stated in Section 1 its

Declaration of Policy: “It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine… (b) capable of serving as a *naval and military auxiliary* in time of war or national emergency” (emphasis added). Perhaps wary of an impending war, Congress clearly contemplated the use of the merchant marine in a military capacity.

Gibson (1986:94) also points out that by the end of 1942, nearly all merchant vessels were armed and carried “at least a partial complement of guns and Naval gunners.” Navy ordinances further required that masters of merchant vessels assign crew members as assistant gunnery personnel and others to help with ammunition handling (Gibson 1986:95). The author notes that a Liberty ship typically carried one 5-inch gun, one 3-inch gun, and 6 20-mm guns, which, according to Navy instructions, required sixteen gunnery assistants from the crew. A Liberty ship was generally manned by 37 officers and crew and required a minimum of nine crew members to operate the vessel, leaving twelve crew members to assist with ammunition handling (Gibson 1986:95-96).

Information derived from secondary sources also suggests that Liberty ships served as naval auxiliaries during wartime. Summarizing several texts devoted to Liberty ships and the history of the US Navy during World War II, the National Park Service website states that “each Liberty ship carried a crew of between 38 and 62 civilian merchant sailors, and 21 to 40 naval personnel to operate defensive guns and communications equipment. The Merchant Marine served in World War II as a Military Auxiliary” (NPS n.d.).

The degree of control exercised by the charterer may become more important when considering the "military noncommercial" nature of the voyage. For example, Gibson (1986:89) notes a ruling from 1937 by the Naval Courts and Boards stating that

> The officers, members of crews, and passengers on board merchant ships of the United States, although not in the naval service of the United States, are, under the laws of the United States, decisions of the courts, and by the necessity of the case, *subject to military control while in the actual theater of war* (emphasis added).

The military character of the voyages on which many of these Liberty ships were deployed is supported by the decision of the District of Columbia District Court in *Schumacher v. Aldridge*, 665 F.Supp. 41 (D.D.C. 1987). In *Schumacher*, the plaintiffs were merchant mariners that served on oceangoing vessels during World War II. The plaintiffs applied for active military status on the basis of their wartime service but were denied by the Department of Defense Civilian/Military Service Review Board and the Secretary of the Air Force. The plaintiffs sought judicial review of the Secretary's decision, arguing that the denial was arbitrary and capricious and an abuse of discretion. *Id.* at 42.

The district court agreed. The judge relied heavily on the history of the Merchant Marine during the war as set forth in the record. The opinion states that, even before the US entered the war, merchant crews were being trained in gunnery and military subjects. *Id.* at 46. In November 1941, Congress ended the ban on arming merchant ships and crewmembers received additional training on "gunnery, handling barrage balloons, wartime communications, gas warfare, swimming through burning oil, and enemy ship spotting at night." *Id.* Through Executive Order 9054, President Roosevelt established the War Shipping Administration (WSA), which transferred all functions and duties of the US Maritime Commission related to the operation and requisition of

vessels to the WSA. The vessels were "a pool to be allocated by the Administrator [of the WSA] for use by the United States Military and other Federal departments and agencies, consistent with military strategic requirements." *Id.* (internal quotations omitted). Merchant crewmembers were now employees of the United States and "seventy-five percent of merchant shipping was allocated to Army and Navy cargoes". *Id.* at 46-47.

The judge remarked further on the military nature of the vessels and the crew that served aboard them:

> [The] record discloses numerous ways by which the military exercised direct control over the operations of the Merchant Marine. Military authorities controlled the duration, route and destination of merchant voyages. Military authorities also controlled the ship's position in a military convoy, when the ship was to be darkened and when it would maintain radio contact, procedures for dealing with a 'straggler,' terms of shore leave in a war theatre, when to engage the enemy, and discipline for offenses involving misconduct and incompetence. Wartime military control superseded the authority of the Master when the military decided this was necessary. Moreover, the Master's ability to decide the fate of his ship and his crew was superseded by Order of the Secretary of the Navy, which required the Master not to surrender his ship. *Id*. at 47 (internal citations omitted).

The opinion also notes that crewmembers faced court martial for attempts to resign and were exempted from other military service while serving in the Merchant Marine. They were to be regarded as members of the armed forces for the purposes of military decorations and Naval Reserve officers serving under the Merchant Marine received credit for promotion within the reserves. The US Navy stated that the efforts of most of the officers of the Merchant Marine "was comparable to active duty with the Navy." *Id.* at 48. Lastly, the judge recognized that merchant mariners suffered significant casualties during the war and were second only to the US Marines in terms of percentage of the members killed. *Id.*

Accordingly, the judge found that the Secretary's denial of active military status for the plaintiffs was unwarranted. The decision was based on the record demonstrating the significant degree to which the military controlled the vessels and crew. Considering the *Schumacher* finding and the legislative and secondary sources previously mentioned, it would be difficult to argue that many of the Liberty ships and crew that manned them were not engaged in military service. The *Schumacher* decision presents a persuasive argument for the overall "military" nature of the Liberty ships' service during World War II, although this element may be a largely factual assessment made on a case-by-case basis.

As previously mentioned, the WSA was active during World War II and coordinated the chartering and use of merchant vessels by the US government. Gibson (1986:124) notes that by the end of 1942 nearly all US merchant shipping was under the control of the WSA. Moreover, the majority of those ships under the authority of the WSA were used by the military. A 1946 report by the WSA states that up to 75% of the tonnage controlled by the WSA during the war was allocated to Navy and Army cargo (Gibson 1986:125). This number is significant because "military discipline under the Articles of War (Army) encompassed those merchant seamen who were on ships engaged in the carriage of military cargo and personnel" (Gibson 1986:127).

The military status of the US Merchant Marine during the war and, by extension, the Liberty ships on which these mariners sailed is perfectly summed up by Gibson (1986:128):

> American merchant seamen who served in oceangoing service during World War II performed their duties under a legal framework which, in light of all recognized international law, placed them into the role of combatants integrated within the Armed Forces of the United States.

2.6 APPLICATION

This section applies the considerations discussed above to two examples of sunken Liberty ships to determine whether they would qualify as being on "military noncommercial service" at the time of sinking. Those ships are SS *Stephen Hopkins*, a Liberty ship sunk by a German commerce raider in 1942, and SS *John Barry*, a Liberty ship sunk by a German U-boat off the coast of Oman in 1944.

2.6.1 SS *Stephen Hopkins*

The Liberty ship SS *Stephen Hopkins* was constructed at the Kaiser Shipyards in Richmond, California in 1942. The vessel was named for a colonial governor of Rhode Island and one of the signatories of the Declaration of Independence. *Stephen Hopkins* was managed by the Luckenbach Steam Company of New York for the US Maritime Commission. On September 19, 1942 *Stephen Hopkins* departed Cape Town, South Africa in ballast for Dutch Suriname, where it was to load a cargo of bauxite for transport to the United States. The crew was comprised of merchant mariners and a contingent of the Naval Armed Guard. The latter group was commanded by Ensign Kenneth Willett and responsible for manning the 4-inch gun on the aft deck, 37-millimeter gun at the bow and six smaller machine guns (Billy and Billy 2008:133; Elphick 2001:195). Among the responsibilities of the Ensign Willett was training the merchant seamen aboard *Stephen Hopkins* in the firing of the ship's guns (Elphick 2001:195).

On September 27, *Stephen Hopkins* was in the South Atlantic and coming out of a squall when it encountered two vessels—*Stier*, a German commerce raider, and *Tannenfels*, a German blockade runner (Bunker 1995). Severely outmanned, *Stephen Hopkins* attempted to elude capture but did not run far before the German vessels

opened fire. *Tannenfels* carried a 6-inch gun and *Stier* carried six 5.9-inch guns and numerous smaller weapons (Bunker 1995:150-151; Žuvić 2013:138). Due to being overmatched, the vessel would have been well within its rights to decline to engage the enemy by scuttling the vessel (Hoehling 1990:153). Instead, the Armed Guard and seamen aboard the vessel chose to fight it out.

The bravery of the sailors aboard *Stephen Hopkins* is legendary. Ensign Willett was hit in the stomach by metal shrapnel while running to man the aft gun but continued to fire until he could no longer lift the gun's shells (Bunker 1995:154-156). After the gun battery was hit and most of the Naval gunners killed, merchant seaman Cadet Edwin O'Hara and other merchant mariners took command of the 4-inch gun and fired the last five shells available. O'Hara hit *Stier* with all five shells and he and the rest of *Stephen Hopkins* crew ultimately succeeded in sinking the larger German ship (Billy and Billy 2008:133). Ensign Willett and Cadet O'Hara were both killed by machine guns while running along the deck to launch life rafts. At the end of twenty-two minutes of battle, all but 19 of the crew would perish, with another four sailors dying during the journey in a lifeboat to Brazil (Hoehling 1990:153-154).

Stephen Hopkins was one of only ten ships to receive the Gallant Ship Award from the US Maritime Commission, which is given to merchant vessels for meritorious service (Elphick 2001:124). Ensign Willett was posthumously awarded the Navy Cross, which is one of the military's highest decorations, and a Navy destroyer would later named for him (Elphick 2001:199). Three other crew members would also receive military honors—Captain Paul Back, Chief Officer Richard Moczkowski, and Cadet O'Hara posthumously received a Distinguished Service Medal. All three also would

have Liberty ships named for them and O'Hara Hall at the Kings Point Merchant Marine Academy was named in honor of Cadet O'Hara (Billy and Billy 2008:132; Elphick 2001:199). Elphick (2001:199) notes that the sinking of *Stier* is the only time that a single merchant vessel would sink an enemy raider.

As noted above, considerations of whether a vessel was on military noncommercial at the time of sinking generally must be made on a case-by-case basis. In this instance, the efforts of *Stephen Hopkins* crew makes the analysis rather straightforward. The US government-owned vessel sank while engaging the enemy in battle on the high seas, successfully destroying a much larger and more heavily armed vessel in the end. The posthumous military awards and honors bestowed upon the vessel and its crew serve only to highlight that fact.

2.6.2 SS *John Barry*

SS *John Barry* was constructed at the Kaiser Shipyards in Portland, Oregon and launched in February 1942 (Elphick 2001:458). The ship was named for Commodore John Barry, originally an Irishman that served in the US Navy during the American Revolution. The ship was managed by Lykes Lines for the War Shipping Administration (Beasant 1999:210) and had experienced a relatively uneventful wartime service before setting sail on what would be its final voyage in 1944.

On July 19, 1944, *John Barry* departed Philadelphia for Ras Tanura, a Saudi Arabian port in the Persian Gulf, and another unnamed port (Elphick 2001:459). On board the vessel were forty-four merchant seamen and twenty-seven Armed Guards. Unfortunately, *John Barry* never reached either destination. On the night of August 28, 1944, the vessel was struck by torpedoes from the German submarine U-859 (Bunker

1995:255). Two of the vessel's crew were never seen again although the rest of the ship's complement was rescued by friendly vessels. The ship currently lies at a depth of approximately 8500 feet and more than 100 miles off the coast of Aden in international waters.

The fate of *John Barry* has enjoyed renown because of the secretive nature of its voyage and its cargo. The ship's manifest is intentionally vague about not only the cargo carried but also the vessel's final destination. It was subsequently learned that, in addition to auto parts, a weapons carrier, trucks, cranes, and a tractor crawler, *John Barry* carried 3,000,000 Saudi Arabian *riyals* and a purported secret cargo of silver bullion worth approximately $26 million in 1944 dollars (Elphick 2001:460). Much of the rest of the cargo was reportedly destined for the Soviet Union and the secret cache of silver bullion was likely destined for that country as well (Beasant 1999; Elphick 2001).

Bunker (1995:256) writes that the US government has never relinquished ownership of the vessel. Indeed, the Maritime Commission (having assumed the responsibilities of the War Shipping Administration after the war) solicited salvage contracts on the ship in 1989. In 1994, a salvage group successfully retrieved approximately 1.5 million of the silver *riyals* from the wreck of *John Barry* (Beasant 1999; Elphick 2001). However, none of the reported silver bullion was detected aboard the wreck during salvage although the salvors were unable to access all of *John Barry*'s cargo holds.

Should *John Barry* be considered protected under the SMCA? The noncommercial nature of the ship is established, considering that it was owned by the federal government through the War Shipping Administration. Previous cases such as

George W. Rogers Const. Corp. and *Bradey* clearly establish that vessels owned or operated by the US government are defined as a "public vessel" and thus satisfying the noncommercial requirement.

The status of *John Barry* turns on whether the ship was on military service at the time of its sinking. Because of the nature of the vessel's cargo, the question would most likely be answered in the affirmative. The vessel carried cargo that was purportedly intended for use by the Soviet Union in the prosecution of its war against Nazi Germany. So although the vessel was not actively engaged in battling enemy ships, the ship's voyage ultimately served a military purpose. Moreover, at least a percentage of Saudi Arabian *riyals* were reportedly to be paid to workers at the American Arabian Oil Company for constructing a new refinery, which would also help to supply the war effort (Beasant 1999; Clark 1997). In sum, *John Barry* was a Liberty ship sunk by enemy forces while carrying supplies and payment for military operations. While the argument in favor of the noncommercial military nature of the voyage of *John Barry* is not as compelling as that of *Stephen Hopkins*, the reasoning in *Schumacher*, *George W. Rogers Construction Corp.* and other cases cited herein should support such a finding.

2.7 CONCLUSION

The author argues that, when a vessel's eligibility under the SMCA is in doubt, authorities should favor an expansive view of covered vessels. Moreover, the importance of protecting State vessels is supported through international law. A former Naval Judge Advocate General and Legal Adviser for the Department of State writes that international law "recognizes that State vessels and aircraft, and their associated

artifacts, whether or not sunken, are entitled to sovereign immunity" (Roach 1996:351). Roach (1996) emphasizes the historical importance of these craft, as well as the significance they represent as the final resting place for those that served on them. He cites the Law of the Sea Convention as support for this contention and also references several international agreements devoted to the protection of specific craft.

The language of the Merchant Marine Act of 1936, the history of the US Merchant Marine during World War II, and cases such as *Schumacher* compel the determination that Liberty ships can be protected under the SMCA. Such coverage would depend on the circumstances surrounding the vessel and its voyage at the time of sinking, however, Liberty ships could certainly qualify under the third class of protected vessels. The cases outlined above counsel strongly for the finding that Liberty ships—assuming that they were owned by the US government through the US Maritime Commission—were engaged in noncommercial service at the time of sinking regardless of the cargo. Indeed, ownership through the US Maritime Commission, along with the subsequent control exercised by the WSA, would appear to satisfy both the government-owned and noncommercial elements.

What is more difficult to ascertain is whether a vessel was on *military* service at the time it sank. However, the decision in *Schumacher*, *supra*, strongly supports the contention that Liberty ships were engaged in both noncommercial *and* military service during World War II. As already stated, this decision might become a fact-specific inquiry based on the nature of the service and cargo being transported at the time of sinking. However, the fact that the military controlled virtually every facet of merchant shipping during the war would be difficult to overcome to reach a different result. The

author would argue that Liberty ships, and other merchant vessels, actively engaged in prosecution of the war effort should be considered covered under the SMCA based on the assessment presented herein. Indeed, one could argue further that the provision covering government owned or operated vessels on military noncommercial service would seem to have been included in the SMCA for just this purpose.

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CHAPTER 3

ABSTRACT

The American privateers that were prevalent during the Revolutionary War and War of 1812 were integral to the success of the newly-formed nation in maintaining independence from Britain. Nevertheless, privateers would not appear to qualify for protection under the Sunken Military Craft Act since they were, by definition, privately owned vessels. Moreover, privateers do not satisfy the modern criteria for classification as warships. Despite these apparent constraints, the article examines whether privateers were considered warships according to contemporary standards. Indeed, research suggests that legal authorities and other commentators of the time considered privateers to be an essential component of a country's navy during maritime conflict. The article uses primary sources, modern legal commentary, and the considerations of contemporary legal and historical authorities to assess whether privateers could be protected as warships under the Sunken Military Craft Act.

3.1 INTRODUCTION

This article examines the private men-of war, or privateers, that were prominent during the American Revolution and War of 1812 in order to answer the question of whether they should be protected under the Sunken Military Craft Act of 2004, 10 U.S.C. 113 *et seq.* (SMCA). The specific language of the statute establishes three classes of covered vessels under the SMCA. Under the "Definitions" contained in Section 1408, the SMCA defines a sunken military craft (SMC) as "all or any portion of

(A) any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank." A close reading of the definition supports the argument that "warships" and "naval auxiliaries" need not be either owned or operated by a government nor engaged in military noncommercial service to fall under SMCA protection—the SMCA requires only that the vessel be considered a warship.[5] The absence of this qualification is important since privateers, by definition, were privately owned. Thus, the wreck of a privateer would automatically be excluded if its protection rested solely on it falling under the third class of covered vessels. But could a privateer be protected under one of the alternate classes of vessels defined in the SMCA?

This article assesses whether privateers could be considered "warships" and thus obtain protection from unauthorized disturbance under the SMCA. Modern definitions of warships would not support the inclusion of privateers. For example, Article 29 of the United Nations Convention of the Law of the Sea (UNCLOS) defines a warship as

> a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Writing in 1908, Wilson discussed the conversion of merchant ships into warships under the Second Hague Convention. He writes that

[5] The distinction is important enough that an amendment was proposed to insert a comma in 1408(3)(A). In 2012, Florida Congressman Connie Mack attempted to amend the definition by inserting a comma between "other vessel" and "that was owned or operated by a government on military noncommercial service." The effect of the added comma would be to require that both warships and naval auxiliaries be owned and operated by a government before being considered an SMC. Considering the congressman represented a district in Florida, the proposed amendment was likely an attempt to limit the types of vessels covered under the SMCA and thus expand the numbers of shipwrecks available for salvage.

> war status will be conceded to merchant vessels only when under state authority, bearing the flag and distinguishing marks of belligerent nationality, subject to the command of a duly commissioned officer, with crew under military discipline, and observing the rules of war (Wilson 1908:272).

He comments that the result of the convention is to completely abolish privateering and instead place converted merchant vessels within the regular navy.

Although privateers might meet *some* of the modern criteria defining warships (e.g., subject to naval discipline), they almost certainly fail to satisfy all of the necessary elements. Nevertheless, privateering was a preferred method for supplementing the standing navy of several sovereign countries before the 20th century. Moreover, it should be noted that the SMCA covers vessels that meet the relevant criteria at the time of sinking. Therefore, the determination of whether privateers are considered warships should be judged according to contemporary standards.

Bederman (2000) noted the difficulties in using modern standards to evaluate the status of vessels that sailed hundreds of years ago. Acknowledging the "ambiguities in the modern definition of warships as applied to *present-day* vessels," Bederman (2000:98) states that the "difficulties are compounded to the point of incoherence, where a modern definition of a warship is used to characterize vessels engaged in activities prior to the 19th century." The difficulty in distinguishing between private and State vessels during this period is noted by Forrest (2012:82), who maintains that the distinction complicates protection of warships under principles of sovereign immunity. The purpose of this article is to determine whether privateers met the contemporary definition of warship as it was used during the period when they were active.

3.2 PRIVATEERING IN GENERAL

The practice of privateering grew out of the issuance of letters of marque and reprisal, which were essentially licenses issued by a sovereign that permitted the capture of a foreign ship (or "prize") and its cargo (Young 2009). Once a ship was captured, the legality of the seizure and the subsequent sale and allocation of profits was adjudicated by an appropriate court within the jurisdiction of the sponsoring country. The use of letters of marque and reprisal was sufficiently widespread by the 18th century that legal authorities produced treatises or other commentary on privateering and prize law.

Young (2009:901) quotes one of these leading scholars, Georg Friedrich von Martens, who defined privateering as

> the expeditions of private individuals during war, who, being provided with a special permission from one of the belligerent powers, fit out at their own expense, one or more vessels with the principal design of attacking the enemy, and preventing neutral subjects or friends from carrying on commerce regarded as illicit.

Writing more recently, Arlyck (2012:252) states that the

> seizure and sale of ships at sea was regulated by the law of prize, under which both regular military vessels and privateers commissioned by a government had authority to capture vessels belonging to nations with which the authorizing power was at war, subject to the constraints of treaties, domestic law, and the law of nations.

As early as the 15th century, there had developed an entire system of rules that governed privateering among the nations (Petrie 1999:5). The body of laws that legitimated privateering recognized the right to capture enemy vessels at sea (Crawford 2011). Anderson and Gifford (1991:109) comment that privateering "was a 'legitimate' business that operated within a carefully defined, actively enforced framework of law."

Anderson and Gifford (1991:110) also note that privateers were "legally obligated by their commissioning government to follow established prize court procedure." Failure to follow procedure or to operate within the guidelines of the commission might subject the offending vessel and crew to prosecution for piracy, which was punishable by death.

Originally a form of private redress, the commissioning of private vessels to enhance the naval capabilities of sovereign nations during wartime was prevalent during the 17th through mid-19th century. Anderson and Gifford (1991:100) write that "until the 19th century, a significant portion of the naval power of many countries was provided by privateers…. During some wars, licensed privateers provided the bulk of naval power employed by one or all of the belligerent powers." Indeed, the numbers of private vessels utilized during wartime often outnumbered public vessels (Anderson and Gifford 1991). For example, Young (2009) references scholarship on privateering that maintains that the majority of both the English and Spanish vessels fighting in the Spanish Armada battles were privately owned. Bourguignon (1977:3) states that "privateers in quest of prizes carried on much of the naval warfare of all European nations."

The practice of employing private vessels to engage enemy ships yielded several benefits to the commissioning government. For one, the ability to quickly summon a private navy lessened or eliminated the need to maintain a standing navy and the expense of fitting it out (Anderson and Gifford 1991). Stivers (1975:57) notes that within a mere eight days following the formal declaration of war against Britain in 1812, Congress approved the issuance of letters of *marque.* Additionally, the capture and

subsequent sale of enemy ships contributed revenue to state coffers, as well as provided a source of goods and employment for local communities (Cooperstein 2009).

More importantly, privateers were especially effective in harassing enemy merchant ships. Anderson and Gifford (1991:116) write that "governments discovered that, as a rule, naval warships were less efficient than privateers as raiders of enemy commerce." Whether due to sheer numbers, the profit incentive, or both, privateers "probably contributed much more than warships to the actual harm done the enemy" (Anderson and Gifford 1991:101). At least one critic of privateering has admitted the generally accepted view that privateers were successful in disrupting British merchant shipping and capturing necessary supplies for the colonies (Marshall 1997:966).

Notwithstanding the above, it is especially important to note that the role of privateers was mostly limited to engaging *merchant* shipping. Anderson and Gifford (1991:104) state that privateers played no important role in strategically significant battles at sea. This is partly a function of the nature of privateering, which obviously was partially (or wholly) motivated by self-interest. Young (2009:903) notes that privateers were not outfitted for any compelling sense of duty owed to the nation but for profits to be made raiding enemy merchant ships. Young also notes that privateers did not typically engage in more traditional military maneuvers. Marshall (1997:959) states that privateers were "incompetent in normal war activities." Marshall adds that, owing to their ineptitude, privateers were not effective in joint actions against the Royal Navy and disputes the contention made by others that privateers fought alongside the US Navy. Because privateers were profit-motivated, they sought out vessels that would prove

lucrative. Of course, merchant vessels would carry more valuable cargo than traditional warships, as well as presenting less of a threat to the privateer of capture or defeat.

Nevertheless, it is also apparent that privateers did play a crucial role during wartime. More significantly, there is some evidence to suggest that private vessels were considered warships just the same as those of the more traditional navies. Significantly, Higgins (1914:708) writes that the terms “privateer” and “private men of war” were “convertible” in the latter half of the 18th century. Additionally, according to Petrie (1999:3), by the 19th century letters of *marque* “were issued *only* in times of war….” Thus, the use of privateers was intimately connected with the war effort. Indeed, certain members of Congress asserted that privateers were only lawful when commissioned during wartime (Bourguignon 1977:51-2).

3.3 PRIVATEERING VERSUS PIRACY

To some, there was little, if any, difference between privateering and piracy. Begrudgingly admitting that privateers were an important augmentation to a nation’s naval capabilities, Casto (1993:124) maintains that privateers were “motivated by personal greed rather than by military duty and patriotism.” He also writes that the “fact was notorious that privateers in their striving for personal gain had a tendency to exceed their authority and occasionally dabble in outright piracy” (Casto 1993:124). Casto (1993) writes further that privateers were not subject to naval discipline despite the fact the government was responsible for the conduct of its private men-of-war. Casto (1993:124) also cites an unpublished opinion from 1796 of Judge Wilson Patterson, who wrote that

> privateering ought to receive no encouragement; it is a sort of licensed depredation; and it is to be wished, that it could be utterly abolished. Activated by a predatory spirit, how often do privateers perpetrate outrages, that shock the moral sense, and disgrace the human character. No guard that tends to insure their good behavior ought to be recouped; indeed every restriction ought to be laid upon them. They must be watched with the utmost vigilance and managed with the strictest hand.

This viewpoint differs markedly from those of other observers and historians. Indeed, President Madison, remarking on the low esteem in which privateers were held, wrote that "it would seem that an extraordinary spite is indulged against the Commanders of our privateers; whose gallantry and success entitle them the more to the protection of their Country." (NWDH, Vol. II:248) [6]

Swanson performed considerable research on the history of privateering in the American colonies during the early to mid-18th century. Swanson notes that the government-imposed restrictions on the conduct of its privateers, which he refers to as "private warships," through the terms of the commission.[7] It is the possession of a letter of marque that Swanson (1991:30) maintains "separated the privateer from a pirate." Swanson notes that both pirates and privateers capture merchant vessels, but the letter of marque renders the capture a legitimate enterprise rather than a "capital crime." Parrillo (2007:48) echoes that sentiment, stating that to "avoid prosecution for piracy, a privateer needed a commission." Lunsford (2005:213), writing on piracy and privateering in the Netherlands, also notes the Dutch Admiralty advised the recipients of

[6] Two compendiums of primary sources were used for this article. The first, *Naval Documents of the American Revolution*, is abbreviated as "NDAR" in citations in the text; the second, T*he Naval War of 1812: A Documentary History*, is abbreviated as "NWDH" in citations in the text.
[7] The receipt of a privateering commission is essentially the same as the issuance of a letter of marque and in this article the terms are used interchangeably.

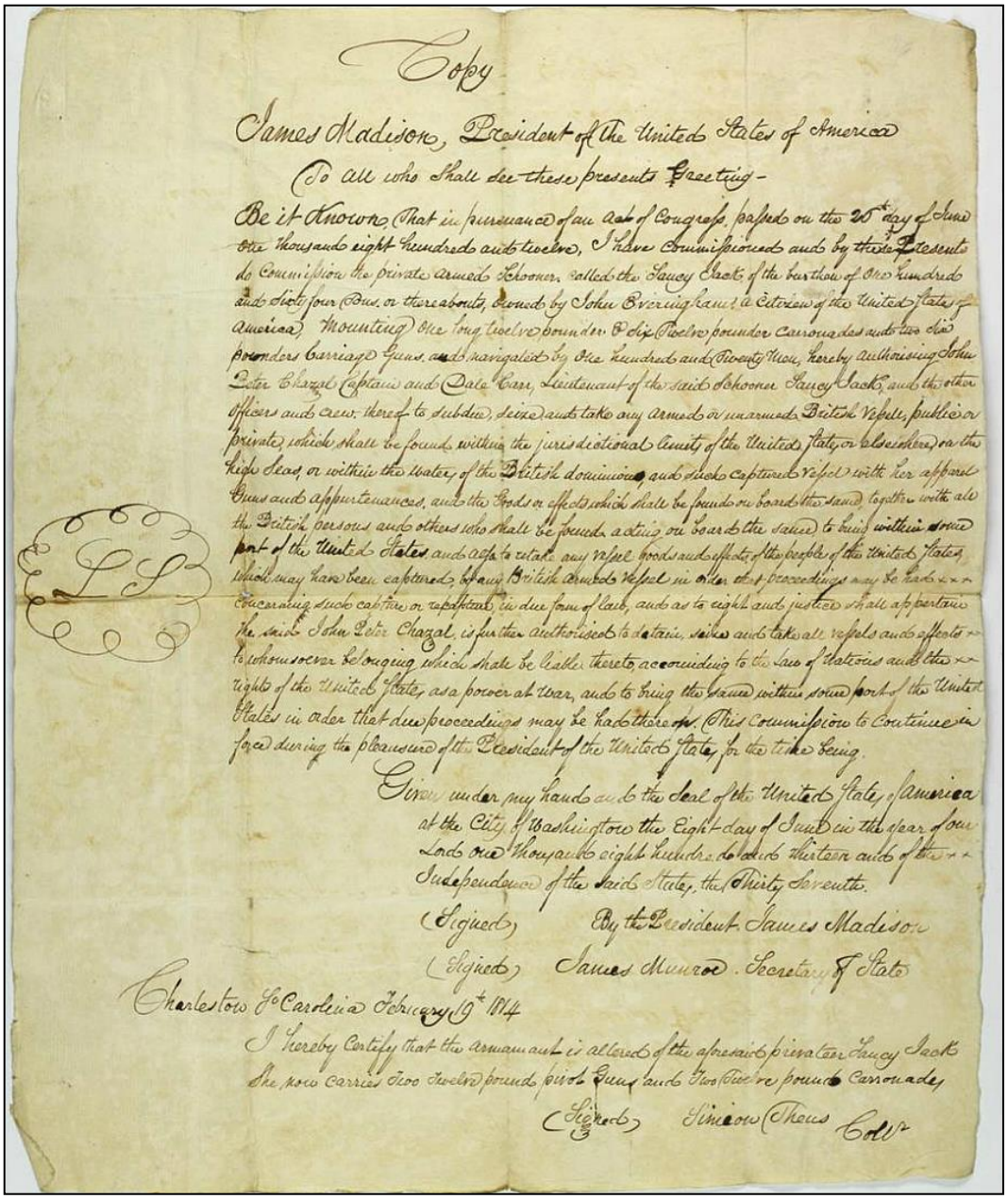
letters of marque that failure to abide by its instructions could result in prosecution as pirates.

As abhorrent as privateering might have appeared to some observers, there was a clear distinction between the two enterprises. Petrie (1999:69) writes that under the law of nations

> a pirate was clearly defined as a person at war with all the world and engaged in criminal depradations at sea against any vessel which could be victimized. Commissioned privateers followed a far different course of action. Their activities were directed solely against the declared enemies of the sovereign commission they held or, subject to the control of a prize court, neutral vessels carrying troops or cargo in aid of such enemies.

Thus, legitimate privateering under a duly issued and bonded commission was not considered piracy (**Figure 3.1**). Lenoir (1934:537–8) writes that while "there were a number of cases in which privateering was held to be piracy… [p]rivateering was never considered in the past to be piracy according to the law of nations." Swanson's research also brings into doubt the claim by Casto that privateers were not subject to naval discipline. Writing about privateering of American colonials during Britain's conflicts with France, Swanson (1991:67) notes that Parliament specifically amended the Prize Act to establish naval discipline for British and American privateers.

Although commissions were necessary for the lawful capture of prizes, they were not all that difficult to obtain. Marshall (1997:974) claims that commissions were "issued as a matter of course, usually immediately." While some historians point out the restrictions on misconduct spelled out in commissions deterred aberrant behavior (see, e.g., Stivers 1975:57), Marshall (1997:974) argues that they had "little bite."



Copy

James Madison, President of the United States of America

To all who shall see these presents Greeting -

Be it Known, That in pursuance of an Act of Congress, passed on the 26th day of June one thousand eight hundred and twelve, I have Commissioned and by these Presents do Commission the private armed Schooner, called the Saucy Jack of the burthen of One hundred and Sixty four Tons or thereabouts, owned by John Bierne and others of the United States of America, Mounting One long twelve pounder & six Twelve pounder Carronades and two six pounders Carriage Guns, and navigated by One hundred and Twenty Men, hereby authorising John Peter Chazal Captain and Dale Carr, Lieutenant of the said Schooner Saucy Jack, and the other Officers and Crew thereof to subdue, seize and take any armed or unarmed British Vessels, public or private, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high Seas, or within the waters of the British dominions, and such captured Vessel with her apparel Guns and appurtenances, and the Goods or effects which shall be found on board the same together with all the British persons and others who shall be found acting on board the same to bring within some port of the United States and also to retake any Vessel Goods and effects of the people of the United States, which may have been captured by any British armed Vessel in order that proceedings may be had &c &c Concerning such capture or recapture in due form of Law, and as to right and justice shall appertain. The said John Peter Chazal, is further authorised to detain, seize and take all Vessels and effects &c to whomsoever belonging which shall be liable thereto according to the Laws of Nations and the rights of the United States, as a power at War, and to bring the same within some port of the United States in order that due proceedings may be had thereon &c. This Commission to Continue in force during the pleasure of the President of the United States for the time being.

Given under my hand and the Seal of the United States of America at the City of Washington the Eighth day of June in the year of our Lords one thousand eight hundred and thirteen and of the &c Independence of the said States, the Thirty Seventh.

(Signed) By the President James Madison

(Signed) James Monroe Secretary of State

Charlestown South Carolina February 9th 1814

I Hereby Certify that the armament is allowed of the aforesaid private Saucy Jack She now carries Two Twelve pounds four Guns and Two Twelve pounds Carronades

(Signed) Simeon Theus Collr

Figure 3.1. Copy of the commission of *Saucy Jack*, a privateer operating out of Charleston, South Carolina. *Saucy Jack* was one of the most successful privateers during the War of 1812 (Records of the District Courts of the United States, Record Group 21, National Archives at Atlanta).

Significantly, the successful applicant for a commission was also required to deliver a bond. So while Parrillo (2007:20) notes that few requirements were needed to obtain a commission, such as a requirement for "good character," one was delivering a bond.

Although Marshall writes that privateers enjoyed a life of "almost total freedom," he acknowledges that they were often well-behaved (1997:971). To some extent, this was due to the regulatory function supplied by the admiralty or prize courts (Casto 1993; Marshall 1997; Parrillo 2007). Prize courts determined whether or not a captured vessel was a legitimate prize. This was crucial since only after a privateer achieved a successful outcome could the vessel and cargo then be sold and the proceeds distributed among the officers and crew of the privateer. Furthermore, the courts could revoke a privateer's commission for gross misconduct (Parrillo 2007:49).

Casto (1993:125) writes that prize courts served a dual purpose in that they "encourage[ed] the privateer trade" but also "were expected to regulate the adventurers and to remedy their abuses." Prize cases could be based solely on the basis of the captured ship's papers showing it to be an enemy-flagged vessel. Courts might also seek the testimony of the captured vessel's master or mate as well (Petrie 1999:124).

Swanson's research involved, in part, an examination of prize cases adjudicated in vice-admiralty courts in Massachusetts, Rhode Island, New York, Pennsylvania, and South Carolina during the years 1739-1748. Of those cases where a clear outcome was reached, Swanson concluded that nearly 92% were decided in favor of the privateer, i.e., that the captured vessel was a legitimate prize. A contemporary comment from a London newspaper is instructive on the legitimacy of privateering versus piracy. On March 12, 1776, the capture of the *Blue Mountain Valley* by a

colonial privateer was reported in the *London Chronicle.* The article went on to say that the “loss of a ship taken by the Provincials is like to make work for the lawyers; the Underwriters declaring they are not Pirates, and the policy not providing against Rebels.” (NDAR, Vol. IV:966).

3.4 PRIVATEERING IN THE UNITED STATES

3.4.1 Privateering During the Revolutionary War and War of 1812

Privateering was especially important in the United States during its struggle to gain independence from Britain and during the War of 1812. Britain possessed the strongest navy in the world at that time and it would have been virtually impossible for the under-matched Continental Navy to engage both the British Navy and British merchant shipping without assistance from privateers. Parrillo (2007:15) instructs that from the later 18th century through the 19th, the objective of naval warfare was to disrupt enemy commercial shipping severely enough that they surrendered. If one accepts the validity of that premise, then privateering was a legitimate and effective method for a nation to prosecute a war, especially one as young as the United States. President Kennedy wrote in the foreword to Volume I of *Naval Documents of the American Revolution* that it “is evident that the thirteen colonies would have been hard put to win independence without this trident of maritime support”—one of those three components expressly stated as privateering.

In the run-up to the formal declaration of independence from Britain in July 1776, the Continental Congress enacted policies for the commissioning of privateers. In April 3, 1776, Congress passed a resolution providing for

> Blank commissions for private ships of war and letters of marque and reprisal, signed by the president, be sent to the general assemblies, conventions, and councils or committees of safety of the United Colonies, to be by them filled up and delivered to the persons intending to fit out such private ships of war, for making captures of British vessels and cargoes…. (NDAR, Vol. IV:648).

Following the resolution of Congress, John Hancock wrote to the New York Convention on April 10, 1776, and stated that letters of marque were necessary as that the United Colonies could "defend ourselves, in the best Manner we can, against all Attempts, in whatever Shape, to deprive us either Liberty or Property." (NDAR, Vol. IV:754).

The necessity of increasing the naval strength of the overmatched US Navy was immediately recognized at the outset of war with Britain in 1812 as well. On June 16, 1812, President James Madison signed a declaration of war against the United Kingdom. In the act, the President Madison provides that he is

> authorized to use the whole land and naval force of the United States… and to issue to private-armed vessels of the United States commissions, or letters-of-marque… against the vessels, goods and effects of the government of the same United Kingdom of Great Britain and Ireland, and of the subjects thereof (Coggeshall 1856:xxxviii).

The resolution required the applicant to furnish key information about the privateer, such as tonnage, number of guns, names of owner or owners, and the crew complement. Additionally, the commission required that the commander of the vessel deliver to the secretary of the Congress a bond of either five thousand or ten thousand dollars depending on the size of the vessel. The standard commission attempted to regulate the conduct of the privateer by providing that the officers and/or crew

> shall not exceed or transgress the Powers and Authorities which shall be contained in the said Commission, but shall, in all Things, observe and conduct himself, and govern his crew, by and according to the same, … and shall make Reparations for all Damages sustained by any Misconduct or unwarrantable Proceedings of Himself, or the Officers of the said [vessel]…. (NDAR, Vol. IV:650).

The privateer commanders were bound by a number of other instructions, including that they were not to attack vessels bringing intended settlers or carrying provisions to the colonies; the successful privateer was to immediately send select documents and officers from a captured vessel to court for adjudication; they were to keep and preserve the ship and cargo until the captured vessel was determined by the court to represent a legitimate prize. Privateers were also specifically instructed not to "in cold blood, kill or maim, or by torture or otherwise, cruelly, inhumanly, and, contrary to common usage, and the practice of civilized nations in war, treat any person or persons surprised in the ship or vessel." The instruction reads further that a breach of these proscriptions would result in the offended being "severely punished." The penalty for failure to abide the instructions would result in liability, which penalty could be taken from the bond, as well as the forfeiture of the commission (NDAR, Vol. IV:651).

An abridged version of the instructions were included in the commissions issued by Congress, which mandated that the privateer was "by force of arms, to attack, seize, and take the ships and other vessels belonging to the inhabitants of Great Britain; captured vessels were to be taken into court to determine if they were lawful prizes; that the commander of the privateer, or its officers or crew, were to do nothing "contrary to, or inconsistent with the usage and customs of civilized nations, and the instructions… and we will and require that all our officers whatever to give succor and assistance to the said commander in the premises." (NDAR, Vol. IV:775). Commissions were granted by states or by Congress itself (NDAR, Vol. IV:774-775) and such commissions might also include powder for the privateer's guns (NDAR, Vol. IV:454).

3.4.2 Importance of Privateering to War Effort

Despite the apparent importance of privateering, Crawford comments on the disparity of opinions regarding their significance to the Revolutionary cause. On one side are the ardent supporters that claim privateers were one of the primary factors motivating the eventual British capitulation. Crawford (2011:220) references scholarship from Stanton Maclay, who stated that the disruptions to British shipping inflicted by privateers led to British merchants petitioning Parliament to end the war. On the other side are those that claim that privateers were little more than licensed pirates and that any contribution they made to the defeat of Britain was minimal (Crawford 2011:221).

The exact numbers of privateers commissioned by the Continental and state governments during the Revolutionary War continue to be debated but generally the figures are substantial. Crawford (2011) writes that there were anywhere from 2000 to over 3000 vessels commissioned. This figure is similar to those suggested by Sidak (2005), who notes that over 2000 privateers were commissioned by the federal and state governments. Sechrest (1999) cites scholarship stating that approximately 800 privateers were commissioned during the Revolutionary War. However, the true importance of privateers becomes evident when compared to the Continental Navy, which had only 64 official naval vessels and commissioned a mere 22 additional warships during the conflict (Young 2009).

The significance of privateers to the naval effort becomes even more significant when one compares the numbers of vessels captured. Privateers actually captured more British vessels during the war than did the Continental Navy. During the

Revolutionary War, privateers captured 600 or more vessels to the Continental Navy's 196 according to one source (Sechrest 1999). Other sources contend that American privateers captured over 3,000 British vessels, including 16 British warships, and whose total worth amounted to between 100 to 200 million valued in 2003 dollars (Crawford 2011; Young 2009). Privateering expeditions were equally critical during the the War of 1812, with privateers capturing 1,300 to 2,500 British merchant ships while the US Navy captured 165 (Sechrest 1999:268).

Consequently, it is not surprising that many scholars highlight the importance of privateers as a critical component of the American naval force during this time. Sechrest (1999) comments that privateers were crucial to limiting the effectiveness of the Royal Navy during the Revolutionary War and War of 1812 (Sechrest 1999). Young (2009:904) states that American privateers had only a small impact against the British Navy itself. Private vessels generally carried fewer guns and men than British naval vessels and ultimately the privateers' success depended on staying afloat (Young 2009).

However, efforts to combat rebel privateers did draw away resources that might otherwise have been allocated to the navy. Because privateers were so effective in disrupting British merchant shipping, Britain had to redirect naval resources to defending against privateers that might otherwise have been used to engage "official" American warships. This necessity drained men away from the navy, as did the capture of seamen aboard merchant ships that eventually were caught as prizes.

Considering the conflicting viewpoints, Crawford (2011:223) concludes that "it is hard to sustain the position that American privateers had a negligible effect on the

British conduct of the war." Recognizing the importance of privateers to the national cause, Thomas Jefferson stated in 1812 that

> every possible encouragement should be given to privateering in time of war with a commercial nation…. Our national ships are too few in number… to retaliate the acts of the enemy. But by licensing private armed vessels, the whole naval force of the nation is truly brought to bear on the foe (quoted in Coggeshall 1856:xliv).

3.4.3 The Debate over Privateering

As noted above, a privateer with a legitimate commission operating only against enemy shipping was not considered piracy. Nevertheless, privateers were still viewed by some as an ignominious pursuit. Coggeshall (1856:xliv-xlv) speculates that the hostility felt towards privateering by the "honest and virtuous part of the world" owes to their association with the buccaneers active in the early 17th century. These "desperate buccaneers" were believed to have embraced robbery and murder and were "a terror to the commercial portion of all civilized nations." (Coggeshall 1856:xlv). But Coggeshall maintained that this belief was unjust. Arguing against the notion that the opportunity profit was the sole motive for their service, Coggeshall states that the assertion "is a base slander upon the good name and fame of these worthy and gallant defenders of their country's rights and of its honor and glory." According to Coggeshall (1856:xlviii), Navy officers and crew received pensions, whereas privateers received nothing.

The detractors frequently cite that profit, which could potentially be substantial, motivated the outfitting of private vessels as opposed to any compelling sense of duty. Sechrest (1999:249) claims, however, that "both profit *and* patriotism usually motivated the actions of those who invested in, or served as part of the crew of, a privateer"

[emphasis added]. Crawford likewise disputes the position that privateers were only interested in financial reward. Crawford (2011:232) writes

> there was a presumption, seldom verbalized, that the privateers were not solely private money-making undertakings, but held a certain obligation to the public interest…. Privateers, for instance, were expected to defend merchantmen from a less powerful armed enemy vessel. If two privateers were sailing within sight of each other, it was expected that they would engage an enemy in tandem.

Bourguignon (1977:75-6) similarly argued that privateers probably possessed dual motivations, stating that "there can be no doubt … that American vessels very early in the conflict took to the seas to protect American coasts" but that they also did so "to capture the especially valuable British ships and cargo."

3.5 ARGUMENTS SUPPORTING CHARACTERIZATION AS WARSHIPS

Differing opinions are not limited to debates over the contribution of privateering to the United States' war efforts. Debate over the morality of privateering was, and remains, a contentious issue as well. Parrillo (2007:30) cites the *President's Instructions to Private Armed Vessels*, which was a set of rules applicable especially to privateers, one provision of which reads that "towards enemy vessels and their crews, you are to proceed, in exercising the rights of war, with all the justice and humanity which characterize the nation of which you are members." Parrillo (2007:34 n. 162) collects cases and reports where privateers were disciplined for pillaging a neutral ship and mistreating its crew; for disobeying orders and neglect of duty; for plundering a neutral; mutiny, treason, neglect of duty and firing into a friendly vessel; striking an officer; and cowardice.

A report on the court-martial of Charles Still dated March 9, 1813, is illustrative of the degree to which officers and crew aboard a privateer were subject to military discipline. The defendant was ostensibly charged for mutiny or attempting to incite a munity (NWDH, Vol. II:29-30). The defendant was acquitted of those charges but the report relates that, nevertheless, Still was deemed

> guilty of such parts of the charge as fall within the meaning of the last clause of the Thirteenth Article of the rules and regulations for the government of the Navy of the United States in as much as he is guilty of having uttered Seditious and Mutinous words, and that he treated with contempt his superior officers…. (NWDH, Vol. II:29).

The court-martial sentenced Still to one hundred lashes for his misconduct.

The total numbers are not known, but certainly some privateer crews and officers previously served in the US Navy. Mahan (1919:395) comments that Commodore Joshua Barney, captain of the privateer "Rossie," had previously served in the navy during the American Revolution. Far from a scoundrel as many privateers are characterized, Mahan (1919:395) referred to him as one of the "most intelligent and enterprising of the early privateers" and suggested that he served, at least in part, "in order to show a good example of patriotic energy."

The record also evidences instances where the Continental Congress itself solicited privateering campaigns. For example, on July 2, 1776, the Marine Committee of the Continental Congress requested Captain John Barry to "make a cruize in the Lexington for one or two Months, in hopes that fortune may favour your industry and reward it with some good prizes." The letter continues that the committee "send[s] you a printed copy of the resolves of Congress respective prizes, by which you Will learn what to take and what to let pass…." (NDAR, Vol. V:878). This example lends further

support to the argument that privateers often essentially served as warships to supplement the woefully out-matched Continental Navy.

3.6 PRIVATEERING IN CONGRESS AND THE COURTS

To determine whether privateers might be considered warships under the SMCA, it is important to note how the US Congress and federal courts in the United States viewed privateers and the role they served during wartime. Despite the critics of privateering, it is apparent that their use as a means to enhance US naval capabilities was appreciated by the federal government. By the advent of the War of 1812, "most viewed letters of marque and reprisal as both a vital part of America's war effort and a welcome boost to commerce" (Young 2009:907). Bourguignon (1977) comments also that Congress encouraged the commissioning of private vessels for protection during the run-up to war with Britain. Letters of marque and reprisal were such an important component that they are officially sanctioned through their inclusion in the US Constitution (U.S. Const., Art. I, § 8, cl. 11).

Their significance is discussed by Cooperstein (2009:230), who stated that "all sides to the Constitutional ratification debate considered letters of marque and reprisal *both a natural component of the national war power and a concurrent aspect of the authority to raise a navy* or enforce international law" [emphasis added]. Cooperstein (2009:231) also cites James Madison's comments on privateering in *The Federalist*, who comments that letters of marque were necessary to protect against "foreign danger" and was part of "the power to provide and maintain a navy…."

There is a dearth of cases examining which attributes a privately commissioned vessel must possess to be properly considered a warship. A couple of Supreme Court

cases do provide some guidance, however. An early Supreme Court case in which the legal status of privateers is considered is *The Invincible*, 14 U.S. 238 (1816). In that case, the Court was compelled to decide whether a French privateer was entitled to the same sovereign immunity from arrest afforded to vessels in the French navy. Comparing the privateer to the French naval vessels, the Court stated that

> The only circumstance, in fact, in which they differ, is, that in those cases, the vessels were the property of the nation; in this it belongs to private adventurers. But the commission under which they acted was the same; the same sovereign power which could claim immunities in those cases equally demands them in this; and although the privateer may be considered a volunteer in the war, *it is not less a part of the efficient national force*…. [T]he seizure by a private armed vessel is as much an act of the sovereign, and entitled to the same exemption from scrutiny, as the seizure by a national vessel. *Id.* at 252-253 (emphasis added).

The passage is compelling since ultimately the Court decided that the privateer was entitled to sovereign immunity as a warship of a foreign power.

The second case is *The Santissima Trinidad*, 20 U.S. 283 (1822) and is also illustrative of the status assigned to privateers by the early Supreme Court. In *The Santissima Trinidad*, the Court decided whether a ship sold to a citizen of Buenos Aires (originally a US citizen) and then commissioned by its government was a "public ship." The decision is somewhat vague as to whether the ship was sold to Captain Chaytor (the citizen) or the Buenos Aires government. In fact, one point of contention between the litigants was that there was no evidence of a bill of sale to the government and thus it was argued that the public nature of the vessel had not been established. *Id.* at 335.

The fact that the vessel had been commissioned to Captain Chaytor was not in dispute and the question was whether this fact, along with other corroborating evidence, provided "satisfactory evidence of her public character." *Id.* The Court determined it did. The Court wrote that

> [i]n general the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character…. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. *Id.* at 336-337.

It is thus clear that the courts considered a private vessel commissioned by a legitimate government to have assumed a public status and thereby entitled to immunity. One other decision of note is that of the Pennsylvania Supreme Court in *Fifield v. Ins. Co. of the State of Pennsylvania*, 47 Pa. 166 (1864). In *Fifield*, the court considered the legitimacy of privateering for a confederate-era claim (Samuels 2010). The court judged that privateering remained a legal enterprise as late as the US Civil War, writing that privateering had "been claimed and defended as lawful warfare on public enemies" and was the "substitute for enormous naval establishments." *Fifield*, 47 Pa. at 169.

3.7 CONCLUSION

The SMCA covers three types of vessels: sunken warships, naval auxiliaries, or other vessels that were owned or operated by a government on military non-commercial service when they sank. By definition, privateers were privately owned, which would appear to restrict their inclusion as a protected vessel under the SMCA. Indeed, one of the key components entitling State vessels to sovereign immunity under maritime and customary international law is their public nature. Whether based on notions of sovereign immunity or property ownership, a growing consensus holds that sunken public vessels, particularly warships, are protected from unauthorized disturbance.

American privateers operating during the 18th and 19th centuries would almost certainly not be considered warships under the definition established by the United

Nations Convention on the Law of the Sea (UNCLOS) and other modern usages. However, research indicates that privateers were largely considered warships or, at the very least, public vessels according to commentary and court decisions from that period. Privateers significantly affected British merchant shipping and Britain's naval response and may have even compelled an end to the War of 1812. It would be difficult to dispute their warship status considering they successfully captured many more vessels than did the regular US Navy. Moreover, the fact that early Supreme Court decisions held that privateers were entitled to sovereign immunity argues in favor of affording them a similar status today. The argument is further strengthened if the privateer was engaged with an enemy vessel at the time of sinking.

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CHAPTER 4

ABSTRACT

Sunken military craft in the state and federal waters off North Carolina face a number of natural and anthropogenic threats. The anthropogenic threats include damage from commercial fishing, commercial salvage, and recreational diving. However, sunken military craft are also protected, either directly or indirectly, by federal and state legislation. Direct legislation includes the Sunken Military Craft Act, which specifically prohibits intrusive activities directed at sunken military craft absent a valid permit. Other federal legislation, such as the National Marine Sanctuaries Act and National Historic Preservation Act, offers indirect protection over these shipwrecks, which can be dependent on the shipwreck's location. Moreover, protection under the Sunken Military Craft Act for foreign shipwrecks or ambiguous vessel classes (e.g., Liberty ships) is uncertain. This intent of this article is to evaluate the threats confronted by sunken military craft on the North Carolina coast and the management implications of their geographical location.

4.1 INTRODUCTION

Designated the "Graveyard of the Atlantic," the waters off the coast of North Carolina are the resting place for thousands of wrecks from around the globe. It has been estimated that 5,000 ships have wrecked off the North Carolina coast since 1584 (Babits 2002:119). Several of these wrecks are considered sunken military craft (SMC) and encompass domestic and foreign vessels. Many of those were vessels lost during

the Battle of the Atlantic, one of the most significant conflicts of World War II. The North Atlantic was a key hunting ground for the German unterseeboot, or U-boats, that devastated Allied shipping during the war and the coastal waters of North Carolina proved to be especially fruitful hunting grounds (Wagner, 2010; Bright, 2012).

Of course, shipping losses in the waters off North Carolina are not limited to those sustained by the US during World War II. In addition to the hundreds of Allied merchant and military vessels sunk off North Carolina, vessels belonging to other foreign nations can be found as well. For example, several of the U-boats that were so successful in harassing Allied ships are wrecked off the North Carolina coast. Many vessels were wrecked or stranded on the North Carolina coast during the US Civil War, especially near Fort Fisher and the inlets of the Outer Banks. The shipwrecks include Confederate vessels, Union vessels, and the numerous blockade runners attempting to pierce the US Navy's cordon in order to deliver needed supplies and munitions to the South. Several of the shipwrecks (e.g., USS *Peterhoff*, CSS *Raleigh*, *Modern Greece*) are now listed in the National Register of Historic Places (NRHP) as part of the Cape Fear Civil War Shipwreck District.

Further up the coast, USS *Huron* wrecked 230 meters off Nags Head in 1877, with only 34 of the 131 aboard the vessel surviving the event (Lawrence 2003:59). Now listed in the NRHP, the wreck location is a popular dive site and protected as a heritage site by the State of North Carolina. Perhaps more importantly, the site is recognized as the final resting place for the sailors that perished in 1877. Numerous vessels wrecked along the North Carolina coast often contain the remains of the crew and officers that served aboard them. The sentiment attached to wrecks as the graves of the men and

women that died aboard them is, at least in part, the motivation behind protecting the sites from unauthorized disturbance.

Both US and foreign SMC off North Carolina are threatened by physical and anthropogenic hazards, such as storms, corrosion, biodegradation, looting, trawling, etc. It is the protection of shipwrecks from these and other hazards to which they may be susceptible that forms the focus of the present article. The article will examine the risks threatening SMC off the North Carolina coast and how their management may be affected by the particular jurisdictional zone or zones in which they are located. Section 4.2 article describes the various statutes, legal traditions, and jurisdictional boundaries that may be implicated during management of SMC. Section 4.3 is devoted to a brief summary of some of the potential threats faced by SMC, and indeed all historic shipwrecks, off the North Carolina coast. Section 4.4 of this article will input this information into a Geographic Information System (GIS) to evaluate the risks and protections confronting each SMC presented herein.

4.2 NORTH CAROLINA LEGISLATION

Chapter 1 presented discussion of the federal laws and international conventions through which underwater cultural heritage (UCH) may be managed or protected. Shipwrecks within the jurisdictional waters of the State of North Carolina are managed through application of several state laws. North Carolina possesses several statutes protecting archaeological resources within its terrestrial and maritime borders. Only those laws having a direct bearing or significant influence on management of submerged cultural resources are presented here.

4.2.1 North Carolina Archaeological Resources Protection Act (NCARPA), N.C.G.S. Ch. 70, Art. 2

North Carolina possesses several statutes protecting archaeological resources within its terrestrial and maritime borders. North Carolina General Statute (N.C.G.S.) Chapter 70, Article 2, titled the "Archaeological Resources Protection Act," is modeled after the similarly-named federal statute. The act applies to State lands (i.e., lands owned, controlled, or occupied by the state) and its stated purpose is the "protection of archaeological resources and sites…." N.C.G.S. § 70-11(b). Section 70-15 ("Prohibited acts and criminal penalties") provides:

> (a) No person may excavate, remove, damage or otherwise alter or deface any archaeological resource located on State lands unless he is acting pursuant to a permit issued under G.S. 70-13.
>
> (b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, exchange, transport or receive any archaeological resource excavated or removed from State lands in violation of the prohibition contained in G.S. 70-15(a).

Under N.C.G.S. § 70-12(2), an archaeological resource is defined as "material remains of past human life and activities which are at least 50 years old and which are of archaeological interest…." Individuals must also obtain a permit before conducting archaeological investigations on State lands and must possess the requisite qualifications and methodological expertise to do so. N.C.G.S. § 70-13(a)-(b). The statute also provides for civil and criminal penalties to be issued for violations of applicable provisions, which may include fines, imprisonment, and forfeiture of vehicles and equipment used during commission of the violation. N.C.G.S. §§ 70-15 – 70-17.

4.2.2 The North Carolina Environmental Policy Act, N.C.G.S. Ch. 113A, Art. 1

The North Carolina Environmental Policy Act (NCEPA) requires state agencies to produce a statement regarding the environmental impact of any proposed action "involving significant expenditure of public moneys or use of public land for projects and programs significantly affecting the quality of the environment." N.C.G.S. §113A-4(2). Under the statute, public lands means "all land and interests therein, title of which is vested in the State of North Carolina, in any State agency, or in the State for the use of any State agency or political subdivision of the State," which includes swampland and submerged land. N.C.G.S. § 113A-9(7). However, certain minimum requirements must be present before the act takes effect, such as the project must be larger than ten acres or the public expenditure must exceed $10,000,000. Like the federal act, the agency must produce an environmental assessment (EA) or environmental impact statement (EIS) evaluating the potential impacts of the proposed project.

4.2.3 Salvage of Abandoned Shipwrecks and Other Underwater Archaeological Sites, c

In 1967, North Carolina asserted title

> to all bottoms of navigable waters within one marine league seaward from the Atlantic seashore measured from the extreme low watermark; and the title to all shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts which have remained unclaimed for more than 10 years lying on the said bottoms, or on the bottoms of any other navigable waters of the State, is hereby declared to be in the State of North Carolina, and such bottoms, shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts shall be subject to the exclusive dominion and control of the State.

N.C.G.S. §121-22. The following section established the North Carolina Department of Natural and Cultural Resources (NCDNCR) as the "custodian of

shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts" under state control and further provided that the department "may adopt rules necessary to preserve, protect, recover, or salvage any or all of these properties." N.C.G.S. § 121-23.

Under the statute, individuals or parties are required to obtain permits for activities in which any part of a derelict vessel or its contents or other archaeological sites may be removed, displaced, or destroyed. N.C.G.S. § 121-25. Among the authorized activities, however, is the right to conduct salvage operations on derelict vessels (as well as exploration and recovery). Unlike the penalties that can be issued under ARPA, violations of this statute constitute merely a Class 1 misdemeanor. No provisions are made for the imposition of fines, imprisonment, or forfeiture of vehicles or equipment.

4.3 THREATS TO NORTH CAROLINA SHIPWRECKS

The potential of GIS applications to facilitate management of archaeological resources through risk modeling was evident by the end of the 20th century (Djindjian 1998). Assessing the usage of GIS in the field of archaeology at the time, Djindian (1998:8) wrote that "the management of an archaeological risk map, for large (or small) civil works… could emerge into predictive modelisation of potential presence of sites, and preventive actions of rescue archaeology". Modeling the risks that endanger preservation of cultural resources through GIS applications is not a foreign concept. Multiple studies and articles have been devoted to assessing the risk to archaeological resources using different variables or in different environments (Cornish 2004; Peggion et al. 2008; Scianna and Villa 2011; Reeder et al. 2012; Uphus et al. 2016; Hadjimitsis

et al. 2013; Romão et al. 2016; Landeschi 2018). Reeder-Myers (2015:437) writes that "[s]patial modeling using geographic information systems can be used at national, regional, and local scales to identify the most highly threatened sites…."

Submerged cultural resources face myriad threats—both anthropogenic and natural—that may result in their deterioration and ultimate destruction. Among the anthropogenic threats are incidental and intentional damage from recreational SCUBA divers, commercial fishing, and commercial salvage. Natural threats to shipwrecks include storms, corrosion, and biodegradation. Research on site formation processes has observed the importance of bottom sediments, waves, currents, tides, and the topography of the wreck environment in determining the preservation potential of the shipwreck (Schiffer 1975; Muckelroy 1978; Ward et al. 1999; Gibbs 2006; Ford et al. 2016; Keith 2016). Indeed, natural forces may cause significantly more destruction to a site than anthropogenic influences. Of course, the destruction of a shipwreck through salvage and looting is not an unknown occurrence. Because this article is focused on the management of human impacts to UCH through legislation, however, it will focus on anthropogenic threats to submerged cultural resources.

The second section of this article seeks to determine how the location of a shipwreck may determine its exposure to human impacts. The first step was to create a database of known SMC located off the North Carolina coast (see **Appendix D**). The database includes a number of variables collected from primary and secondary sources deemed critical to its management, such as whether the SMC is foreign or domestic; the date of loss; whether the shipwreck is a known dive site; and the shipwreck's listing in, or eligibility for listing in, the NRHP. The database was then input into a GIS to collect a

second set of variables based on its geographical coordinates, which include the jurisdictional zone in which the SMC is located (e.g., state waters, Exclusive Economic Zone [EEZ], high seas, etc.); the depth of the wreck; whether the shipwreck is located in a federal or state protected area, or Bureau of Ocean Energy Management (BOEM) offshore lease area, or some other federal or state administrative boundary. To increase the number of entries available for analysis, shipwrecks that were formerly SMC and ships that were sunk during World War II and are arguably SMC (for instance, the vessel carried an armed guard) were included in the database. However, their ambiguous status will be incorporated into the risk analysis as will be discussed later. The following three subsections briefly detail damages associated with three anthropogenic threats—commercial fishing (and especially bottom trawling), recreational diving, and commercial salvage and treasure hunting.

4.3.1 Anthropogenic Threats Impacting Shipwrecks off North Carolina

Commercial fishing

Several studies concerning the damaging effects of commercial fisheries—especially bottom trawling—on archaeological resources have been published within the last decade (Kingsley 2010; Steinmetz 2010; Atkinson 2012; Brennan 2016). Each study makes clear that bottom trawling can have deleterious consequences for shipwrecks, especially those exposed above the seafloor. The injury is typically accidental, since shipwrecks exposed above the surface will also damage expensive fishing gear and thus fishing vessels generally try to avoid known sites. Nevertheless, Brennan (2016:173) observed that bottom trawling is “one of the greatest anthropogenic threats to underwater cultural heritage” and notes that the damage caused by bottom

trawling is not limited to archaeological sites—the process also affects ecological, biogeochemical, and sedimentary resources. In addition to damage from bottom trawling, other types of commercial fishing can damage shipwrecks through "equipment being caught on shipwrecks, removing natural protection, altering the surrounding marine environment, dropping anchors on or near shipwrecks, and producing waves…. (Cornish 2004:2).

Atkinson (2012:8) defines a trawl as "a net of which the mouth is held open by a beam or other method, towed behind one or multiple vessels at various depths depending on the intended catch species." Trawling nets are large in size and weighted down in order to drag along the seabed. There are several types of trawls and their utilization will depend on the size and power of the trawling vessel, the depths at which they are operating, and the particular species being targeted. Among the most common types of trawls are otter trawls, dredge trawls, and beam trawls.

Otter trawls are equipped with otter doors, which are heavy boards attached to the ends of the trawling net and function to keep the net open for capturing fish. Otter doors can weigh several tons and "scrape along the seabed effectively scouring the bottom while also creating large furrows and spoil heaps…." (Atkinson 2012:15). Dredge trawls are equipped with dredges that "plow through the sediment with steel frames and ring bags, which carve deeper furrows into the seabed…." (Brennan 2016:159). Some dredge trawls also use hydraulic dredges on the frame to suspend the sediment in front of the dredge to lift buried species (Atkinson 2012). As the name implies, beam trawls are equipped with a beam to keep the trawl net open. Beam trawls are generally smaller (12 to 30 feet) than otter trawls and are typically found in

nearshore waters. Nets used by modern trawlers are often composed from synthetic materials, which will break or tear less easily than those made from natural fibers, and can stretch as far as 300 feet (Atkinson 2012:18). Other variations of trawling gear exist but Brennan (2016) posits that trawls equipped with otter doors and weighted nets cause the most damage to the seabed.

The geographical extent of bottom trawling is immense. Trawling has extended further and further offshore owing to the desire to seek previously unexploited fisheries and the technological capability that allows them to do so. Atkinson (2012) distinguishes between coastal or inshore trawlers, which operate in coastal waters up to the limits of a coastal State's EEZ, and high seas trawlers, which exploit resources beyond the limits of any State's EEZ. Atkinson (2012) notes that historically maritime archaeologists have been most concerned with coastal trawling because of shallower depths and the higher frequency of shipwrecks near the shore. The preoccupation on the effects of nearshore trawling is, perhaps, not unwarranted. In a study that discussed trawling damage in the Gulf of Mexico, it was noted that shipwrecks deeper than 2,000 feet were not impacted while extensive damage was sustained by shallower wrecks (Church et al. 2009).

Trawling can damage benthic habitat, and thus shipwrecks, in several ways. A shipwreck caught in a trawl net can become demolished as it get dragged along the bottom. Plow-like features and hydraulic jets on dredge trawls can scour and scar hull remains and associated artifacts. Brennan (2016:11) notes several factors that determine the extent of damage that may be sustained by shipwrecks through trawling, including "the prominence of the wreck on the seabed, sedimentation, amount of the

hull preserved, and locations near rocks and other features that may hinder trawling…." For example, wooden-hulled wrecks that gradually assume a flatter topography may suffer less damage than a metal-hulled wreck extending meters above the seafloor. The metal-hulled wrecks are more likely to become ensnared in trawl nets and, consequently, sustain more damage. Moreover, the impacts from trawling are not limited to the event itself. Atkinson (2012:40) writes that steel- or iron-hulled ships may be bent or sheared when ensnared, which will accelerate corrosion. Newly-uncovered wooden hull remains may become exposed to oxygen and wood-boring species (Atkinson 2012).

Regardless of the type of shipwreck, the studies conclude that bottom trawling has a significant impact on submerged archaeological resources. Steinmetz (2010) presented statements from sanctuary managers that bottom fishing gear represented the most significant impact to submerged archaeological resources. Steinmetz's research on shipwrecks in the mid-Atlantic revealed that 69% of the wrecks in her study had derelict nets or dredging gear on site. Accordingly, damage to SMC from commercial fishing vessels is a significant risk factor in this analysis.

Recreational Diving

The perfection of the modern Self- Contained Underwater Breathing Apparatus (SCUBA) by Yves-Jacques Cousteau and Emile Gagnan in 1947 heralded a new age in underwater exploration. Divers equipped with the perfected apparatus were able to descend to deeper depths and for longer periods of time, as well as enjoying increased mobility. The benefits of SCUBA were soon recognized by George Bass, a doctoral student in anthropology at the University of Pennsylvania. Bass utilized the equipment

to conduct what is recognized as the first excavation of an underwater site utilizing traditional land-based methods. That excavation off the coast of Turkey during the 1960s is viewed as the beginnings of the new field of marine or underwater archaeology (Bass 1998; Delgado 1997).

Recreational diving can damage shipwrecks in several ways. Edney (2006; 2016) has written extensively about the effects of the SCUBA diving industry on shipwrecks. These threats include damage from boat anchors and mooring, intentional and unintentional contact of the shipwreck by divers, increased corrosion due to exhaled air bubbles, vandalism, and removal of artifacts (Edney and Howard 2013; Edney 2016; McKinnon 2015). Cornish (2004:2) writes that SCUBA divers damage shipwrecks by "creating new entrances to shipwrecks, removing materials that provide natural protection, collecting souvenirs, dropping heavy equipment such as weights and tanks, and colliding with shipwrecks because of buoyancy control problems." The damage to shipwrecks will likely increase, since, as Edney and Howard (2013:52) write, shipwrecks "are becoming increasingly popular and important recreational and tourism resources."

Commercial Salvage and Treasure Hunting

The effects of salvage operations on shipwrecks have been briefly discussed in Section 4.2.3. As with underwater archaeological investigations, salvage operations typically are expensive and so profits are maximized by working quickly to shorten the time spent on site. In most instances, commercial salvage destroys the resource it exploits with scant regard paid to such trivialities as maintaining archaeological integrity

or the recordation of diagnostic artifacts. As Johnston (1993:54) writes, the "archaeological contexts for these materials had not been carefully recorded by divers or salvors, who work under financial pressure from their investors to raise their sea booty as quickly and efficiently as possible." Kleeberg (2013:19) observes that "[t]o the archaeological profession, the commercial exploitation of historic shipwrecks is not archaeology in any form whatsoever." Throckmorton (1998) famously criticized the salvage industry in a 1998 piece. Speaking in this instance about salvage in the Caribbean, he states that "[a] significant part of the Caribbean's historical heritage … are scattered over thousands of reefs and cays and they are being mindlessly destroyed by treasure hunters" (Throckmorton 1998:76).

McKinnon (2007) and Scott-Ireton and McKinnon (2015) observed that much of this damage is intentional as treasure hunters improperly buoyed by the promise of sunken wealth rip apart shipwrecks in search of treasure. The authors note that, even where it is known that the sunken ship carried little, if anything, of value, shipwrecks are still destroyed in the pursuit of non-existent loot. Writing nearly 50 years earlier, Owen (1970:25) stated that "[o]ne of the most urgent problems confronting archaeology today is the continued destruction and looting of archaeological sites…. Remains which have survived for thousands of years are often destroyed in a matter of days…."

The Abandoned Shipwreck Act of 1987 (ASA) was passed, at least in part, to curb the plundering of historic shipwrecks by commercial salvors. The proposed outcome has not always been realized, since some states, among them North Carolina and Florida, still officially permit commercial salvage in their state waters. As noted by Scott-Ireton and McKinnon (2015), the continued sanctioning of commercial salvage of

shipwrecks in state waters is fundamentally at odds with the intent of the ASA. Nevertheless, the exercise of some control over commercial salvage affords a level of protection not found in unregulated waters.

Those shipwrecks located outside state waters and not falling under the aegis of a federal statute (e.g., Sunken Military Craft Act [SMCA] or National Marine Sanctuaries Act [NMSA]) would be governed by maritime law if a claim were brought in federal court. Consequently, the disposition of the shipwreck would be adjudicated based on either the law of salvage or finds. While the law of salvage is marginally preferable to the law of finds, neither is especially attractive to the historic preservation professional. Consequently, shipwrecks within federal waters are considered at a medium risk while those within state waters are considered at very low risk. Shipwrecks located outside of federal waters would be considered at very high risk.

4.4 RISK MODEL AND GIS FOR NORTH CAROLINA SHIPWRECKS

This section deals with an analysis of the threats facing shipwrecks off the North Carolina coast through development of a risk model. The model utilizes GIS to populate categories assessed in the risk calculations. The results of the risk model are presented in Section 4.4.2.

4.4.1 Risk Model

One of the necessary steps in risk modeling is the assignment of values for each threat category being evaluated. To be certain, assignment of values for the risks presented here are inherently subjective. Nevertheless, the intent of this article was to fashion a basic risk model to determine which SMC were more or less threatened and

how that might affect their management. The justifications for the value assigned for each category are, wherever possible, supported by research.

To assess the risks confronted by SMC collected in the database, a numerical value was assigned for each potential threat that was derived from non-geographical sources. For most factors, the threat was designated as very low risk (R=1), low risk (R=2), medium risk (R=3), high risk (R=4), or very high risk (R=5) depending on the severity of the threat faced. The decision to use 1 through 5 (rather than 1 through 3) was to allow for a greater range of distinction for those categories where three threat levels was deemed overly restrictive. Some variables were binary—generally either a "yes" or "no." In that instance, if "no" meant the shipwreck faced a higher risk (e.g., the shipwreck is located outside a protected area) then it was assigned a "5" and, in the example given, a "yes" was assigned a "1." The potential threats to SMC and values associated with each variable are detailed in **Table 4.1**.

Table 4.1.
Values for Threats and Geographic Variables

Variables	1. Very Low	2. Low	3. Medium	4. High	5. Very High
Depth (Diving) = DD (ft)	351+	171-350	131-170	61-130	0-60
Dive Site = DS	No	-	-	-	Yes
Protected Area/ Habitat = PA	Yes	-	-	-	No
Depth (Fishing) = DF (ft)	+5906	3281-5905	2001-3280	331-2000	0-330
Jurisdictional Waters = JW	State		Federal		High Seas
NRHP = NR	Listed/ Eligible	-	Unevaluated	-	Not Eligible
SMC = SMC	Yes	-	Foreign/ Maybe	-	No

Another issue was how to combine the values assigned for each variable to achieve a supportable result. Previous research reporting on risk modeling for threats to shipwrecks in Philips Bay, Victoria, Australia (Cornish 2004), and threats to archaeological sites in the Santa Barbara Channel in California (Reeder et al. 2012; Reeder-Myers 2015) provided useful guidance. Each article discusses the assignment

of values for the risks being evaluated and the different combination methods for analyzing the accumulated risks.

In Reeder et al. (2012), the authors were concerned with two threats to archaeological resources—erosion and coastal urban development. In Reeder-Myers (2015), the possible risks were expanded to three categories. Cornish (2004), whose study modeled risks to shipwrecks from human impacts, was also focused on three possible threats—SCUBA diving, fishing and shipping, and general population, tourism and development. Cornish used values from 1 to 5, which she determined after experimentation worked better than 1 to 3. The author argued that the larger range allowed "the extreme high and low values to be distinguished better" (Cornish 2004:3). Reeder et al. (2012) and Reeder-Myers (2015) also used a 1 to 5 range for their risk evaluation.

Both studies also discussed the preferred combination methods to calculate risk. Cornish (2004) experimented with manual combination, rating and weighing, and adding. Ultimately, Cornish found rating and weighing achieved the best outcome. The method is similar to weighted averages, which was determined to be the preferred method in the Reeder et al. (2012) and Reeder-Myers (2015) analyses as well. In the Reeder-Myers study, the authors used the following formula:

$$\mathbf{CRVI} = \frac{\mathbf{2\,(D + E) + 3\,(SV) + 2\,(LU)}}{\mathbf{3}}$$

where *CRVI* is the Cultural Resource Vulnerability Index; *D* + *E* represents Distance to Shoreline and Elevation; *SV* represents Shoreline Vulnerability; and *LU* represents Land Use. Each of these variables was assigned a number from 1 to 5 based on the author's valuation of the risk—five represented the highest degree of threat and one represented

no threat. The variables were multiplied by coefficients depending on how the author chose to weight the categories. Distance and elevation were considered most important and multiplied by, essentially, a coefficient of four (since two categories are combined the coefficient is effectively four, which is the coefficient that was assigned to that category in the previous Reeder et al. 2012 study).

The variables used in the present risk calculation were selected as representative of the human impacts discussed above. To assess the risks from diving, the two variables used were Depth-Diving (*DD*) and Dive Site (*DS*). The assignment of risk for depth for diving is based on recreational and technical diving limits. Shipwrecks at the shallowest depths (< 60 feet) were assigned the highest risk, which is regarded as an appropriate limit for inexperienced divers. This is important for two reasons: (1) the pool of visitors to shipwrecks below this depth will be significantly larger than those for shipwrecks at deeper depths; and (2) inexperienced divers typically exhibit less buoyancy control and thus are more likely to damage a wreck through incidental contact. High risk was assigned to depths between 61 and 130 feet, the latter representing the maximum depth for recreational divers. Medium risk was assigned to depths from 131 to 170 feet and low risk was assigned to shipwrecks between 171 to 350 feet, which is regarded by the National Oceanic and Atmospheric Administration (NOAA) (2013) as the typical depths for technical diving. Any shipwrecks deeper than 351 feet were assigned a very low risk.

Dive Site is a binary category and represents shipwrecks that are publicly advertised or represented as dive sites based on online research. This category is binary so Very High risk was assigned to known dive sites and Very Low risk was

assigned to shipwrecks that are not. The fact that a shipwreck may not be recognized as a dive site may be attributed to the fact that it is are too deep to access, its location is unknown, the condition of the wreck makes it unsuitable or unattractive to divers, or some other factor.

A different set of variables were employed to assess the risks from commercial fishing. Depth was used again as an indicator of the potential threat from commercial fishing and, primarily, bottom trawling (Fishing Depth or *FD*). For the purposes of this analysis, shipwrecks located in depths less than 330 feet (100 meters) are assigned a Very High risk based on research cited by Atkinson, which found that all shipwrecks below this depth had some indication of disturbance from commercial fishing. Based on the research by Church et al. (2009), shipwrecks located between 331 and 2000 feet are signed a high risk for damage from commercial fisheries. Shipwrecks between 2,001 to 3,280 feet (1,000 meters), which Brennan (2016) notes as the depth under which most trawlers operate, will be considered at medium risk. Brennan also observes that overfishing in shallower waters has increased the depths in which trawling occurs up to 5,905 feet (1,800 meters). Therefore, shipwrecks located between 3,281 to 5,905 feet will be placed in a low risk category. Shipwrecks located in depths of 5,906 feet are deeper are at very low risk.

A binary category was also used in addition to the depth of the shipwreck. Utilizing the GIS, each shipwreck was mapped to determine whether it fell within a protected area or protected fish habitat where commercial fishing is restricted. Shipwrecks within a protected area were considered a very low risk from commercial

fishing and assigned a value of one and the remaining were considered at very high risk and assigned a five.

As with the risk assigned for commercial fishing, one of the factors for determining risk to historic shipwrecks from commercial salvage is geographically-based. In this instance, shipwrecks were mapped to determine whether they fell within state territorial waters, federal waters (territorial seas, the contiguous zone, or the EEZ), or on the high seas. Under the ASA, North Carolina has control over activities directed at abandoned shipwrecks within its state waters. Although commercial salvage is officially permitted, the NCDNCR does maintain some authority over those activities. Accordingly, shipwrecks in state waters are considered to have a very low risk.

The federal government possesses authority to manage impacts to shipwrecks in federal waters through the National Historic Preservation Act of 1966 (NHPA). However, the authority is restricted to activities that are considered federal undertakings or to shipwrecks located in federally-managed lands or bottomlands. Absent a superseding law, the right to acquire or salvage a shipwreck in federal waters would be determined by maritime law, i.e., the laws of salvage and finds. Therefore, shipwrecks in federal waters are considered to have a medium risk of damage from human impacts, unless the shipwrecks fall within a known federally-managed area. One such example is BOEM's proposed Wind Lease Areas. In compliance with Section 106 of the NHPA, BOEM requires archaeological investigation of areas that may be potentially affected by bottom disturbing activities. If a potential shipwreck (or other submerged cultural resource) is identified during survey, the potential resource must be avoided or the adverse impacts mitigated. Therefore, shipwrecks in federally-managed areas are

considered at very low risk. Finally, shipwrecks on the high seas are assigned a very high risk as being outside of any federal protection.

A shipwreck's listing or eligibility for listing in the NRHP would prohibit commercial salvage of the resource. Consequently, shipwrecks that are listed, nominated, or determined eligible for listing in the NRHP are assigned a very low risk. Several of the shipwrecks in the database are either listed in the NRHP (e.g., *EM Clark*, HMT *Bedfordshire, U-85*, *U-325*, *U-576*, and *U-701*) or considered eligible for listing in the NRHP (YP-389). Several other wrecks have been nominated for listing in the NRHP as components of a multiple property nomination—in this case, as part of the "World War II Shipwrecks along the East Coast and Gulf of Mexico," or Battle of the Atlantic, multiple property nomination (Marx and Delgado 2013) (hereafter referred to as the BOTA nomination). Shipwrecks whose status is unevaluated are assigned a medium risk; those that are not considered eligible for listing in the NRHP are assigned a very high risk.

A shipwreck's status as SMC is incorporated into the risk calculation as a single factor. Since the SMCA extends broad authority for restricting activities directed at SMC, shipwrecks considered SMC are considered at very low risk. As discussed earlier, foreign SMC and vessels whose status are ambiguous under the SMCA are included in the analysis. Due to their unverified status under the SMCA, they are considered at medium risk. All other shipwrecks are considered to be at very high risk for threat from commercial salvage, although admittedly the financial incentive for salvage of most of these vessels is marginal so it is unlikely that salvage claims would be pursued.

4.4.2 GIS and Risk Model Results

The calculation used to determine the collective risk facing the shipwrecks in the database is modeled after Reeder-Myers (2015). For this analysis, the following calculation was used:

$$\mathbf{SVI} = \frac{\mathbf{6\,(SMC) + 2\,(DS + DD) + 2\,(PA + FD) + 2\,(JW + NR)}}{\mathbf{7}}$$

where *SVI* represents the Shipwreck Vulnerability Index; the risk from diving is represented as *(DS + DD)*; the risk from commercial fishing is represented as *(PA + FD)*; and the risk from commercial salvage is represented as *(JW + NR).* The numerator is divided by seven, which represents the number of threat variables incorporated into the equation. A shipwreck's status under the SMCA was considered the most critical factor and so it was assigned the highest multiplier. The remaining categories were multiplied by a factor of two but they are also two variables for each category. Because the other categories contain two variables, the SMC category is given effectively 1.5 times the weight of the remaining categories. The lowest possible SVI score is 2.57; the highest possible score is 12.86.

The results of the threat analysis are detailed in **Table 4.2;** the geographical distribution of shipwrecks included in the database are depicted in **Figure 4.2** and the SVI results are depicted in **Figure 4.3.** The range of the SVI for shipwrecks in the database runs from a low of 4.29 (USS *Cythera*) to a high of 12.29 (USS *Indra*). USS *Cythera* scored the lowest value in the SVI because of its status as an SMC, its nomination to the NRHP, the wreck is a non-diving site, and its depth protects it from recreational and technical divers and nearly all commercial fishing. USS *Cythera* did

Table 4.2.
Results of SVI Analysis

Ship	Orig	Sink Year	Casualty	Decom	Depth (feet)		Diving		Fishing		Jurisdiction		SVI
						SMC	DS	DD	PA	FD	JW	NR	
USS *Cythera*	US	1942	69	N	11400	1	1	1	5	1	3	1	4.29
USS *Monitor*	US	1862	16	N	240	1	5	2	1	5	3	1	5.71
USS *Aster*	US	1864	N	N	10	1	1	5	5	5	1	1	6.00
USS *Atik*	US	1942	141	N	14700	1	1	1	5	1	5	5	6.00
USS *Ellis*	US	1862	0	N	6	1	1	5	1	5	1	5	6.00
USS *Huron*	US	1877	98	N	10	1	5	5	1	5	1	1	6.00
USS *Louisiana*	US	1864	0	N	10	1	1	5	5	5	1	1	6.00
CSS *Raleigh*	CONF	1864	0	N	10	1	1	5	5	5	1	1	6.00
U-879	FOR	1945	52	N	8500	3	1	1	5	1	3	1	6.00
Diamond Shoals Lightship	US	1918	0	N	200	1	5	2	5	5	3	1	6.86
Panam	US	1943	2	N	500	3	1	1	5	4	3	1	6.86
William Rockefeller	US	1942	0	N	900	3	1	1	5	4	3	1	6.86
Nordal	FOR	1942	0	N	650	3	1	1	5	4	3	1	6.86
YP-389	US	1942	6	N	300	1	5	2	5	5	3	1	6.86
USS *Iron Age*	US	1864	0	N	10	1	5	5	5	5	1	1	7.14
CSS *Bendigo*	CONF	1864	0	N	10	1	5	5	5	5	1	1	7.14
USS *Keshena*	US	1942	2	N	85	1	5	4	5	5	3	1	7.43
USS *Merak*	US	1928	0	N	90	1	1	4	5	5	3	5	7.43
USS *Peterhoff*	US	1864	0	N	60	1	5	5	5	5	3	1	7.71
U-576	FOR	1942	45	N	700	3	5	1	5	4	3	1	8.00
Ljubica Matkovic	FOR	1942	0	N	2100	5	1	1	5	3	3	1	8.29
USS *Schurz*	US	1918	1	N	110	1	5	4	5	5	3	5	8.57
Bluefields	FOR	1942	0	N	690	5	1	1	5	4	3	1	8.57
USS *Chopper*	US	1976	0	Y	14000	5	1	1	5	1	3	5	8.86
Manuela	US	1942	2	N	160	3	5	3	5	5	3	1	8.86
El Salvador	FOR	1750	UNK	N	30	3	1	5	5	5	1	5	8.86
Empire Gem	FOR	1942	49	N	160	3	5	3	5	5	3	1	8.86
USS *YCF-42*	US	1944	0	N	8700	1	1	1	5	1	3	5	8.86
John D Gill	US	1942	23	N	90	3	5	4	5	5	3	1	9.14
Liberator	US	1942	5	N	120	3	5	4	5	5	3	1	9.14
HMT *Bedfordshire*	FOR	1942	37	N	100	3	5	4	5	5	3	1	9.14
San Delfino	FOR	1942	28	N	110	3	5	4	5	5	3	1	9.14
U-701	FOR	1942	39	N	120	3	5	4	5	5	3	1	9.14
U-352	FOR	1942	15	N	110	3	5	4	5	5	3	1	9.14

Table 4.2.
Results of SVI Analysis

Ship	Orig	Sink Year	Casualty	Decom	Depth (feet)		Diving		Fishing		Jurisdiction		SVI
						SMC	DS	DD	PA	FD	JW	NR	
U-85	FOR	1942	46	N	100	3	5	4	5	5	3	1	9.14
USS *Comte de Grasse*	US	2006	0	Y	14010	5	1	1	5	1	5	5	9.43
USS *Spruance*	US	2006	0	Y	14000	5	1	1	5	1	5	5	9.43
USS *Stump*	US	2006	0	Y	14100	5	1	1	5	1	5	5	9.43
USS *Virginia*	US	1923	0	Y	440	5	1	1	5	4	3	5	9.71
Margaret	US	1942	1+	N	65	5	1	5	5	5	3	1	10.00
USCGC *Bedloe*	US	1944	26	N	90	3	5	4	5	5	3	5	10.29
E.M. Clark	US	1942	1	N	260	5	5	2	5	5	3	1	10.29
USCGC *Jackson*	US	1944	21	N	90	3	5	4	5	5	3	5	10.29
USS *New Jersey*	US	1923	0	Y	320	5	1	2	5	5	3	5	10.29
HMS *Senateur Duhamel*	FOR	1942	0	N	65	3	5	4	5	5	3	5	10.29
USS *Pilgrim*	US	1935	0	Y	5	5	1	5	5	5	1	5	10.57
Kyzikes	FOR	1927	4	N	20	5	5	1	5	5	1	5	10.57
Lancing	FOR	1942	1	N	160	5	5	3	5	5	3	1	10.57
Condor	CONF	1864	0	N	25	5	5	5	5	5	1	1	10.57
Modern Greece	CONF	1862	0	N	25	5	5	5	5	5	1	1	10.57
Dixie Arrow	US	1942	11	N	70	5	5	4	5	5	3	1	10.86
Kassandra Louloudis	FOR	1942	0	N	70	5	5	4	5	5	3	1	10.86
Empire Thrush	FOR	1942	0	N	40	5	5	5	5	5	3	1	11.14
Theodore Parker	US	1974	0	Y	25	5	5	5	5	5	1	5	11.71
USS *Yancey*	US	1990	0	Y	160	5	5	3	5	5	3	5	11.71
USS *Aeolus*	US	1988	0	Y	90	5	5	4	5	5	3	5	12.00
USS *Tarpon*	US	1957	0	Y	130	5	5	4	5	5	3	5	12.00
USS *Indra*	US	1992	0	Y	60	5	5	5	5	5	3	5	12.29

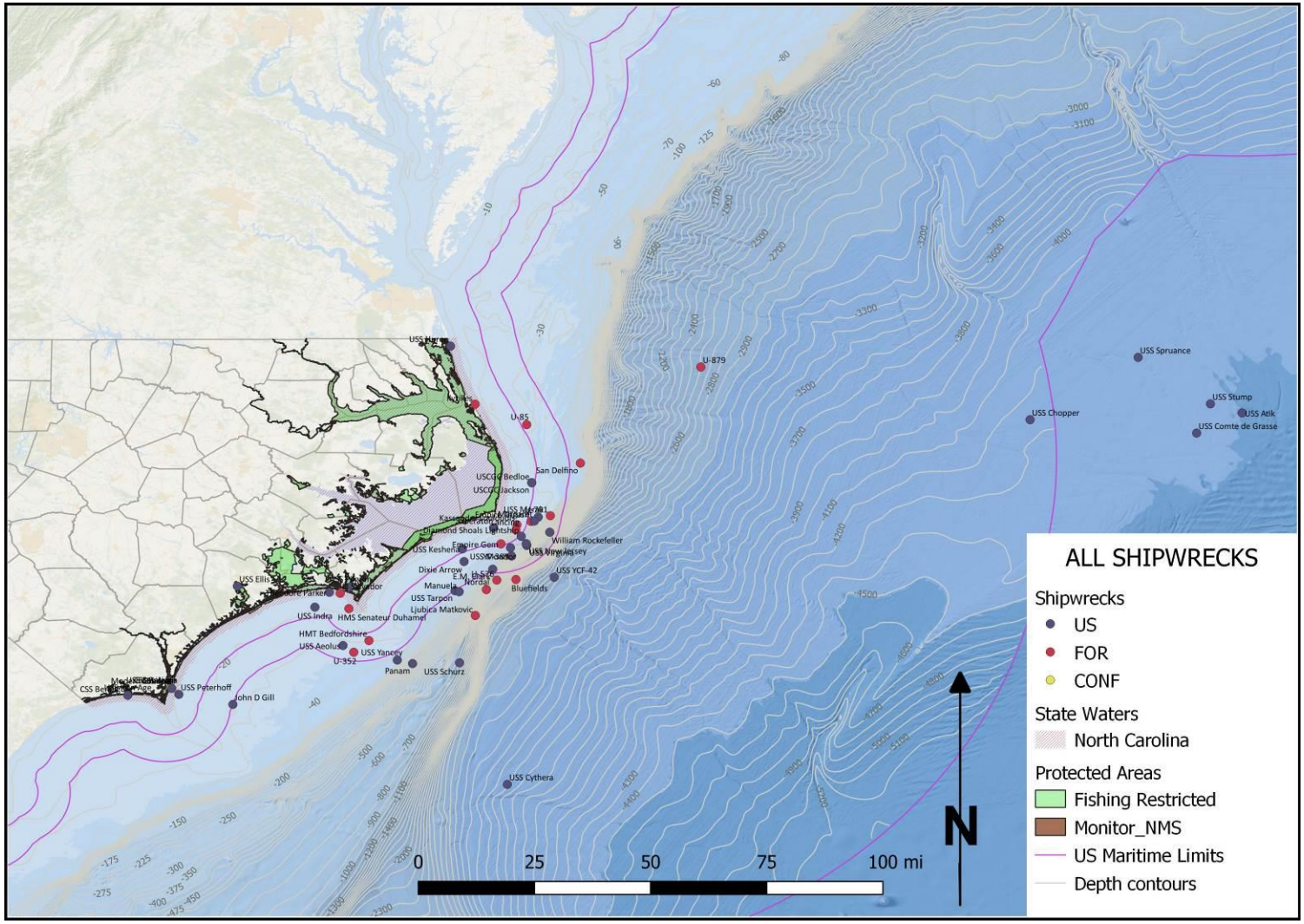

Figure 4.2. Distribution of shipwrecks off North Carolina in SVI database.

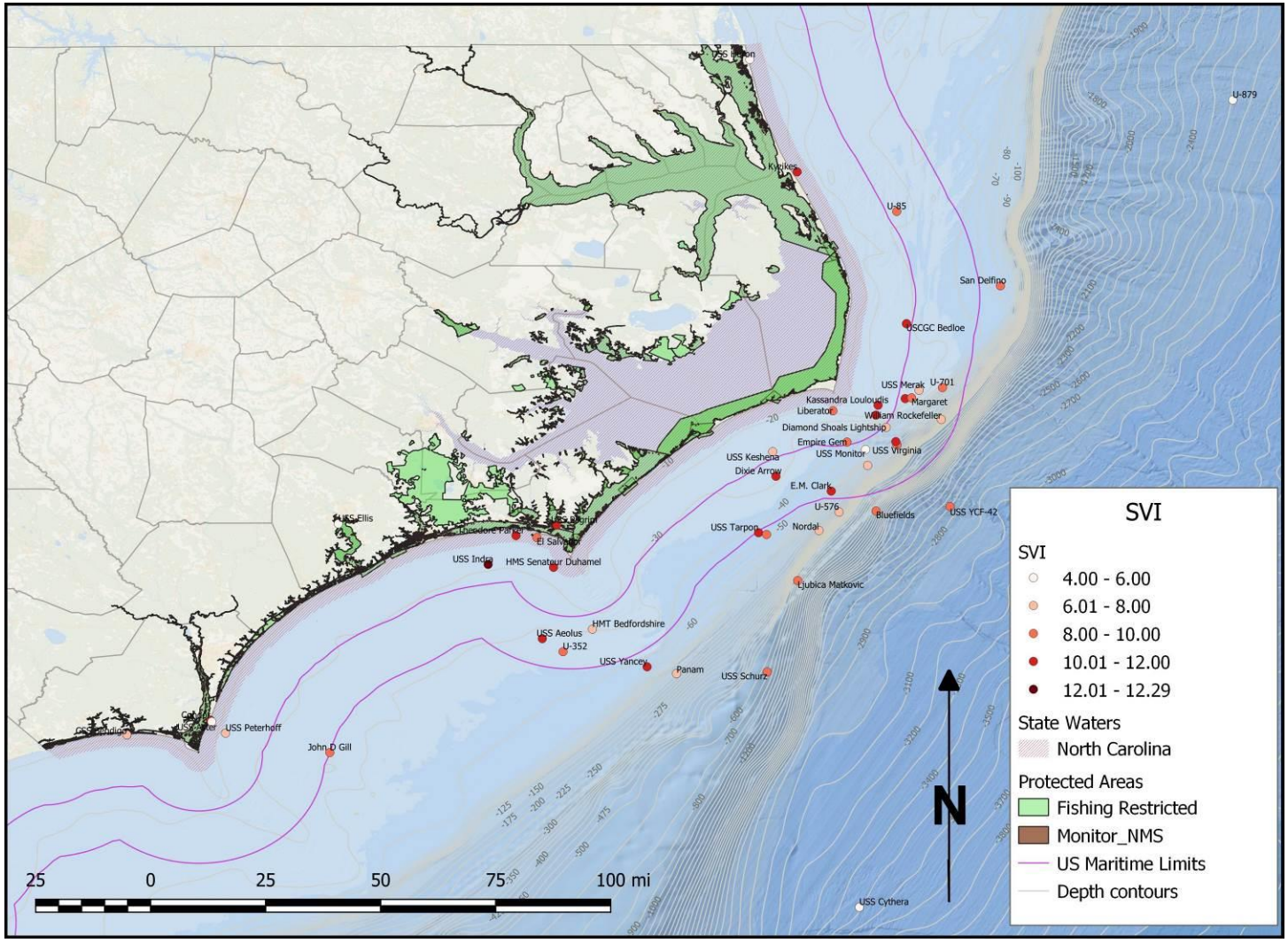

Figure 4.3. Results of SVI calculations for shipwrecks off North Carolina (excluding high seas).

not achieve the lowest possible score due to its location outside state waters and outside a protected area. The next lowest score was for USS *Monitor*. The shipwreck's location places it within technical diving limits and commercial fishing limits. However, the shipwreck achieved the second-lowest score because of its placement within a protected area (also specifically created for the resource and small enough to enforce), NRHP-listing, and status as an SMC. Indeed, the 20 lowest-scoring wrecks are all either US SMC, Confederate SMC or foreign/possible SMC.

As previously noted, the database includes a number of shipwrecks that are not SMC for comparison. The five shipwrecks with the highest SVI were all scuttled off the North Carolina coast—primarily to serve as artificial reefs. In the instance of the *Indra*, which was scuttled in state waters and is one of the most popular wreck dives in North Carolina, the results support the effectiveness of the SVI methodology. The shipwreck with the highest risk score not intentionally scuttled is the British freighter *Empire Thrush*, which was sunk by U-203 in 1942. The vessel does not possess characteristics rendering it a possible SMC, is a known dive site, sits in approximately 40 feet of water, and in an unprotected area. The only protections enjoyed by the shipwreck are that it located in state waters and was included in the BOTA nomination.

The highest-scoring SMC in the database is HMS *Senateur Duhamel* (*SVI* = 10.29) The vessel was a fishing trawler converted by the Royal Navy for anti-submarine patrol. The vessel was on loan to the US Navy when it collided with USS *Semmes* and sank. Therefore, the vessel was on military noncommercial service at the time of sinking and would be considered an SMC. However, the wreck of *Senateur Duhamel* sits in approximately 65 feet of water, is a known dive site, and lies in an unprotected

area within range of recreational divers and commercial fishing. Although rightfully considered an SMC, it is also not listed in the NRHP.

Table 4.3 shows the distribution of the different types of vessels within the range of calculated *SVI* scores. The US shipwrecks appear evenly distributed on the continuum between high and low risk. When separating out US vessels intentionally scuttled or decommissioned before use as targets (*n* = 12), the numbers skew towards the lower risk ranges. The scuttled or target vessels comprise five of the medium risk shipwrecks, six of the high-risk shipwrecks, and the single very high-risk shipwreck. Additionally, none of the US shipwrecks within the medium through very high-risk ranges are SMC.

Table 4.3.
Distribution of SVI Scores

	4.0 – 6.0 Very Low Risk	**6.1 – 8.0 Low Risk**	**8.10 – 10.0 Medium Risk**	**10.1 – 12.0 High Risk**	**12.0+ Very High Risk**	**TOTAL**
US	7	8	11	10	1	37
*US**	*7*	*8*	*6*	*4*	*0*	*(25)*
Foreign	1	1	10	5	0	17
Confederate	1	1	0	2	0	4
TOTAL	9	11	20	17	1	58

**Only US vessels that were not sunk as artificial reefs or targets*.

The foreign shipwrecks included in the database are largely found in the medium and high-risk categories. This is due, in part, to the lower value assigned to foreign shipwrecks in the SMC category. The lowest-scored foreign shipwreck is U-*879*, which was purportedly sunk by depth charges from USS *Natchez*, USS *Coffmann*, USS *Bostwick*, and USS *Thomas.* Originally thought to have been sunk off Cape Cod, Massachusetts, it is now believed that U-*879* is several miles off Cape Hatteras (Chatterton 2009). The shipwreck scored on the lower end of the scale due to its location in deep waters far offshore and thus distant from the human threats found

closer to land. The German submarine has also been nominated as a component of the BOTA NRHP submittal.

4.5 ISSUES CONCERNING FOREIGN SMC

One of the goals of this article was to determine how location of a foreign SMC might affect its management. Consequently, the discussion in this section is limited to foreign SMC, which includes five U-boats (U-*85*, U-*352*, U-*576*, U-*701*, U-*879*), two anti-submarine patrols (HMT *Bedfordshire*, HMS *Senateur Duhamel*), and two merchant ships chartered to the UK Ministry of War at the time of sinking (*Nordal*, *Empire Gem*). For the sake of analysis, an additional foreign shipwreck will be discussed below. *El Salvador* was a Spanish merchant ship that ran aground off Beaufort Inlet in 1750. The location of the wreck has not yet been ascertained but it is likely located within the three-mile limit of North Carolina state waters. Although considered a merchantman, the line between sovereign and commercial vessels was often blurred during the Spanish colonial period, as was the case of the La Nuestra Señora de las Mercedes in which the federal court ultimately found that the Spanish shipwreck was entitled to sovereign immunity protections.

4.5.1 Management of Foreign SMC in US Waters

Of the ten foreign SMC in the database (including *El Salvador*), one is located in state waters, two shipwrecks are in US territorial seas, four shipwrecks are in the US contiguous zone, and three are in the US EEZ (**Figure 4.4**). None of the shipwrecks are located in protected areas, which in North Carolina are mostly restricted to the sounds and larger waterbodies that empty into them. Several other foreign vessels are

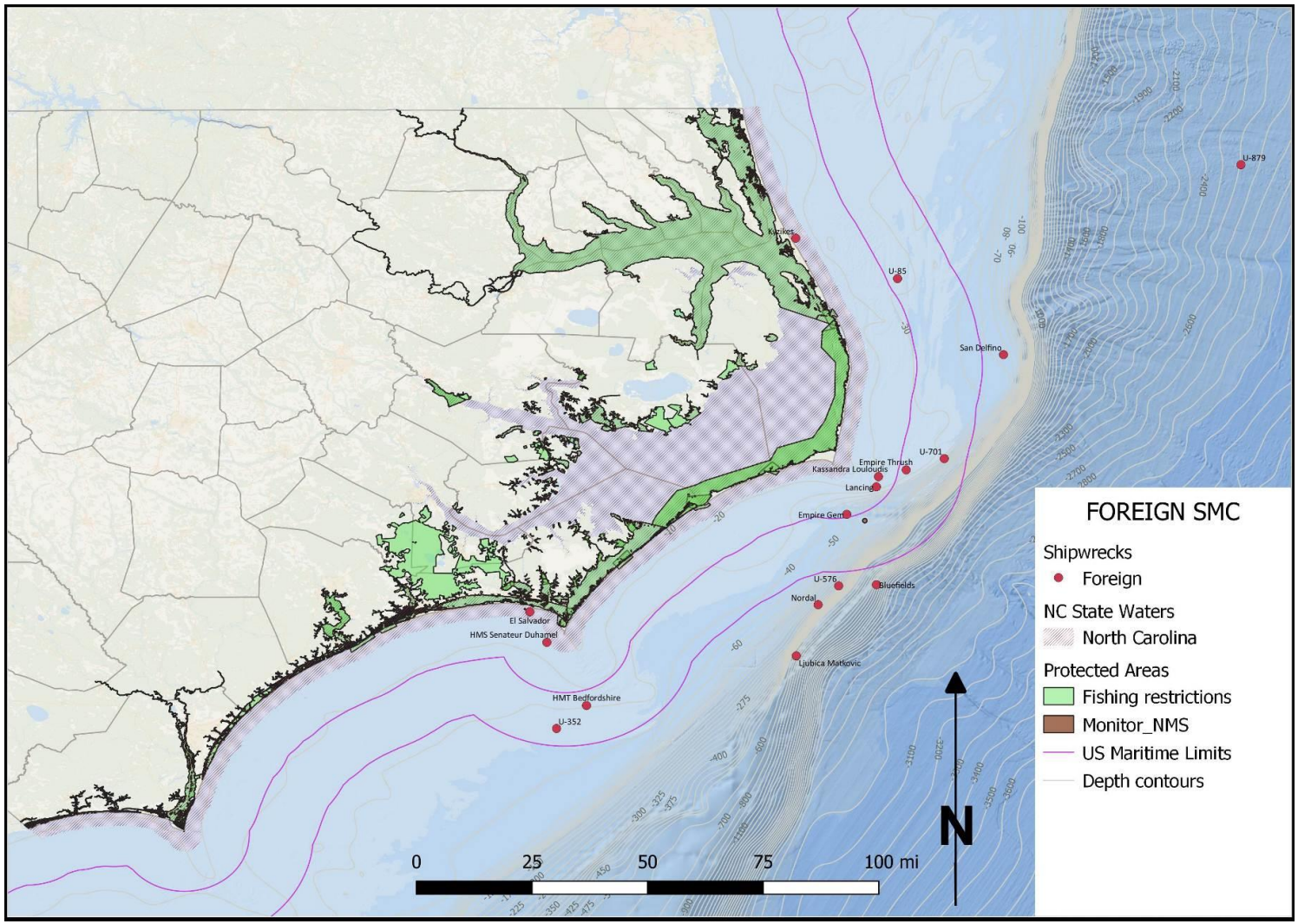

Figure 4.4. Distribution of foreign shipwrecks off North Carolina.

included in the database but it is unlikely that they would be considered SMC (*Bluefields*, *Empire Thrush*, *Kassandra Louloudis*, *Kyzikes*, *Lancing*, *Ljubica Matkovic*, and *San Delfino*). Consequently, these seven vessels are not considered in the following discussion.

El Salvador is purportedly wrecked just off the North Carolina shore near Beaufort Inlet—the same vicinity as Blackbeard's *Queen Anne's Revenge.* The shipwreck has not been discovered but is still being sought under a permit issued to Intersal by the State of North Carolina (Dukes 2018). Assuming the shipwreck is located, the next step for Intersal would be to attempt salvage of its remains. Under N.C.G.S. §121-25, the NCDNCR may grant salvage permits for shipwrecks in state waters—the authority for which stems from the Abandoned Shipwreck Act. Section 121-25 does state, however, that the NCDNCR shall issue the permit only when it is found to be "in the best interests of the State." Furthermore, the statute provides that conditions may attach to the permit such that the salvage is conducted in a manner also considered "in the best interests of the State." Thus, the North Carolina government exercises some degree of control over the initiation and prosecution of salvage activities in state waters. Federal admiralty courts lack the same administrative authority when applying the maritime law of salvage and finds. So while commercial salvage of historic shipwrecks in North Carolina state waters is unfortunate, it remains preferable to the alternative.

The authority of North Carolina (through the federal government) to assert that shipwrecks are "subject to the exclusive dominion and control of the State" (N.C.G.S. § 121-22) brings jurisdictional issues under UNCLOS into play. UNCLOS provides the

coastal State nearly unlimited powers within its own territorial seas. Customary international law is unsettled over the question of whether the flag State's right to manage its own SMC located in the jurisdiction of another State exceeds the right of the coastal State to control activities and property within its own territorial seas. While it is generally acknowledged that the coastal State has the right to manage UCH up to the limits of the contiguous zone, the extent to which the right of the flag State must be consulted before interference is "deeply controversial" (Dromgoole 2013:140). For instance, Roach and Smith (2012:545) submit that a

> coastal state does not acquire any right of ownership to a sunken military craft by reason of its being located or embedded in land, waters, or the seabed over which it exercises sovereignty or jurisdiction. Access to some SMC … is subject to coastal State control in accordance with international law.

The North Carolina law thus conflicts with the jurisdictional provisions of UNCLOS as they relate to foreign shipwrecks in state waters. One method for resolving this management issue would be for foreign governments to solicit protection for the shipwreck under the SMCA. In the case of *El Salvador*, the most propitious outcome would have the Kingdom of Spain arguing for and pursuing the shipwreck's protection under the SMCA or asserting the shipwreck retains sovereign immunity under international law. Should such protections be afforded through applicable federal legislation, it would supersede the state laws of North Carolina.

HMS *Senateur Duhamel* and *Empire Gem* are located within the US territorial seas. The federal government has broad latitude to legislate and protect resources within this zone as was previously noted. Although the federal government has authority to enact legislation protecting historic resources in its territorial seas, it has largely chosen not to do so, however. Consequently, absent protection under the

SMCA, the shipwrecks would be subject to maritime law if a potential salvor chose to bring a claim against the wreck. However, *Empire Gem* has been nominated for listing in the NRHP in association with the BOTA nomination. Should the shipwreck be determined eligible for listing, it would be protected from potential salvage claims.

The same does not hold true for *Senateur Duhamel*, which was not a listed property in the BOTA nomination and is one reason it scored higher in the SVI calculation. Apart from the SMCA, the wrecks would be protected from a federal undertaking under the NHPA. For example, if proposed dredging were to occur off the North Carolina coast for a beach renourishment project, the NHPA mandates that the Area of Potential Effects (APE) undergo an archaeological survey to determine the presence or absence of potential submerged cultural resources. If the shipwrecks were located within the proposed APE, a Phase II investigation to determine the resource's eligibility for listing in the NRHP would be required. A finding that the shipwreck is historically significant would trigger protection under the NHPA and the wreck would either have to be avoided during the project or likely undergo a Phase III recovery.

The same discussion regarding the rights of coastal States versus flag States under UNCLOS applies here. As it relates to the two foreign SMC in US territorial seas, a diplomatic agreement for protection under the SMCA between the US and the respective countries of origin of each shipwreck would enable the US to prohibit any activity directed at the shipwrecks without an approved permit. Consequently, salvage of HMS *Senateur Duhamel* and *Empire Gem* would be prohibited.

Four SMC (HMT *Bedfordshire*, U-*85*, U-*352*, U-*701*) are located within the US contiguous zone off North Carolina and three are located in the EEZ (*Nordal*, U-*57*,

U-*879*) (see **Figure 4.4**). The authority of the coastal State to manage UCH in the contiguous zone and EEZ under UNCLOS is the subject of some debate. Under UNCLOS, the coastal State's authority in its contiguous zone and EEZ is more restricted than in territorial seas. During negotiations over Article 2(1) of the Geneva Convention of the Continental Shelf (various components of this convention would ultimately be incorporated into UNCLOS), it was determined that the right of a coastal State to manage its natural resources on the continental shelf did not extend to cultural heritage, such as shipwrecks (Dromgoole 2013:30). Dromgoole (2013:43) notes that, during negotiation on the geographical extent of coastal State jurisdiction over UCH in UNCLOS discussions, the "broadest support" was given to the compromise option whereby jurisdiction was limited to the extent of the State's contiguous zone. According to Roach and Smith (2012:546),

> [a]ccess to some SMC and their associated artifacts located on or embedded in the continental shelf seaward of 24 miles from the baseline is subject only to flag State control and is not subject to coastal State control, as coastal State rights under the law of the sea do not extend to man-made objects which are not natural resources of the continental shelf and exclusive economic zone. Some coastal States take a different view.

Some States desired that the right to protect UCH extend to the limits of the EEZ, while others wanted to restrict the right to a coastal State's territorial seas. Ultimately, it was decided that the strict control of the coastal State over UCH would extend to the limit of its territorial seas. UNCLOS provides limited rights to the coastal State to protect UCH in the contiguous zone, which was viewed as the most pragmatic compromise during negotiations (Dromgoole 2013:32-33) (see also, Forrest 2010:337). Elia (2000:45) notes that, despite the absence of authority in UNCLOS, several countries

have extended their jurisdiction to protect UCH to the limits of their respective continental shelves or EEZs.

Notwithstanding the above, various flag States have asserted their sovereignty over its SMC regardless of location. For example, the SMCA represents a partial codification of President Clinton's Presidential Statement of US Policy for the Protection of Sunken Warships for 2001 (Dromgoole 2013:144). The Statement declares that the "United States retains title indefinitely to its sunken State craft unless title has been expressly abandoned or transferred in the manner Congress authorized or directed" (Dromgoole 2013:144). The Statement continues that "the United States recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea" (Dromgoole 2013:144). Roach and Smith (2012:542) state that "as a general rule, sunken military craft, and their associated artifacts, are now presumed to remain the property of the flag State, and are not subject to salvage without the authorization of the flag State, and, in some cases, additionally the coastal State."

As a practical matter, the difference in reach of federal legislation between the territorial seas, contiguous zone and EEZ is nonexistent (Cameron and Matthews 2016). The laws enforced in the territorial seas apply equally to resources up to the limits of the EEZ. For much of the Outer Continental Shelf (OCS), these laws and regulations are enforced by BOEM. BOEM notes their historical preservation responsibilities under the Outer Continental Shelf Lands Act (OCSLA) in Cameron and Matthews (2016:29), which states that "exploration (oil and gas) will not … disturb any site, structure, or object of historical or archaeological significance." Of course, there is

currently no oil and gas exploration on the Atlantic coast and thus North Carolina is not impacted. However, the current administration has announced it plans to open the Atlantic OCS to energy production so this may become an issue in the near future (Peterson 2018). As it stands, the largest question regarding management of UCH beyond the US territorial seas is the extent to which federal legislation considered antithetical to a potential flag State's preferred management of its resource would control. This question has not been definitely answered as of yet.

4.5.2 Recommendations

Apart from the SMCA itself, one of the most effective mechanisms for protection of cultural resources is the creation of a marine sanctuary. Protection within a national marine sanctuary would eliminate or substantially curb two of the human threats to SMC. Sanctuary regulations can restrict not only commercial salvage of a resource within its boundaries but also commercial fishing that incidentally damages historic shipwrecks. For several of the SMC and other historic shipwrecks on the North Carolina OCS, this may soon become a reality. Currently, the expansion of the Monitor National Marine Sanctuary (MNMS) off North Carolina is being considered, whose purpose is to protect shipwrecks lost not only during the Battle of the Atlantic but from the start of European colonization (Federal Register 2016).

Four different models for the proposed expansion have been presented (NOAA 2016) (**Figure 4.5**). Model A would establish wreck-specific boundaries for only those sites located in federal waters (NOAA 2016). The shipwrecks protected under this model are USS *YP-389*; *U-85*, *U-352*, and *U-701*; HMT *Bedfordshire*; the Diamond Shoals Lightship, and *E.M. Clark*. Model B would enlarge the sanctuary boundaries off

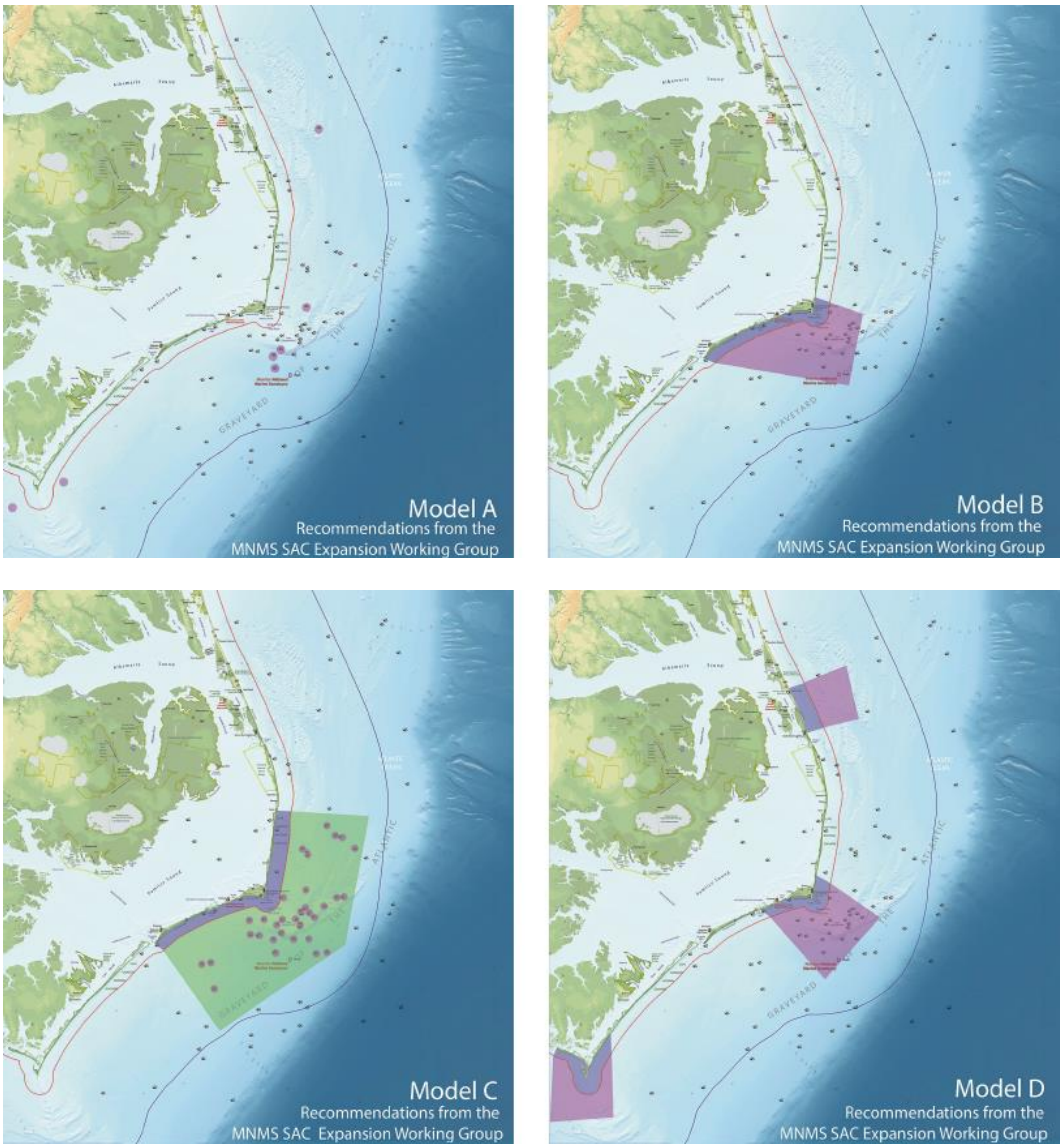

Figure 4.5. Proposed expansion models for the Monitor NMS (NOAA 2016).

Cape Hatteras. NOAA states that 65 known shipwrecks in federal waters would be protected (including many of those presented in the current research) and 150 additional shipwrecks if expanded to state waters under this model. Model C is an amalgam of Models A and B, with site-specific boundaries around individual shipwrecks and a non-regulatory study area. The number of shipwrecks included for protection under Model C is greater than Model A as well. Finally, Model D would establish three

separate sanctuary zones, which would be designed towards "'capturing' both a representative collection of wrecks in federal and potentially state waters from many eras and vessel types" (NOAA 2016).

The expansion would effectively protect wrecks within the proposed boundaries from risks from salvage and commercial fishing assuming such restrictions are put in place. Two additional related management tools that could be implemented to mitigate damage from recreational diving is (1) promotion of education for divers; and (2) the creation of shipwreck trails. Scott-Ireton and McKinnon (2015) write that laws designed to stop looting of historic shipwrecks have been largely ineffectual. Harris (1996), Scott-Ireton and McKinnon (2015), and Edney (2016) have promoted the education of recreational divers to stem abuses to cultural resources. Harris (1996) observes further that training divers to become avocational archaeologists provides a needed boost to state historic professionals that are often constrained by funding and workload. Moreover, recreational divers often locate many of the wrecks in state waters and so it is crucial to promote historic preservation to those individuals that discover historic resources.

Another management tool seen as effective is the creation of shipwreck trails or underwater shipwreck preserves (Spirek and Harris 2003; Scott-Ireton and McKinnon 2015; Edney 2016). Shipwreck trails not only educate the public but can also bring in tourists and thereby benefit the larger community. In addition to fostering a sense of archaeological stewardship, a well-designed trial can enlighten the visitor about the natural environment surrounding the trail and promote understanding of the broader maritime cultural landscape (Spirek and Harris 2003). These non-intrusive methods for

exploiting non-renewable resources can possibly yield benefits for decades rather than the short-term gains acquired from looting and commercial salvage.

4.6 CONCLUSION

The waters off the coast of North Carolina hold numerous shipwrecks that span from the colonial era (and possibly pre-contact) through present day. The finite resources of the Graveyard of the Atlantic face continual risk from both natural and anthropogenic threats. The statutory and regulatory framework controlling access and exploitation of these resources is frequently muddled and ineffective. Two bright spots within the legislative regime are the SMCA and NMSA, which should be considered two of the more robust mechanisms for enforcement of historic preservation goals.

Extension of the SMCA to foreign shipwrecks in US waters is not only possible but encouraged. However, the act requires an express act on the part of a shipwreck's flag State and so the status for many of these foreign shipwrecks is ambiguous. The risk model presented in this research found that most of these shipwrecks are at high to medium risk of damage by human factors, i.e., salvage, commercial fishing, and recreational diving. The continued preservation of foreign shipwrecks, and indeed all historic shipwrecks in North Carolina and beyond, will require implementation of more effective and/or expansive legislation and the promotion of public awareness about these valuable and irreplaceable resources.

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CHAPTER 5

5.1 SUMMARY

One of the strongest legislative protections for submerged cultural resources of a military character is the SMCA. Considering its importance in protecting SMC, it is worthwhile to determine the types of shipwrecks that are covered under the act. Coverage under the act will generally result in a greater level of defense from predatory actors. Chapters 2 and 3 assessed two separate classes of vessels historically associated with military conflicts but not obviously covered under the SMCA. The evaluation considered the general history of each class of vessel and also any legislation or judicial decisions bearing on their status. The intent of the chapters was to not only assess the specific protection of Liberty ships and privateers under the SMCA but also to provide examples of resources and methods that might be used to assess other classes of vessels.

The evaluation in Chapters 2 and 3 determined that, at least where the appropriate circumstances are met, Liberty ships and privateers could qualify as SMC and thus obtain coverage under the SMCA. It is imperative to note, however, that coverage for more ambiguous classes of vessels will typically require a case-by-case determination. Nevertheless, as mentioned in the following section, future research might involve assessing a collection of shipwrecks of a particular type to evaluate whether they generally meet the requirements of SMC. The ability to make broad generalizations whether a certain class of vessel is covered could facilitate management of identified or newly-discovered shipwrecks.

The goal of Chapter 4 was to assess how a shipwreck's location might affect the risks faced by the resource and its management. After looking at similar research, a risk model was created to evaluate the anthropogenic threats faced by SMC off the North Carolina coast. The model also incorporated the applicable law or laws that might be implicated based on the shipwreck's location. The two sets of variables were input into a Shipwreck Vulnerability Index, which calculated a score for each shipwreck within a possible range between 2.57 (lowest risk) and 12.86 (highest risk). Generally speaking, those shipwrecks found to suffer the lowest risk were those located at deeper depths and/or within a governmentally protected area. Higher risk vessels were those found closest to shore, where they were more likely to be disturbed by divers and commercial fishing.

One of the other key factors was the shipwreck's status, or possible status, as an SMC and, consequently, its protected status under the SMCA. Based on the research and analysis presented in Chapters 2 and 3, certain vessels were assigned possible SMC status based on specific characteristics applied at the time of the vessel's sinking, such as whether it was government owned or operated and/or carrying armament. The assignment was supported by the legal context presented in Chapter 1 concerning sovereign immunity as it applies to sunken warships. Experts differ on whether sovereign immunity covers sunken warships but, notwithstanding the ambiguity, there exists at least some authority for the contention that these shipwrecks remain protected under international law. Furthermore, the provision of the SMCA allowing foreign shipwrecks to be designated for protection through the federal government places them at a decreased risk from unsanctioned intrusion.

The information and analysis presented in Chapter 4 was informed by the results of the evaluations conducted in Chapters 2 and 3. For example, shipwrecks known to be carrying an Armed Guard or armament at the time of sinking were considered possible SMC based on the assessment of the "military" component of the SMCA definition of covered vessels detailed in Chapter 2. On a broader scale, the assessments in Chapters 2 and 3 can be used to guide future evaluations of SMC status and, in combination with the risk model in Chapter 4, determine the risks that may be confronted by a particular shipwreck or class of vessels.

Figure 5.1 depicts a decision tree that might be utilized to determined the law or laws that might apply to a particular shipwreck. The determination of the laws under which a shipwreck might be managed are frequently complex and thus Figure 5.1 represents a simplified view of the possible permutations. For instance, a shipwreck might be covered by the SMCA, the NHPA, and the ASA depending on its location. Moreover, the laws presented herein are only those found to be the most frequently implicated—additional legislation, such as the Antiquities Act, the Archaeological Resources Protection Act, other state laws, etc., may also apply. Nevertheless, the decision tree may assist the cultural resource manager to visualize the possible legislative alternatives. The legal analyses in Chapters 2 and 3 were presented to guide future determinations of which vessels may be protected under the SMCA, while the risk modeling presented in Chapter 4 is to be used to assess the threats that might be confronted by a particular shipwreck and the protections available based on its SMC status and location.

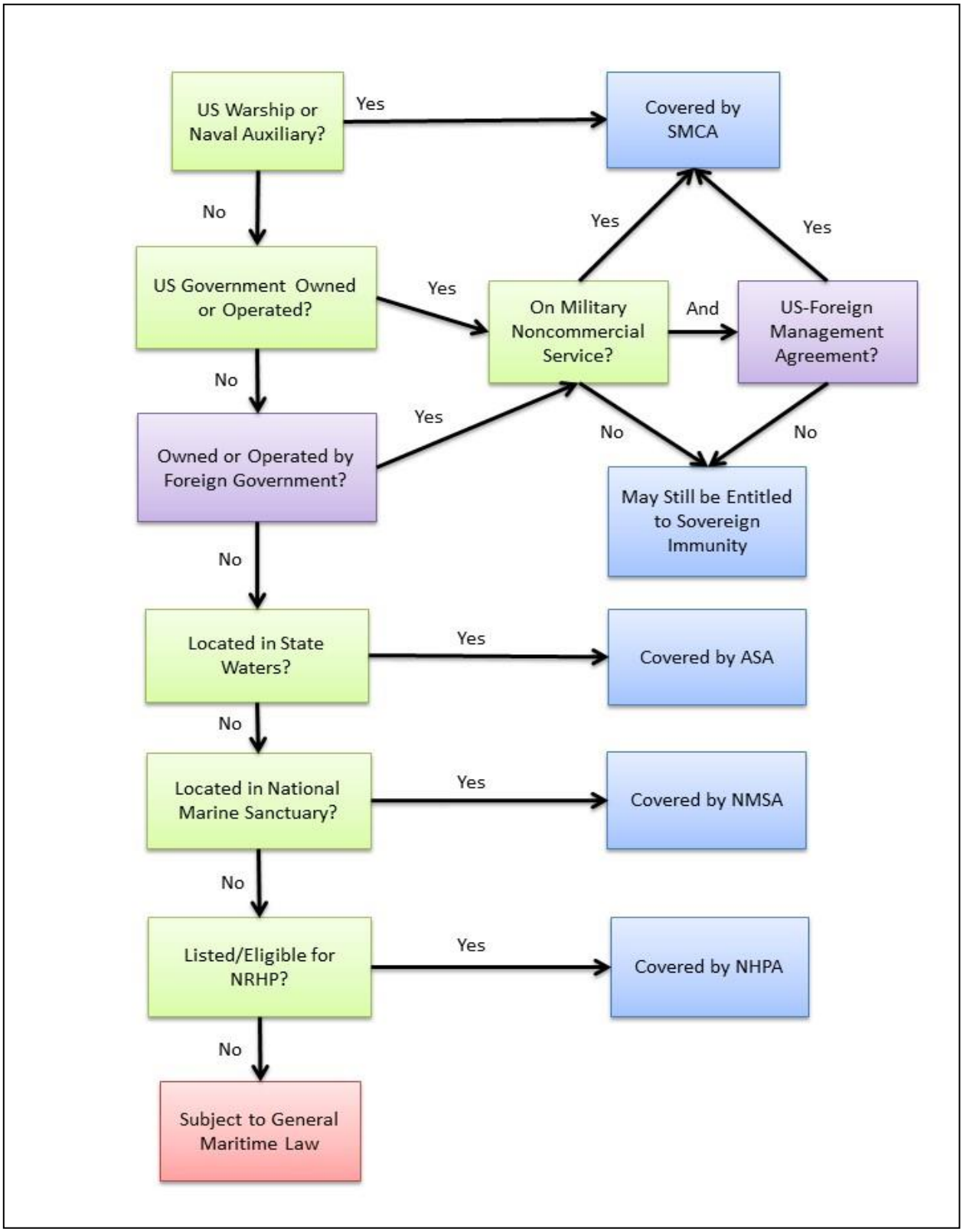

Figure 5.1. Decision Tree showing federal laws that might apply to historic shipwrecks.

5.2 FUTURE RESEARCH

The research and analysis presented in Chapters 2 and 3 lends itself to similar evaluations of other classes of vessels that are not obviously covered under the SMCA. Chapter 3 described the attempts of the nascent federal government to bolster the seriously outmatched Continental Navy through the encouragement and sanctioning of privateers during the Revolutionary War. Many of the colonial state governments, aiding in the fight against Britain and the Royal Navy, formed their own state navies. Research on the history of the various state navies, including the histories of particular vessels, would be one potential research avenue. As with Liberty ships and privateers, these vessels might arguably qualify as covered vessels under the SMCA based on their particular exploits.

The conclusions in Chapters 2 and 3 noted that the determination of whether a shipwreck should be considered an SMC under the act is generally made on a case-by-case basis. However, future management of these types of vessels would benefit from a broader generalization as to whether they are covered or not, e.g., Liberty ships and privateers are typically considered SMC unless proven otherwise. To achieve such a result, additional research might focus on assembling a larger class of vessels for evaluation. For example, a sample of one hundred Liberty ships could be analyzed under the guidance provided in Chapter 2. If the historical record supports the conclusion that a significant number of the shipwrecks in the sample class qualify as SMC, then a recommendation could be made that most Liberty ships should be considered protected unless or until contradictory evidence is presented. As previously

noted, this could facilitate management since a shipwreck could be automatically given protection while the historical record for that specific vessel is analyzed.

The other suggested future research focuses on the analysis presented in Chapter 4. The vulnerability index focused on anthropogenic threats to shipwrecks in North Carolina. The addition of environmental variables to the model, such as data on waves and currents, composition of the substrate, and sedimentation rates, would supplement the existing variables and present a fuller picture of the hazards faced by each shipwreck in the database. Furthermore, expansion of the model with other laws that might be applicable to the assessment of risks and threats to historic shipwrecks could be beneficial.

Additionally, Chapter 4 was devoted to the hazards faced by potential SMC but the threat to submerged cultural resources is not limited to those shipwrecks. The incorporation of all known shipwrecks in North Carolina, and associated data, would result in a more robust model. The model could also be expanded to add shipwrecks, either SMC or not, located in multiple states or regions, such as the entire Atlantic coast. The model would also be improved through “ground-truthing” of the variables involved in the SVI calculations. This might include interviews with local diving shops for observations on those shipwrecks they consider at greatest risk, their experience with looting on SMC and other shipwrecks, and anecdotal evidence about deterioration of shipwrecks that they visit.

Along similar lines, the research presented in Chapter 4 could be supplemented by assessments of the condition and threats to North Carolina shipwrecks through consultations with those that manage the state’s resources, namely the North Carolina

Underwater Archaeology Branch (NCUAB). Qualitative data would include interviews with the NCUAB about their own observations on damage done to sites and the management concerns they confront in performance of their duties. The data could be further supplemented with existing site assessments that have been conducted over the years. Accumulation of these various sources of data and incorporation into the risk model would enhance the SVI's use a management tool.

5.3 CONCLUSION

Historic shipwrecks are a finite resource that are worth protecting for myriad reasons. One of the significant aspects of historic shipwrecks is that they provide a "snapshot" view of the culture when it sank. After the wreck reaches a state of equilibrium, the image can remain captured until a thorough archaeological excavation can be conducted. Whereas analysis of artifacts discovered at terrestrial sites may be misleading because objects tend to accumulate as successive generations occupy the same site, shipwrecks are significant because they can capture a moment in time. Additionally, the remains of the vessels themselves are likewise a source of invaluable archaeological and historical data. Generally, however, the value of the data recovered to the archaeological community will depend on the scientific rigor applied during recovery. Once a shipwreck is destroyed, it remains lost forever.

One of the more sensitive factors for promoting protection of shipwrecks are their potential status as war graves. For vessels that sank during wartime, the shipwrecks are frequently the final resting place for the men and women that served aboard them in support of their respective nations or causes. Even if not serving during wartime, those shipwrecks containing human remains deserve respectful treatment and freedom from

disturbance by predatory actors concerned primarily with profit. An argument could be made that these submerged memorials should be afforded the same protections as cemeteries on land notwithstanding that they are underwater.

As presented in the preceding chapters, the US has enacted several laws that protect submerged cultural resources in US waters. One of the more important provisions in a number of these laws is the prohibition against application of the law of finds or salvage to historic shipwrecks. Due to the expense associated with salvage, especially those shipwrecks at deeper depths, the salvor typically favors speed over integrity during recovery. As a result, the archaeological context, and indeed the shipwreck itself, is typically destroyed during salvage and with it any opportunity of further study due to the loss of contextual data. Moreover, the cost of salvage operations are funded or reimbursed through the sale of artifacts extracted from the shipwreck. As artifacts are sold and scattered across the country, the capacity to study a comprehensive collection of recovered material culture is extinguished. For the archaeological researcher, then, the restriction of for-profit recovery of historic shipwrecks is considered necessary to preserving UCH wherever located.

While the US may never formally adopt the United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention for the Protection of Underwater Cultural Heritage, a federal law prohibiting the application of the law of salvage and finds for all shipwrecks located in US jurisdictional waters would eliminate the lacunae present in the current piecemeal approach. The law could be fashioned so that management of shipwrecks within state waters would remain with the respective states but with the requirement that the implementing state legislation prohibit salvage

of historic shipwrecks. This would not necessarily prevent commercial salvors from brining salvage claims from shipwrecks discovered in foreign waters. However, legislative recognition that historic shipwrecks represent a limited resource whose value is only recognized through scientific study would set an important precedent that could prove difficult to ignore by federal courts adjudicating such claims. Such legislation would further establish a recognition that underwater cultural resources contribute as much to the collective history of the nation as does a historic building or archaeological site on land.

One of the motivations for the research presented herein is the absence of court decisions interpreting the SMCA and, consequently, lack of judicial guidance. While it is Congress that writes the laws, it remains the prerogative of the federal courts to interpret them. For instance, there is no judicial direction for interpreting the three definitions of covered vessels under the SMCA. The intent of this article was to offer guidance for how these definitions could be examined and examples of the types of evidentiary support that might support the decision of whether a shipwreck is covered. The author maintains that an expansive application of the definition is favored from a public policy perspective. Instituting a broad application of covered vessels would offer a legislative mechanism for more effective management of shipwrecks that otherwise might not be protected.

APPENDIX A. FEDERAL LEGISLATION

The National Historic Preservation Act of 1966, 54 U.S.C. §§ 300101 *et seq.* (as amended through December 16, 2016)

Division A—Historic Preservation

Subdivision 1—General Provisions

Chapter 3001—Policy

54 U.S.C. § 300101. Policy

It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to—

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the historic property of the United States and of the international community of nations and in the administration of the national preservation program;

(3) administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation’s historic built environment; and

(6) assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust to expand and accelerate their historic preservation programs and activities.

Chapter 3003—Definitions

§ 300301. Agency

In this division, the term ‘‘agency’’ has the meaning given the term in section 551 of title 5.

§ 300302. Certified local government

In this division, the term ‘‘certified local government’’ means a local government whose local historic preservation program is certified pursuant to chapter 3025 of this title.

§ 300303. Council

In this division, the term ‘‘Council’’ means the Advisory Council on Historic Preservation established by section 304101 of this title.

§ 300304. Cultural park

In this division, the term ‘‘cultural park’’ means a definable area that— (A) is distinguished by historic property, prehistoric property, and land related to that property; and (B) constitutes an interpretive, educational, and recreational resource for the public at large.

§ 300305. Historic conservation district

In this division, the term ‘‘historic conservation district’’ means an area that contains— (1) historic property;

(2) buildings having similar or related architectural characteristics; (3) cultural cohesiveness; or (4) any combination of features described in paragraphs (1) to (3).

§ 300306. Historic Preservation Fund

In this division, the term ‘‘Historic Preservation Fund’’ means the Historic Preservation Fund established under section 303101 of this title.

§ 300307. Historic preservation review commission

In this division, the term ‘‘historic preservation review commission’’ means a board, council, commission, or other similar collegial body—

(1) that is established by State or local legislation as provided in section 302503(a)(2) of this title; and

(2) the members of which are appointed by the chief elected official of a jurisdiction

(unless State or local law provides for appointment by another official) from among—

(A) professionals in the disciplines of architecture, history, architectural history, planning, prehistoric and historic archeology, folklore, cultural anthropology, curation, conservation, and landscape architecture, or related disciplines, to the extent that those professionals are available in the community; and

(B) other individuals who have demonstrated special interest, experience, or knowledge in history, architecture, or related disciplines and will provide for an adequate and qualified commission.

§ 300308. Historic property

In this division, the term ‘‘historic property’’ means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.

§ 300309. Indian tribe

In this division, the term ‘‘Indian tribe’’ means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation(as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

§ 300310. Local government

In this division, the term ‘‘local government’’ means a city, county, township, municipality, or borough, or any other general purpose political subdivision of any State.

§ 300311.National Register

In this division, the term ‘‘National Register’’ means the National Register of Historic Places maintained under chapter 3021 of this title.

§ 300312. National Trust

In this division, the term ‘‘National Trust’’ means the National Trust for Historic Preservation in the United States established under section 312102 of this title.

§ 300313. Native Hawaiian

In this division, the term ‘‘Native Hawaiian’’ means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the

area that now constitutes Hawaii.

§ 300314. Native Hawaiian organization

(a) IN GENERAL.— In this division, the term ‘‘Native Hawaiian organization’’ means any organization that—

(1) serves and represents the interests of Native Hawaiians;

(2) has as a primary and stated purpose the provision of services to Native Hawaiians; and

(3) has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians.

(b) INCLUSIONS.—In this division, the term ‘‘Native Hawaiian organization’’ includes the Office of Hawaiian Affairs of Hawaii and Hui Malama I Na Kupuna O Hawai’i Nei, an organization incorporated under the laws of the State of Hawaii.

§ 300315. Preservation or historic preservation

In this division, the term ‘‘preservation’’ or ‘‘historic preservation’’ includes—

(1) identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, research, interpretation, and conservation;

(2) education and training regarding the foregoing activities; or

(3) any combination of the foregoing activities.

§ 300316. Secretary

In this division, the term ‘‘Secretary’’ means the Secretary acting through the Director.

§ 300317.State

In this division, the term ‘‘State’’ means—

(1) a State, the District of Columbia, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands; and

(2) the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

§ 300318. State historic preservation review board

In this division, the term ‘‘State historic preservation review board’’ means a board,

council, commission, or other similar collegial body established as provided in section 302301(2) of this title—

(1) the members of which are appointed by the State Historic Preservation Officer (unless otherwise provided for by State law);

(2) a majority of the members of which are professionals qualified in history, prehistoric and historic archeology, architectural history, architecture, folklore, cultural anthropology, curation, conservation, landscape architecture, and related disciplines; and

(3) that has the authority to— (A) review National Register nominations and appeals from nominations;

(B) review appropriate documentation submitted in conjunction with the Historic Preservation Fund;

(C) provide general advice and guidance to the State Historic Preservation Officer; and (D) perform such other duties as may be appropriate.

§ 300319. Tribal land

In this division, the term ‘‘tribal land’’ means— (1) all land within the exterior boundaries of any Indian reservation; and (2) all dependent Indian communities.

§ 300320.Undertaking

In this division, the term ‘‘undertaking’’ means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

(1) those carried out by or on behalf of the Federal agency;

(2) those carried out with Federal financial assistance;

(3) those requiring a Federal permit, license, or approval; and

(4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

§ 300321. World Heritage Convention

In this division, the term ‘‘World Heritage Convention’’ means the Convention concerning the Protection of the World Cultural and Natural Heritage, done at Paris November 23, 1972 (27 UST 37).

Subdivision 2—Historic Preservation Program Chapter 3021—National Register of

Historic Places

§ 302101. Maintenance by Secretary

The Secretary may expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.

§ 302102. Inclusion of properties on National Register

(a) IN GENERAL.— A property that meets the criteria for National Historic Landmarks established pursuant to section 302103 of this title shall be designated as a National Historic Landmark and included on the National Register subject to the requirements of section 302107 of this title.

(b) HISTORIC PROPERTY ON NATIONAL REGISTER ON DECEMBER 12, 1980.— All historic property included on the National Register on December 12, 1980, shall be deemed to be included on the National Register as of their initial listing for purposes of this division.

(c) HISTORIC PROPERTY LISTED IN FEDERAL REGISTER OF FEBRUARY 6, 1979, OR PRIOR TO DECEMBER 12, 1980, AS NATIONAL HISTORIC LANDMARKS.— All historic property listed in the Federal Register of February 6,1979, or prior to December 12,1980, as National Historic Landmarks are declared by Congress to be National Historic Landmarks of national historic significance as of their initial listing in the Federal Register for purposes of this division and chapter 3201 of this title, except that in the case of a National Historic Landmark district for which no boundaries had been established as of December 12, 1980, boundaries shall first be published in the Federal Register.

§ 302103. Criteria and regulations relating to National Register, National Historic Landmarks, and World Heritage List

The Secretary, in consultation with national historical and archeological associations, shall—

(1) establish criteria for properties to be included on the National Register and criteria for National Historic Landmarks; and

(2) promulgate regulations for—

(A) nominating properties for inclusion on, and removal from, the National Register and the recommendation of properties by certified local governments;

(B) designating properties as National Historic Landmarks and removing that designation;

(C) considering appeals from recommendations, nominations, removals, and designations (or any failure or refusal by a nominating authority to nominate or designate);

(D) nominating historic property for inclusion in the World Heritage List in accordance with the World Heritage Convention;

(E) making determinations of eligibility of properties for inclusion on the National Register; and

(F) notifying the owner of a property, any appropriate local governments, and the general public, when the property is being considered for inclusion on the National Register, for designation as a National Historic Landmark, or for nomination to the World Heritage List.

§ 302104. Nominations for inclusion on National Register

(a) NOMINATION BY STATE.— Subject to the requirements of section 302107 of this title, any State that is carrying out a program approved under chapter 3023 shall nominate to the Secretary property that meets the criteria promulgated under section 302103 of this title for inclusion on the National Register. Subject to section 302107 of this title, any property nominated under this subsection or under section 306102 of this title shall be included on the National Register on the date that is 45 days after receipt by the Secretary of the nomination and the necessary documentation, unless the Secretary disapproves the nomination within the 45-day period or unless an appeal is filed under subsection (c).

(b) NOMINATION BY PERSON OR LOCAL GOVERNMENT.— Subject to the requirements of section 302107 of this title, the Secretary may accept a nomination directly from any person or local government for inclusion of a property on the National Register only if the property is located in a State where there is no program approved under chapter 3023 of this title. The Secretary may include on the National Register any property for which such a nomination is made if the Secretary determines that the property is eligible in accordance with the regulations promulgated under section 302103 of this title. The determination shall be made within 90 days from the date of the nomination unless the nomination is appealed under subsection (c).

(c) NOMINATION BY FEDERAL AGENCY.— Subject to the requirements of section 302107 of this title, the regulations promulgated under section 302103 of this title, and appeal under subsection (d) of this section, the Secretary may accept a nomination directly by a Federal agency for inclusion of property on the National Register only if—

(1) completed nominations are sent to the State Historic Preservation Officer for review and comment regarding the adequacy of the nomination, the significance of the property and its eligibility for the National Register;

(2) within 45 days of receiving the completed nomination, the State Historic

Preservation Officer has made a recommendation regarding the nomination to the Federal Preservation Officer, except that failure to meet this deadline shall constitute a recommendation to not support the nomination;

(3) the chief elected officials of the county (or equivalent governmental unit) and municipal political jurisdiction in which the property is located are notified and given 45 days in which to comment;

(4) the Federal Preservation Officer forwards it to the Keeper of the National Register of Historic Places after determining that all procedural requirements have been met, including those in paragraphs (1) through (3) above; the nomination is adequately documented; the nomination is technically and professionally correct and sufficient; and may include an opinion as to whether the property meets the National Register criteria for evaluation;

(5) notice is provided in the Federal Register that the nominated property is being considered for listing on the National Register that includes any comments and the recommendation of the State Historic Preservation Officer and a declaration whether the State Historic Preservation Officer has responded within the 45 day-period of review provided in paragraph (2); and

(6) the Secretary addresses in the Federal Register any comments from the State Historic Preservation Officer that do not support the nomination of the property on the National Register before the property is included in the National Register.

(d)APPEAL.—Any person or local government may appeal to the Secretary— (1) a nomination of any property for inclusion on the National Register; and (2)the failure of a nominating authority to nominate a property in accordance with this chapter.

§ 302105. Owner participation in nomination process

(a) REGULATIONS.— The Secretary shall promulgate regulations requiring that before any property may be included on the National Register or designated as a National Historic Landmark, the owner of the property, or a majority of the owners of the individual properties within a district in the case of a historic district, shall be given the opportunity (including areas on able period of time) to concur in, or object to, the nomination of the property for inclusion or designation. The regulations shall include provisions to carry out this section in the case of multiple ownership of a single property.

(b) WHEN PROPERTY SHALL NOT BE INCLUDED ON NATIONAL REGISTER OR DESIGNATED AS NATIONAL HISTORIC LANDMARK.— If the owner of any privately owned property, or a majority of the owners of privately owned properties within the district in the case of a historic district, object to inclusion or designation, the property shall not be included on the National Register or designated as a National Historic Landmark until the objection is withdrawn.

(c) REVIEW BY SECRETARY.—The Secretary shall review the nomination of the property when an objection has been made and shall determine whether or not the property is eligible for inclusion or designation. If the Secretary determines that the property is eligible for inclusion or designation, the Secretary shall inform the Advisory Council on Historic Preservation, the appropriate State Historic Preservation Officer, the appropriate chief elected local official, and the owner or owners of the property of the Secretary's determination.

§ 302106. Retention of name

Notwithstanding section 43(c) of the Act of July 5, 1946 (known as the Trademark Act of 1946) (15 U.S.C. 1125(c)), buildings and structures on or eligible for inclusion on the National Register (either individually or as part of a historic district), or designated as an individual landmark or as a contributing building in a historic district by a unit of State or local government, may retain the name historically associated with the building or structure.

§ 302107.Regulations

The Secretary shall promulgate regulations—

(1) ensuring that significant prehistoric and historic artifacts, and associated records, subject to subchapter I of chapter 3061, chapter 3125, or the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa et seq.) are deposited in an institution with adequate long-term curatorial capabilities;

(2) establishing a uniform process and standards for documenting historic property by public agencies and private parties for purposes of incorporation into, or complementing, the national historical architectural and engineering records in the Library of Congress; and

(3) certifying local governments, in accordance with sections 302502 and 302503 of this title, and for the transfer of funds pursuant to section 302902(c)(4) of this title.

§ 302108. Review of threats to historic property

At least once every 4 years, the Secretary, in consultation with the Council and with State Historic Preservation Officers, shall review significant threats to historic property to—

(1) determine the kinds of historic property that may be threatened; (2) as certain the causes of the threats; and (3) develop and submit to the President and Congress recommendations for appropriate action.

Chapter 3023—State Historic Preservation Programs

§ 302301. Regulations

The Secretary, in consultation with the National Conference of State Historic Preservation Officers and the National Trust, shall promulgate regulations for State Historic Preservation Programs. The regulations shall provide that a State program submitted to the Secretary under this chapter shall be approved by the Secretary if the Secretary determines that the program provides for—

(1) the designation and appointment by the chief elected official of the State of a State Historic Preservation Officer to administer the program in accordance with section 302303 of this title and for the employment or appointment by the officer of such professionally qualified staff as may be necessary for those purposes;

(2) an adequate and qualified State historic preservation review board designated by the State Historic Preservation Officer unless otherwise provided for by State law; and

(3) adequate public participation in the State Historic Preservation Program, including the process of recommending properties for nomination to the National Register.

§ 302302. Program evaluation

(omitted)

§ 302303. Responsibilities of State Historic Preservation Officer

(a) IN GENERAL.— It shall be the responsibility of the State Historic Preservation Officer to administer the State Historic Preservation Program.

(b) PARTICULAR RESPONSIBILITIES.— It shall be the responsibility of the State Historic Preservation Officer to—

(1) in cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive statewide survey of historic property and maintain inventories of the property;

(2) identify and nominate eligible property to the National Register and otherwise administer applications for listing historic property on the National Register;

(3) prepare and implement a comprehensive statewide historic preservation plan;

(4) administer the State program of Federal assistance for historic preservation within the State;

(5) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;

(6) cooperate with the Secretary, the Council, other Federal and State agencies, local

governments, and private organizations and individuals to ensure that historic property is taken into consideration at all levels of planning and development;

(7) provide public information, education, and training and technical assistance in historic preservation;

(8) cooperate with local governments in the development of local historic preservation programs and assist local governments in becoming certified pursuant to chapter 3025;

(9) consult with appropriate Federal agencies in accordance with this division on—

(A) Federal undertakings that may affect historic property; and

(B) the content and sufficiency of any plans developed to protect, manage, or reduce or mitigate harm to that property; and

(10) advise and assist in the evaluation of proposals for rehabilitation projects that may qualify for Federal assistance.

§ 302304. Contracts and cooperative agreements

(a) STATE.— A State may carry out all or any part of its responsibilities under this chapter by contractor cooperative agreement with a qualified nonprofit organization or educational institution.

(b) SECRETARY.—

(1) IN GENERAL.—

(A) AUTHORITY TO ASSIST SECRETARY.— Subject to paragraphs (3) and (4), the Secretary may enter into contracts or cooperative agreements with a State Historic Preservation Officer for any State authorizing the Officer to assist the Secretary in carrying out one or more of the following responsibilities within that State:

(i) Identification and preservation of historic property.

(ii) Determination of the eligibility of property for listing on the National Register.

(iii) Preparation of nominations for inclusion on the National Register.

(iv) Maintenance of historical and archeological data bases.

(v) Evaluation of eligibility for Federal preservation incentives.

(B) AUTHORITY TO MAINTAIN NATIONAL REGISTER.— Nothing in subparagraph (A) shall be construed to provide that any State Historic Preservation Officer or any other person other than the Secretary shall have the authority to maintain the National Register for properties in any State.

(2) REQUIREMENTS.— The Secretary may enter into a contract or cooperative agreement under paragraph (1) only if—

(A) the State Historic Preservation Officer has requested the additional responsibility;

(B) the Secretary has approved the State historic preservation program pursuant to sections 302301 and 302302 of this title;

(C) the State Historic Preservation Officer agrees to carry out the additional responsibility in a timely and efficient manner acceptable to the Secretary and the Secretary determines that the Officer is fully capable of carrying out the responsibility in that manner;

(D) the State Historic Preservation Officer agrees to permit the Secretary to review and revise, as appropriate in the discretion of the Secretary, decisions made by the Officer pursuant to the contract or cooperative agreement; and

(E) the Secretary and the State Historic Preservation Officer agree on the terms of additional financial assistance to the State, if there is to be any, for the costs of carrying out that responsibility.

(3)ESTABLISH CONDITIONSAND CRITERIA.—For each significant program area under the Secretary's authority, the Secretary shall establish specific conditions and criteria essential for the assumption by a State Historic Preservation Officer of the Secretary's duties in each of those programs.

(4) PRESERVATION PROGRAMS AND ACTIVITIES NOT DIMINISHED.— Nothing in this chapter shall have the effect of diminishing the preservation programs and activities of the Service.

Chapter 3025—Certification of Local Governments

(omitted)

Chapter 3027—Historic Preservation Programs and Authorities for Indian Tribes and Native Hawaiian Organizations

(omitted)

Chapter 3029—Grants

(omitted)

Chapter 3031—Historic Preservation Fund

(omitted)

Chapters 3033 Through 3037—Reserved

Chapter 3039—Miscellaneous

§ 303901. Loan insurance program for preservation of property included on National Register

(omitted)

§ 303902. Training in, and dissemination of information concerning, professional methods and techniques for preservation of historic property

The Secretary shall develop and make available to Federal agencies, State and local governments, private organizations and individuals, and other nations and international organizations pursuant to the World Heritage Convention, training in, and information concerning, professional methods and techniques for the preservation of historic property and for the administration of the historic preservation program at the Federal, State, and local level. The Secretary shall also develop mechanisms to provide information concerning historic preservation to the general public including students.

§ 303903. Preservation education and training program

(omitted)

Subdivision 3—Advisory Council on Historic Preservation

Chapter 3041—Advisory Council on Historic Preservation

§ 304101.Establishment; vacancies

(a) ESTABLISHMENT.— There is established as an independent agency of the United States Government an Advisory Council on Historic Preservation, which shall be composed of the following members:

(1) A Chairman appointed by the President selected from the general public.

(2) The Secretary.

(3) The Architect of the Capitol.

(4) The Secretary of Agriculture and the heads of 7 other agencies of the United States (other than the Department of the Interior), the activities of which affect historic

preservation, designated by the President.

(5) One Governor appointed by the President.

(6) One mayor appointed by the President.

(7) The President of the National Conference of State Historic Preservation Officers.

(8) The General Chairman of the National Association of Tribal Historic Preservation Officers.

(9) The Chairman of the National Trust.

(10) Four experts in the field of historic preservation appointed by the President from architecture, history, archeology, and other appropriate disciplines.

(11) Three members from the general public, appointed by the President.

(12) One member of an Indian tribe or Native Hawaiian organization who represents the interests of the Indian tribe or Native Hawaiian organization of which he or she is a member, appointed by the President.

(b) DESIGNATION OF SUBSTITUTES.—Each member of the Council specified in paragraphs (2) to (5) and (7) through (9) of subsection (a) may designate another officer of the department, agency, or organization to serve on the Council instead of the member, except that, in the case of paragraphs (2) and (4), no officer other than an Assistant Secretary or an officer having major department wide or agency-wide responsibilities may be designated.

(c) TERM OF OFFICE.—Each member of the Council appointed under paragraphs (10) through (12) of subsection (a) shall serve for a term of 4 years from the expiration of the term of the member's predecessor. The members appointed under paragraphs (5) and(6) shall serve for the term of their elected office but not in excess of 4 years. An appointed member, other than the Chairman of the Council, may not serve more than 2 terms. An appointed member whose term has expired shall serve until that member's successor has been appointed.

(d) VACANCIES.—A vacancy in the Council shall not affect its powers, but shall be filled, not later than 60 days after the vacancy commences, in the same manner as the original appointment (and for the balance of the unexpired term).

(e) CHAIRMAN.—

(1) After January 20, 2017, the Chairman shall—

(A) be appointed by the President, by and with the advice and consent of the Senate;

(B) serve at the will of the President;

(C) serve full time; and

(D) be compensated at the rate provided for Level V of the Executive Schedule Pay Rates under section 5316 of title 5.

(2) The Chairman shall serve for a term of 4 years and may be reappointed once, for a total of not more than 8 years of service as Chairman, except that a Chairman whose appointment has expired under this paragraph shall serve until his or her successor has been appointed. The term of a Chairman shall start (regardless of actual appointment date) on January 20 after each general Presidential election. The first Chairman appointed after the date of enactment of this paragraph shall have a first term commencing on January 20, 2017, and ending on January 19, 2021.

(3) The Chairmen before the first appointment of a Chairman in accordance with paragraph (1) of this subsection shall receive $100 per diem when engaged in the performance of the duties of the Council, and shall receive reimbursement for necessary traveling and subsistence expenses incurred by them in the performance of the duties of the Council.

(f) DESIGNATION OF VICECHAIRMAN.—The President shall designate a Vice Chairman from the members appointed under paragraph (5), (6), (10), or (11) of subsection (a). The Vice Chairman shall perform the functions of the Chairman during the absence or disability of the Chairman or when the office is vacant.

(g) QUORUM.—Thirteen members of the Council shall constitute a quorum.

§ 304102. Duties of Council

(a) DUTIES.—The Council shall—

(1) advise the President and Congress on matters relating to historic preservation, recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation, and advise on the dissemination of information pertaining to those activities;

(2) encourage, in cooperation with the National Trust and appropriate private agencies, public interest and participation in historic preservation;

(3) recommend the conduct of studies in such areas as—

(A) the adequacy of legislative and administrative statutes and regulations pertaining to historic preservation activities of State and local governments; and

(B) the effects of tax policies at all levels of government on historic preservation;

(4) advise as to guidelines for the assistance of State and local governments in drafting legislation relating to historic preservation;

(5) encourage, in cooperation with appropriate public and private agencies and institutions, training and education in the field of historic preservation;

(6) review the policies and programs of Federal agencies and recommend to Federal agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under this division; and

(7) inform and educate Federal agencies, State and local governments, Indian tribes, other nations and international organizations and private groups and individuals as to the Council's authorized activities.

(b) ANNUAL REPORT.—The Council annually shall submit to the President a comprehensive report of its activities and the results of its studies and shall from time to time submit additional and special reports as it deems advisable. Each report shall propose legislative enactments and other actions as, in the judgment of the Council, are necessary and appropriate to carry out its recommendations and shall provide the Council's assessment of current and emerging problems in the field of historic preservation and an evaluation of the effectiveness of the programs of Federal agencies, State and local governments, and the private sector in carrying out this division.

§ 304103. Cooperation between Council and instrumentalities of executive branch of Federal Government

The Council may secure directly from any Federal agency information, suggestions, estimates, and statistics for the purpose of this chapter. Each Federal agency may furnish information, suggestions, estimates, and statistics to the extent permitted by law and within available funds.

§ 304104. Compensation of members of Council

(omitted)

§ 304105. Administration

(omitted)

§ 304106. International Centre for the Study of the Preservation and Restoration of Cultural Property

(omitted)

§ 304107. Transmittal of legislative recommendations, testimony, or comments to any officer or agency of the United States prior to submission to Congress

No officer or agency of the United States shall have any authority to require the Council to submit its legislative recommendations, or testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of the recommendations, testimony, or comments to Congress. When the Council voluntarily seeks to obtain the comments or review of any officer or agency of the United States, the Council shall include a description of the actions in its legislative recommendations, testimony, or comments on legislation that it transmits to Congress.

§ 304108. Regulations, procedures, and guidelines

(a) IN GENERAL.— The Council may promulgate regulations as it considers necessary to govern the implementation of section 306108 of this title in its entirety.

(b) PARTICIPATION BY LOCAL GOVERNMENTS.— The Council shall by regulation establish such procedures as may be necessary to provide for participation by local governments in proceedings and other actions taken by the Council with respect to undertakings referred to in section 306108 of this title that affect the local governments.

(c) EXEMPTION FOR FEDERAL PROGRAMS OR UNDERTAKINGS.— The Council, with the concurrence of the Secretary, shall promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this division when the exemption is determined to be consistent with the purposes of this division, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic property.

§ 304109. Budget submission

(omitted)

§ 304110. Report by Secretary to Council

(omitted)

§ 304111. Reimbursements from State and local agencies

(omitted)

§ 304112. Effectiveness of Federal grant and assistance programs

(omitted)

Subdivision 4—Other Organizations and Programs

(omitted)

Subdivision 5—Federal Agency Historic Preservation Responsibilities

Chapter 3061—Program Responsibilities and Authorities

Subchapter I—In General

§ 306101. Assumption of responsibility for preservation of historic property

(a) IN GENERAL.—

(1) AGENCY HEAD RESPONSIBILITY.— The head of each Federal agency shall assume responsibility for the preservation of historic property that is owned or controlled by the agency.

(2) USE OF AVAILABLE HISTORIC PROPERTY.— Prior to acquiring, constructing, or leasing a building for purposes of carrying out agency responsibilities, a Federal agency shall use, to the maximum extent feasible, historic property available to the agency, in accordance with Executive Order No. 13006 (40 U.S.C. 3306 note).

(3) NECESSARY PRESERVATION.— Each Federal agency shall undertake, consistent with the preservation of historic property, the mission of the agency, and the professional standards established pursuant to subsection (c), any preservation as may be necessary to carry out this chapter.

(b) GUIDELINES FOR FEDERAL AGENCY RESPONSIBILITY FOR AGENCY-OWNED HISTORIC PROPERTY.— In consultation with the Council, the Secretary shall promulgate guidelines for Federal agency responsibilities under this subchapter (except section 306108).

(c) PROFESSIONAL STANDARDS FOR PRESERVATION OF FEDERALLY OWNED OR CONTROLLED HISTORIC PROPERTY.— The Secretary shall establish, in consultation with the Secretary of Agriculture, the Secretary of Defense, the Smithsonian Institution, and the Administrator of General Services, professional standards for the preservation of historic property in Federal ownership or control.

§ 306102. Preservation program

(a) ESTABLISHMENT.— Each Federal agency shall establish (except for programs or undertakings exempted pursuant to section 304108(c) of this title), in consultation with the Secretary, a preservation program for the identification, evaluation, and nomination to the National Register, and protection, of historic property.

(b) REQUIREMENTS.— The program shall ensure that—

(1) historic property under the jurisdiction or control of the agency is identified,

evaluated, and nominated to the National Register;

(2) historic property under the jurisdiction or control of the agency is managed and maintained in a way that considers the preservation of their historic, archeological, architectural, and cultural values in compliance with section 306108 of this title and gives special consideration to the preservation of those values in the case of property designated as having national significance;

(3) the preservation of property not under the jurisdiction or control of the agency but potentially affected by agency actions is given full consideration in planning;

(4) the agency's preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations carrying out historic preservation planning activities, and the private sector; and

(5) the agency's procedures for compliance with section 306108 of this title—

(A) are consistent with regulations promulgated by the Council pursuant to section 304108(a) and (b) of this title;

(B) provide a process for the identification and evaluation of historic property for listing on the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate, regarding the means by which adverse effects on historic property will be considered; and

(c) provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3(c) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3002(c)).

§ 306103. Recordation of historic property prior to alteration or demolition

Each Federal agency shall initiate measures to ensure that where, as a result of Federal action or assistance carried out by the agency, a historic property is to be substantially altered or demolished—

(1) timely steps are taken to make or have made appropriate records; and

(2) the records are deposited, in accordance with section 302107 of this title, in the Library of Congress or with such other appropriate agency as the Secretary may designate, for future use and reference.

§ 306104. Agency Preservation Officer

The head of each Federal agency (except an agency that is exempted under section 304108(c) of this title) shall designate a qualified official as the agency's Preservation Officer who shall be responsible for coordinating the agency's activities under this

division. Each Preservation Officer may, to be considered qualified, satisfactorily complete an appropriate training program established by the Secretary under section 306101(c) of this title.

§ 306105.Agency programs and projects

Consistent with the agency's missions and mandates, each Federal agency shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this division and give consideration to programs and projects that will further the purposes of this division.

§ 306106. Review of plans of transferees of surplus federally owned historic property

The Secretary shall review and approve the plans of transferees of surplus federally owned historic property not later than 90 days after receipt of the plans to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved or enhanced.

§ 306107. Planning and actions to minimize harm to National Historic Landmarks

Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

§ 306108. Effect of undertaking on historic property

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior t0 the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

§ 306109. Costs of preservation as eligible project costs

A Federal agency may include the costs of preservation activities of the agency under this division as eligible project costs in all undertakings of the agency or assisted by the agency. The eligible project costs may include amounts paid by a Federal agency to a State to be used in carrying out the preservation responsibilities of the Federal agency under this division, and reasonable costs may be charged to Federal licensees and

permittees as a condition to the issuance of the license or permit.

§ 306110. Annual preservation awards program

The Secretary shall establish an annual preservation awards program under which the Secretary may make monetary awards in amounts of not to exceed $1,000 and provide citations for special achievement to officers and employees of Federal, State, and certified local governments in recognition of their outstanding contributions to the preservation of historic property. The program may include the issuance of annual awards by the President to any citizen of the United States recommended for the award by the Secretary.

§ 306111. Environmental impact statement

Nothing in this division shall be construed to—

(1) require the preparation of an environmental impact statement where the statement would not otherwise be required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); or

(2) provide any exemption from any requirement respecting the preparation of an environmental impact statement under that Act.

§ 306112. Waiver of provisions in event of natural disaster or imminent threat to national security

The Secretary shall promulgate regulations under which the requirements of this subchapter (except section 306108) may be waived in whole or in part in the event of a major natural disaster or an imminent threat to national security.

§ 306113.Anticipatory demolition

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of section 306108 of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.

§ 306114. Documentation of decisions respecting undertakings

With respect to any undertaking subject to section306108of this title that adversely affects any historic property for which a Federal agency has not entered into an agreement pursuant to regulations issued by the Council, the head of the agency shall

document any decision made pursuant to section306108of this title. The head of the agency may not delegate the responsibility to document a decision pursuant to this section. Where an agreement pursuant to regulations issued by the Council has been executed with respect to an undertaking, the agreement shall govern the undertaking and all of its parts.

Subchapter II—Lease, Exchange, or Management of Historic Property

(omitted)

Subchapter III—Protection and Preservation of Resources

§ 306131.Standards and guidelines

(a) STANDARDS.—

(1) IN GENERAL.—Each Federal agency that is responsible for the protection of historic property (including archeological property) pursuant to this division or any other law shall ensure that—

(A) all actions taken by employees or contractors of the agency meet professional standards under regulations developed by the Secretary in consultation with the Council, other affected agencies, and the appropriate professional societies of archeology, architecture, conservation, history, landscape architecture, and planning;

(B) agency personnel or contractors responsible for historic property meet qualification standards established by the Office of Personnel Management in consultation with the Secretary and appropriate professional societies of archeology, architecture, conservation, curation, history, landscape architecture, and planning; and

(C) records and other data, including data produced by historical research and archeological surveys and excavations, are permanently maintained inappropriate databases and made available to potential users pursuant to such regulations as the Secretary shall promulgate.

(2)CONSIDERATIONS.—The standards referred to in paragraph(1)(B) shall consider the particular skills and expertise needed for the preservation of historic property and shall be equivalent requirements for the disciplines involved.

(3) REVISION.—The Office of Management and Budget shall revise qualification standards for the disciplines involved.

(b)GUIDELINES.—To promote the preservation of historic property eligible for listing on the National Register, the Secretary shall, in consultation with the Council, promulgate guidelines to ensure that Federal, State, and tribal historic preservation programs

subject to this division include plans to—

(1) provide information to the owners of historic property (including architectural, curatorial, and archeological property) with demonstrated or likely research significance, about the need for protection of the historic property, and the available means of protection;

(2) encourage owners to preserve historic property intact and in place and offer the owners of historic property information on the tax and grant assistance available for the donation of the historic property or of a preservation easement of the historic property;

(3) encourage the protection of Native American cultural items (within the meaning of section 2 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001)) and of property of religious or cultural importance to Indian tribes, Native Hawaiian organizations, or other Native American groups; and

(4) encourage owners that are undertaking archeological excavations to—

(A) conduct excavations and analyses that meet standards for federally-sponsored excavations established by the Secretary;

(B) donate or lend artifacts of research significance to an appropriate research institution;

(C) allow access to artifacts for research purposes; and

(D) prior to excavating or disposing of a Native American cultural item in which an Indian tribe or Native Hawaiian organization may have an interest under subparagraph (B) or (C) of section 3(a)(2) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3002(a)(2)(B), (C)), give notice to and consult with the Indian tribe or Native Hawaiian organization.

Subdivision 6—Miscellaneous

Chapter 3071—Miscellaneous

§ 307101. World Heritage Convention

(omitted)

§ 307102.Effective date of regulations

(omitted)

§ 307103. Access to information

(a) AUTHORITY TO WITHHOLD FROM DISCLOSURE.—The head of a Federal

agency, or other public official receiving grant assistance pursuant to this division, after consultation with the Secretary, shall withhold from disclosure to the public information about the location, character, or ownership of a historic property if the Secretary and the agency determine that disclosure may—

(1) cause a significant invasion of privacy;(2) risk harm to the historic property; or(3) impede the use of a traditional religious site by practitioners.

(b) ACCESS DETERMINATION.—When the head of a Federal agency or other public official determines that information should be withheld from the public pursuant to subsection (a), the Secretary, in consultation with the Federal agency head or official, shall determine who may have access to the information for the purpose of carrying out this division.

(c) CONSULTATION WITH COUNCIL.—When information described in subsection (a) has been developed in the course of an agency's compliance with section 306107 or 306108 of this title, the Secretary shall consult with the Council in reaching determinations under subsections (a) and (b).

§ 307104. Inapplicability of division to White House, Supreme Court building, or United States Capitol

Nothing in this division applies to the White House and its grounds, the Supreme Court building and its grounds, or the United States Capitol and its related buildings and grounds.

§ 307105. Attorney's fees and costs to prevailing parties in civil actions

In any civil action brought in any United States district court by any interested person to enforce this division, if the person substantially prevails in the action, the court may award attorney's fees, expert witness fees, and other costs of participating in the civil action, as the court considers reasonable.

§ 307106. Authorization for expenditure of appropriated funds

Where appropriate, each Federal agency may expend funds appropriated for its authorized programs for the purposes of activities carried out pursuant to this division, except to the extent that appropriations legislation expressly provides otherwise.

§ 307107. Donations and bequests of money, personal property, and less than fee interests in historic property

(omitted)

§ 307108. Privately donated funds

(omitted)

National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*

§4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

SUBCHAPTER I—POLICIES AND GOALS

§4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into

such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

§4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State

agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the “Council”). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

§4343. Employment of personnel, experts and consultants

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this chapter. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this chapter, in accordance with section 3109 of title 5 (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

§4344. Duties and functions

It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are

interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

§4345. Consultation with Citizens' Advisory Committee on Environmental Quality and other representatives

In exercising its powers, functions, and duties under this chapter, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

§4346. Tenure and compensation of members

Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5

U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV or 1 the Executive Schedule Pay Rates (5 U.S.C. 5315).

§4346a. Travel reimbursement by private organizations and Federal, State, and local governments

(omitted)

§4346b. Expenditures in support of international activities

(omitted)

§4347. Authorization of appropriations

(omitted)

SUBCHAPTER III—MISCELLANEOUS PROVISIONS

(omitted)

National Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431 et seq.

§1431. Findings, purposes, and policies; establishment of system

(a) Findings The Congress finds that—

(1) this Nation historically has recognized the importance of protecting special areas of its public domain, but these efforts have been directed almost exclusively to land areas above the high-water mark;

(2) certain areas of the marine environment possess conservation, recreational, ecological, historical, scientific, educational, cultural, archeological, or esthetic qualities which give them special national, and in some cases international, significance;

(3) while the need to control the effects of particular activities has led to enactment of resource-specific legislation, these laws cannot in all cases provide a coordinated and comprehensive approach to the conservation and management of special areas of the marine environment; and

(4) a Federal program which establishes areas of the marine environment which have special conservation, recreational, ecological, historical, cultural, archeological, scientific, educational, or esthetic qualities as national marine sanctuaries managed as the National Marine Sanctuary System will—

(A) improve the conservation, understanding, management, and wise and sustainable use of marine resources;

(B) enhance public awareness, understanding, and appreciation of the marine environment; and

(C) maintain for future generations the habitat, and ecological services, of the natural assemblage of living resources that inhabit these areas.

(b) Purposes and policies

The purposes and policies of this chapter are—

(1) to identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance and to manage these areas as the National Marine Sanctuary System;

(2) to provide authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner which complements existing regulatory authorities;

(3) to maintain the natural biological communities in the national marine sanctuaries, and to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes;

(4) to enhance public awareness, understanding, appreciation, and wise and sustainable use of the marine environment, and the natural, historical, cultural, and archeological resources of the National Marine Sanctuary System;

(5) to support, promote, and coordinate scientific research on, and long-term monitoring of, the resources of these marine areas;

(6) to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities;

(7) to develop and implement coordinated plans for the protection and management of these areas with appropriate Federal agencies, State and local governments, Native American tribes and organizations, international organizations, and other public and private interests concerned with the continuing health and resilience of these marine areas;

(8) to create models of, and incentives for, ways to conserve and manage these areas, including the application of innovative management techniques; and

(9) to cooperate with global programs encouraging conservation of marine resources.

(c) Establishment of system

There is established the National Marine Sanctuary System, which shall consist of national marine sanctuaries designated by the Secretary in accordance with this chapter.

§1432. Definitions

As used in this chapter, the term—

(1) “draft management plan” means the plan described in section 1434(a)(1)(C)(v) of this title;

(2) “Magnuson-Stevens Act” means the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.);

(3) “marine environment” means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law;

(4) “Secretary” means the Secretary of Commerce;

(5) “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, the Virgin Islands, Guam, and any other commonwealth, territory, or possession of the United States;

(6) “damages” includes—

(A) compensation for—

(i)(I) the cost of replacing, restoring, or acquiring the equivalent of a sanctuary resource; and

(II) the value of the lost use of a sanctuary resource pending its restoration or replacement or the acquisition of an equivalent sanctuary resource; or

(ii) the value of a sanctuary resource if the sanctuary resource cannot be restored or replaced or if the equivalent of such resource cannot be acquired;

(B) the cost of damage assessments under section 1443(b)(2) of this title;

(C) the reasonable cost of monitoring appropriate to the injured, restored, or replaced resources;

(D) the cost of curation and conservation of archeological, historical, and cultural sanctuary resources; and

(E) the cost of enforcement actions undertaken by the Secretary in response to the destruction or loss of, or injury to, a sanctuary resource;

(7) “response costs” means the costs of actions taken or authorized by the Secretary to minimize destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risks of such destruction, loss, or injury, including costs related to seizure, forfeiture, storage, or disposal arising from liability under section 1443 of this title;

(8) “sanctuary resource” means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary; and

(9) “exclusive economic zone” means the exclusive economic zone as defined in the Magnuson-Stevens Act; and

(10) “System” means the National Marine Sanctuary System established by section 1431 of this title.

§1433. Sanctuary designation standards

(a) Standards

The Secretary may designate any discrete area of the marine environment as a national marine sanctuary and promulgate regulations implementing the designation if the Secretary determines that—

(1) the designation will fulfill the purposes and policies of this chapter;

(2) the area is of special national significance due to—

(A) its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities;

(B) the communities of living marine resources it harbors; or

(C) its resource or human-use values;

(3) existing State and Federal authorities are inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education;

(4) designation of the area as a national marine sanctuary will facilitate the objectives stated in paragraph (3); and

(5) the area is of a size and nature that will permit comprehensive and coordinated conservation and management.

(b) Factors and consultations required in making determinations and findings

(1) Factors

For purposes of determining if an area of the marine environment meets the standards set forth in subsection (a) of this section, the Secretary shall consider—

(A) the area's natural resource and ecological qualities, including its contribution to biological productivity, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, maintenance of critical habitat of endangered species, and the biogeographic representation of the site;

(B) the area's historical, cultural, archaeological, or paleontological significance;

(C) the present and potential uses of the area that depend on maintenance of the area's resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education;

(D) the present and potential activities that may adversely affect the factors identified in subparagraphs (A), (B), and (C);

(E) the existing State and Federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes and policies of this chapter;

(F) the manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities;

(G) the public benefits to be derived from sanctuary status, with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate tourism;

(H) the negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development;

(I) the socioeconomic effects of sanctuary designation;

(J) the area's scientific value and value for monitoring the resources and natural processes that occur there;

(K) the feasibility, where appropriate, of employing innovative management approaches to protect sanctuary resources or to manage compatible uses; and

(L) the value of the area as an addition to the System.

(2) Consultation

In making determinations and findings, the Secretary shall consult with—

(A) the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate;

(B) the Secretaries of State, Defense, Transportation, and the Interior, the Administrator, and the heads of other interested Federal agencies;

(C) the responsible officials or relevant agency heads of the appropriate State and local government entities, including coastal zone management agencies, that will or are likely to be affected by the establishment of the area as a national marine sanctuary;

(D) the appropriate officials of any Regional Fishery Management Council established by section 302 of the Magnuson-Stevens Act (16 U.S.C. 1852) that may be affected by the proposed designation; and

(E) other interested persons.

§1434. Procedures for designation and implementation (a) Sanctuary proposal (1) Notice In proposing to designate a national marine sanctuary, the Secretary shall—

(A) issue, in the Federal Register, a notice of the proposal, proposed regulations that may be necessary and reasonable to implement the proposal, and a summary of the draft management plan;

(B) provide notice of the proposal in newspapers of general circulation or electronic media in the communities that may be affected by the proposal; and

(C) no later than the day on which the notice required under subparagraph (A) is submitted to the Office of the Federal Register, submit a copy of that notice and the draft sanctuary designation documents prepared pursuant to paragraph (2), including an executive summary, to the Committee on Resources of the House of Representatives, the Committee on Commerce, Science, and Transportation of the Senate, and the Governor of each State in which any part of the proposed sanctuary would be located.

(2) Sanctuary designation documents

The Secretary shall prepare and make available to the public sanctuary designation documents on the proposal that include the following:

(A) A draft environmental impact statement pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) A resource assessment that documents—

(i) present and potential uses of the area, including commercial and recreational fishing, research and education, minerals and energy development, subsistence uses, and other commercial, governmental, or recreational uses;

(ii) after consultation with the Secretary of the Interior, any commercial, governmental, or recreational resource uses in the areas that are subject to the primary jurisdiction of the Department of the Interior; and

(iii) information prepared in consultation with the Secretary of Defense, the Secretary of Energy, and the Administrator of the Environmental Protection Agency, on any past, present, or proposed future disposal or discharge of materials in the vicinity of the proposed sanctuary.

Public disclosure by the Secretary of such information shall be consistent with national security regulations.

(C) A draft management plan for the proposed national marine sanctuary that includes the following:

(i) The terms of the proposed designation.

(ii) Proposed mechanisms to coordinate existing regulatory and management authorities within the area.

(iii) The proposed goals and objectives, management responsibilities, resource studies, and appropriate strategies for managing sanctuary resources of the proposed sanctuary, including interpretation and education, innovative management strategies, research, monitoring and assessment, resource protection, restoration, enforcement, and surveillance activities.

(iv) An evaluation of the advantages of cooperative State and Federal management if all or part of the proposed sanctuary is within the territorial limits of any State or is superjacent to the subsoil and seabed within the seaward boundary of a State, as that boundary is established under the Submerged Lands Act (43 U.S.C. 1301 et seq.).

(v) An estimate of the annual cost to the Federal Government of the proposed designation, including costs of personnel, equipment and facilities, enforcement, research, and public education.

(vi) The proposed regulations referred to in paragraph (1)(A). (D) Maps depicting the boundaries of the proposed sanctuary.

(E) The basis for the determinations made under section 1433(a) of this title with respect to the area.

(F) An assessment of the considerations under section 1433(b)(1) of this title.

(3) Public hearing

No sooner than thirty days after issuing a notice under this subsection, the Secretary shall hold at least one public hearing in the coastal area or areas that will be most affected by the proposed designation of the area as a national marine sanctuary for the purpose of receiving the views of interested parties.

(4) Terms of designation

The terms of designation of a sanctuary shall include the geographic area proposed to be included within the sanctuary, the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic value, and the types of activities that will be subject to regulation by the Secretary to protect those characteristics. The terms of designation may be modified only by the same procedures by which the original designation is made.

(5) Fishing regulations

The Secretary shall provide the appropriate Regional Fishery Management Council with the opportunity to prepare draft regulations for fishing within the Exclusive Economic Zone as the Council may deem necessary to implement the proposed designation. Draft regulations prepared by the Council, or a Council determination that regulations are not necessary pursuant to this paragraph, shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the Council's action fails to fulfill the purposes and policies of this chapter and the goals and objectives of the proposed designation. In preparing the draft regulations, a Regional Fishery Management Council shall use as guidance the national standards of section 301(a) of the Magnuson-Stevens Act (16 U.S.C. 1851) to the extent that the standards are consistent and compatible with the goals and objectives of the proposed designation. The Secretary shall prepare the fishing regulations, if the Council declines to make a determination with respect to the need for regulations, makes a determination which is rejected by the Secretary, or fails to prepare the draft regulations in a timely manner. Any amendments to the fishing regulations shall be drafted, approved, and issued in the same manner as the original regulations. The Secretary shall also cooperate with other appropriate fishery management authorities with rights or responsibilities within a proposed sanctuary at the earliest practicable stage in drafting any sanctuary fishing regulations.

(6) Committee action

After receiving the documents under subsection (a)(1)(C) of this section, the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate may each hold hearings on the proposed designation and on the matters set forth in the documents. If within the forty-five day period of continuous session of Congress beginning on the date of submission of the documents, either Committee issues a report concerning matters addressed in the

documents, the Secretary shall consider this report before publishing a notice to designate the national marine sanctuary.

(b) Taking effect of designations

(1) Notice

In designating a national marine sanctuary, the Secretary shall publish in the Federal Register notice of the designation together with final regulations to implement the designation and any other matters required by law, and submit such notice to the Congress. The Secretary shall advise the public of the availability of the final management plan and the final environmental impact statement with respect to such sanctuary. The Secretary shall issue a notice of designation with respect to a proposed national marine sanctuary site not later than 30 months after the date a notice declaring the site to be an active candidate for sanctuary designation is published in the Federal Register under regulations issued under this Act, or shall publish not later than such date in the Federal Register findings regarding why such notice has not been published. No notice of designation may occur until the expiration of the period for Committee action under subsection (a)(6) of this section. The designation (and any of its terms not disapproved under this subsection) and regulations shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress beginning on the day on which such notice is published unless, in the case of a national marine sanctuary that is located partially or entirely within the seaward boundary of any State, the Governor affected certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area of the sanctuary lying within the seaward boundary of the State.

(2) Withdrawal of designation

If the Secretary considers that actions taken under paragraph (1) will affect the designation of a national marine sanctuary in a manner that the goals and objectives of the sanctuary or System cannot be fulfilled, the Secretary may withdraw the entire designation. If the Secretary does not withdraw the designation, only those terms of the designation not certified under paragraph (1) shall take effect.

(3) Procedures

In computing the forty-five-day periods of continuous session of Congress pursuant to

subsection (a)(6) of this section and paragraph (1) of this subsection—

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain are excluded.

(c) Access and valid rights

(1) Nothing in this chapter shall be construed as terminating or granting to the Secretary the right to terminate any valid lease, permit, license, or right of subsistence use or of access that is in existence on the date of designation of any national marine sanctuary.

(2) The exercise of a lease, permit, license, or right is subject to regulation by the Secretary consistent with the purposes for which the sanctuary is designated.

(d) Interagency cooperation

(1) Review of agency actions

(A) In general

Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary.

(B) Agency statements required

Subject to any regulations the Secretary may establish each Federal agency proposing an action described in subparagraph (A) shall provide the Secretary with a written statement describing the action and its potential effects on sanctuary resources at the earliest practicable time, but in no case later than 45 days before the final approval of the action unless such Federal agency and the Secretary agree to a different schedule.

(2) Secretary's recommended alternatives

If the Secretary finds that a Federal agency action is likely to destroy, cause the loss of, or injure a sanctuary resource, the Secretary shall (within 45 days of receipt of complete information on the proposed agency action) recommend reasonable and prudent

alternatives, which may include conduct of the action elsewhere, which can be taken by the Federal agency in implementing the agency action that will protect sanctuary resources.

(3) Response to recommendations

The agency head who receives the Secretary's recommended alternatives under paragraph (2) shall promptly consult with the Secretary on the alternatives. If the agency head decides not to follow the alternatives, the agency head shall provide the Secretary with a written statement explaining the reasons for that decision.

(4) Failure to follow alternative

If the head of a Federal agency takes an action other than an alternative recommended by the Secretary and such action results in the destruction of, loss of, or injury to a sanctuary resource, the head of the agency shall promptly prevent and mitigate further damage and restore or replace the sanctuary resource in a manner approved by the Secretary.

(e) Review of management plans

Not more than five years after the date of designation of any national marine sanctuary, and thereafter at intervals not exceeding five years, the Secretary shall evaluate the substantive progress toward implementing the management plan and goals for the sanctuary, especially the effectiveness of site-specific management techniques and strategies, and shall revise the management plan and regulations as necessary to fulfill the purposes and policies of this chapter. This review shall include a prioritization of management objectives.

(f) Limitation on designation of new sanctuaries

(1) Finding required

The Secretary may not publish in the Federal Register any sanctuary designation notice or regulations proposing to designate a new sanctuary, unless the Secretary has published a finding that—

(A) the addition of a new sanctuary will not have a negative impact on the System; and

(B) sufficient resources were available in the fiscal year in which the finding is made to—

(i) effectively implement sanctuary management plans for each sanctuary in the System; and

(ii) complete site characterization studies and inventory known sanctuary resources, including cultural resources, for each sanctuary in the System within 10 years after the date that the finding is made if the resources available for those activities are maintained at the same level for each fiscal year in that 10 year period.

(2) Deadline

If the Secretary does not submit the findings required by paragraph (1) before February 1, 2004, the Secretary shall submit to the Congress before October 1, 2004, a finding with respect to whether the requirements of subparagraphs (A) and (B) of paragraph (1) have been met by all existing sanctuaries.

(3) Limitation on application

Paragraph (1) does not apply to any sanctuary designation documents for— (A) a Thunder Bay National Marine Sanctuary; or (B) a Northwestern Hawaiian Islands National Marine Sanctuary.

§1435. Application of regulations; international negotiations and cooperation

(a) Regulations

This chapter and the regulations issued under section 1434 of this title shall be applied in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party. No regulation shall apply to or be enforced against a person who is not a citizen, national, or resident alien of the United States, unless in accordance with—

(1) generally recognized principles of international law;

(2) an agreement between the United States and the foreign state of which the person is a citizen; or

(3) an agreement between the United States and the flag state of a foreign vessel, if the

person is a crewmember of the vessel.

(b) Negotiations

The Secretary of State, in consultation with the Secretary, shall take appropriate action to enter into negotiations with other governments to make necessary arrangements for the protection of any national marine sanctuary and to promote the purposes for which the sanctuary is established.

(c) International cooperation

The Secretary, in consultation with the Secretary of State and other appropriate Federal agencies, shall cooperate with other governments and international organizations in furtherance of the purposes and policies of this chapter and consistent with applicable regional and mutilateral arrangements for the protection and management of special marine areas.

§1436. Prohibited activities

It is unlawful for any person to—

(1) destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary;

(2) possess, sell, offer for sale, purchase, import, export, deliver, carry, transport, or ship by any means any sanctuary resource taken in violation of this section;

(3) interfere with the enforcement of this chapter by—

(A) refusing to permit any officer authorized to enforce this chapter to board a vessel, other than a vessel operated by the Department of Defense or United States Coast Guard, subject to such person's control for the purposes of conducting any search or inspection in connection with the enforcement of this chapter;

(B) resisting, opposing, impeding, intimidating, harassing, bribing, interfering with, or forcibly assaulting any person authorized by the Secretary to implement this chapter or any such authorized officer in the conduct of any search or inspection performed under this chapter; or

(C) knowingly and willfully submitting false information to the Secretary or any officer

authorized to enforce this chapter in connection with any search or inspection conducted under this chapter; or

(4) violate any provision of this chapter or any regulation or permit issued pursuant to this chapter.

§1437. Enforcement

(a) In general

The Secretary shall conduct such enforcement activities as are necessary and reasonable to carry out this chapter.

(b) Powers of authorized officers

Any person who is authorized to enforce this chapter may—

(1) board, search, inspect, and seize any vessel suspected of being used to violate this chapter or any regulation or permit issued under this chapter and any equipment, stores, and cargo of such vessel;

(2) seize wherever found any sanctuary resource taken or retained in violation of this chapter or any regulation or permit issued under this chapter;

(3) seize any evidence of a violation of this chapter or of any regulation or permit issued under this chapter;

(4) execute any warrant or other process issued by any court of competent jurisdiction;
(5) exercise any other lawful authority; and

(6) arrest any person, if there is reasonable cause to believe that such person has committed an act prohibited by section 1436(3) of this title.

(c) Criminal offenses

(1) Offenses

A person is guilty of an offense under this subsection if the person commits any act prohibited by section 1436(3) of this title.

(2) Punishment

Any person that is guilty of an offense under this subsection—

(A) except as provided in subparagraph (B), shall be fined under title 18, imprisoned for not more than 6 months, or both; or

(B) in the case of a person who in the commission of such an offense uses a dangerous weapon, engages in conduct that causes bodily injury to any person authorized to enforce this chapter or any person authorized to implement the provisions of this chapter, or places any such person in fear of imminent bodily injury, shall be fined under title 18, imprisoned for not more than 10 years, or both.

(d) Civil penalties

(1) Civil penalty

Any person subject to the jurisdiction of the United States who violates this chapter or any regulation or permit issued under this chapter shall be liable to the United States for a civil penalty of not more than $100,000 for each such violation, to be assessed by the Secretary. Each day of a continuing violation shall constitute a separate violation.

(2) Notice

No penalty shall be assessed under this subsection until after the person charged has been given notice and an opportunity for a hearing.

(3) In rem jurisdiction

A vessel used in violating this chapter or any regulation or permit issued under this chapter shall be liable in rem for any civil penalty assessed for such violation. Such penalty shall constitute a maritime lien on the vessel and may be recovered in an action in rem in the district court of the United States having jurisdiction over the vessel.

(4) Review of civil penalty

Any person against whom a civil penalty is assessed under this subsection may obtain review in the United States district court for the appropriate district by filing a complaint in such court not later than 30 days after the date of such order.

(5) Collection of penalties

If any person fails to pay an assessment of a civil penalty under this section after it has become a final and unappealable order, or after the appropriate court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(6) Compromise or other action by Secretary

The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which is or may be imposed under this section.

(e) Forfeiture

(1) In general

Any vessel (including the vessel's equipment, stores, and cargo) and other item used, and any sanctuary resource taken or retained, in any manner, in connection with or as a result of any violation of this chapter or of any regulation or permit issued under this chapter shall be subject to forfeiture to the United States pursuant to a civil proceeding under this subsection. The proceeds from forfeiture actions under this subsection shall constitute a separate recovery in addition to any amounts recovered as civil penalties under this section or as civil damages under section 1443 of this title. None of those proceeds shall be subject to set-off.

(2) Application of the customs laws

The Secretary may exercise the authority of any United States official granted by any relevant customs law relating to the seizure, forfeiture, condemnation, disposition, remission, and mitigation of property in enforcing this chapter.

(3) Disposal of sanctuary resources

Any sanctuary resource seized pursuant to this chapter may be disposed of pursuant to an order of the appropriate court, or, if perishable, in a manner prescribed by regulations promulgated by the Secretary. Any proceeds from the sale of such sanctuary resource shall for all purposes represent the sanctuary resource so disposed of in any subsequent legal proceedings.

(4) Presumption

For the purposes of this section there is a rebuttable presumption that all sanctuary resources found on board a vessel that is used or seized in connection with a violation of this chapter or of any regulation or permit issued under this chapter were taken or retained in violation of this chapter or of a regulation or permit issued under this chapter.

(f) Payment of storage, care, and other costs

(1) Expenditures

(A) Notwithstanding any other law, amounts received by the United States as civil penalties, forfeitures of property, and costs imposed under paragraph (2) shall be retained by the Secretary in the manner provided for in section 9607(f)(1) of title 42.

(B) Amounts received under this section for forfeitures and costs imposed under paragraph (2) shall be used to pay the reasonable and necessary costs incurred by the Secretary to provide temporary storage, care, maintenance, and disposal of any sanctuary resource or other property seized in connection with a violation of this chapter or any regulation or permit issued under this chapter.

(C) Amounts received under this section as civil penalties and any amounts remaining after the operation of subparagraph (B) shall be used, in order of priority, to—

(i) manage and improve the national marine sanctuary with respect to which the violation occurred that resulted in the penalty or forfeiture;

(ii) pay a reward to any person who furnishes information leading to an assessment of a civil penalty, or to a forfeiture of property, for a violation of this chapter or any regulation or permit issued under this chapter; and

(iii) manage and improve any other national marine sanctuary.

(2) Liability for costs

Any person assessed a civil penalty for a violation of this chapter or of any regulation or permit issued under this chapter, and any claimant in a forfeiture action brought for such a violation, shall be liable for the reasonable costs incurred by the Secretary in storage, care, and maintenance of any sanctuary resource or other property seized in connection

with the violation.

(g) Subpoenas

In the case of any hearing under this section which is determined on the record in accordance with the procedures provided for under section 554 of title 5, the Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, electronic files, and documents, and may administer oaths.

(h) Use of resources of State and other Federal agencies

The Secretary shall, whenever appropriate, use by agreement the personnel, services, and facilities of State and other Federal departments, agencies, and instrumentalities, on a reimbursable or nonreimbursable basis, to carry out the Secretary's responsibilities under this section.

(i) Coast Guard authority not limited

Nothing in this section shall be considered to limit the authority of the Coast Guard to enforce this or any other Federal law under section 89 of title 14.

(j) Injunctive relief

If the Secretary determines that there is an imminent risk of destruction or loss of or injury to a sanctuary resource, or that there has been actual destruction or loss of, or injury to, a sanctuary resource which may give rise to liability under section 1443 of this title, the Attorney General, upon request of the Secretary, shall seek to obtain such relief as may be necessary to abate such risk or actual destruction, loss, or injury, or to restore or replace the sanctuary resource, or both. The district courts of the United States shall have jurisdiction in such a case to order such relief as the public interest and the equities of the case may require.

(k) Area of application and enforceability

The area of application and enforceability of this chapter includes the territorial sea of the United States, as described in Presidential Proclamation 5928 of December 27, 1988, which is subject to the sovereignty of the United States, and the United States exclusive economic zone, consistent with international law.

(l) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

§1439. Regulations

The Secretary may issue such regulations as may be necessary to carry out this chapter.

§1440. Research, monitoring, and education

(a) In general

The Secretary shall conduct, support, or coordinate research, monitoring, evaluation, and education programs consistent with subsections (b) and (c) of this section and the purposes and policies of this chapter.

(b) Research and monitoring

(1) In general

The Secretary may—

(A) support, promote, and coordinate research on, and long-term monitoring of, sanctuary resources and natural processes that occur in national marine sanctuaries, including exploration, mapping, and environmental and socioeconomic assessment;

(B) develop and test methods to enhance degraded habitats or restore damaged, injured, or lost sanctuary resources; and

(C) support, promote, and coordinate research on, and the conservation, curation, and public display of, the cultural, archeological, and historical resources of national marine sanctuaries.

(2) Availability of results

The results of research and monitoring conducted, supported, or permitted by the Secretary under this subsection shall be made available to the public.

(c) Education

(1) In general

The Secretary may support, promote, and coordinate efforts to enhance public awareness, understanding, and appreciation of national marine sanctuaries and the System. Efforts supported, promoted, or coordinated under this subsection must emphasize the conservation goals and sustainable public uses of national marine sanctuaries and the System.

(2) Educational activities

Activities under this subsection may include education of the general public, teachers, students, national marine sanctuary users, and ocean and coastal resource managers.

(d) Interpretive facilities

(1) In general

The Secretary may develop interpretive facilities near any national marine sanctuary.

(2) Facility requirement

Any facility developed under this subsection must emphasize the conservation goals and sustainable public uses of national marine sanctuaries by providing the public with information about the conservation, recreational, ecological, historical, cultural, archeological, scientific, educational, or esthetic qualities of the national marine sanctuary.

(e) Consultation and coordination

In conducting, supporting, and coordinating research, monitoring, evaluation, and education programs under subsection (a) of this section and developing interpretive facilities under subsection (d) of this section, the Secretary may consult or coordinate with Federal, interstate, or regional agencies, States or local governments.

§1441. Special use permits

(a) Issuance of permits

The Secretary may issue special use permits which authorize the conduct of specific activities in a national marine sanctuary if the Secretary determines such authorization is necessary—

(1) to establish conditions of access to and use of any sanctuary resource; or

(2) to promote public use and understanding of a sanctuary resource.

(b) Public notice required

The Secretary shall provide appropriate public notice before identifying any category of activity subject to a special use permit under subsection (a) of this section.

(c) Permit terms

A permit issued under this section—

(1) shall authorize the conduct of an activity only if that activity is compatible with the purposes for which the sanctuary is designated and with protection of sanctuary resources;

(2) shall not authorize the conduct of any activity for a period of more than 5 years unless renewed by the Secretary;

(3) shall require that activities carried out under the permit be conducted in a manner that does not destroy, cause the loss of, or injure sanctuary resources; and

(4) shall require the permittee to purchase and maintain comprehensive general liability insurance, or post an equivalent bond, against claims arising out of activities conducted under the permit and to agree to hold the United States harmless against such claims.

(d) Fees

(1) Assessment and collection

The Secretary may assess and collect fees for the conduct of any activity under a permit issued under this section.

(2) Amount

The amount of a fee under this subsection shall be equal to the sum of—

(A) costs incurred, or expected to be incurred, by the Secretary in issuing the permit;

(B) costs incurred, or expected to be incurred, by the Secretary as a direct result of the conduct of the activity for which the permit is issued, including costs of monitoring the conduct of the activity; and

(C) an amount which represents the fair market value of the use of the sanctuary resource.

(3) Use of fees

Amounts collected by the Secretary in the form of fees under this section may be used by the Secretary—

(A) for issuing and administering permits under this section; and

(B) for expenses of managing national marine sanctuaries.

(4) Waiver or reduction of fees

The Secretary may accept in-kind contributions in lieu of a fee under paragraph (2)(C), or waive or reduce any fee assessed under this subsection for any activity that does not derive profit from the access to or use of sanctuary resources.

(e) Violations

Upon violation of a term or condition of a permit issued under this section, the Secretary may—

(1) suspend or revoke the permit without compensation to the permittee and without liability to the United States;

(2) assess a civil penalty in accordance with section 1437 of this title; or

(3) both.

(f) Reports

Each person issued a permit under this section shall submit an annual report to the Secretary not later than December 31 of each year which describes activities conducted under that permit and revenues derived from such activities during the year.

(g) Fishing

Nothing in this section shall be considered to require a person to obtain a permit under this section for the conduct of any fishing activities in a national marine sanctuary.

§1442. Cooperative agreements, donations, and acquisitions

(a) Agreements and grants

The Secretary may enter into cooperative agreements, contracts, or other agreements with, or make grants to, States, local governments, regional agencies, interstate agencies, or other persons to carry out the purposes and policies of this chapter.

(b) Authorization to solicit donations

The Secretary may enter into such agreements with any nonprofit organization authorizing the organization to solicit private donations to carry out the purposes and policies of this chapter.

(c) Donations

The Secretary may accept donations of funds, property, and services for use in designating and administering national marine sanctuaries under this chapter. Donations accepted under this section shall be considered as a gift or bequest to or for the use of the United States.

(d) Acquisitions

The Secretary may acquire by purchase, lease, or exchange, any land, facilities, or other property necessary and appropriate to carry out the purposes and policies of this chapter.

(e) Use of resources of other government agencies

The Secretary may, whenever appropriate, enter into an agreement with a State or other Federal agency to use the personnel, services, or facilities of such agency on a reimbursable or nonreimbursable basis, to assist in carrying out the purposes and policies of this chapter.

(f) Authority to obtain grants

Notwithstanding any other provision of law that prohibits a Federal agency from receiving assistance, the Secretary may apply for, accept, and use grants from other Federal agencies, States, local governments, regional agencies, interstate agencies, foundations, or other persons, to carry out the purposes and policies of this chapter.

§1443. Destruction or loss of, or injury to, sanctuary resources

(a) Liability

(1) Liability to United States

Any person who destroys, causes the loss of, or injures any sanctuary resource is liable to the United States for an amount equal to the sum of—

(A) the amount of response costs and damages resulting from the destruction, loss, or injury; and

(B) interest on that amount calculated in the manner described under section 2705 of title 33.

(2) Liability in rem

Any vessel used to destroy, cause the loss of, or injure any sanctuary resource shall be liable in rem to the United States for response costs and damages resulting from such destruction, loss, or injury. The amount of that liability shall constitute a maritime lien on the vessel and may be recovered in an action in rem in any district court of the United States that has jurisdiction over the vessel.

(3) Defenses

A person is not liable under this subsection if that person establishes that—

(A) the destruction or loss of, or injury to, the sanctuary resource was caused solely by an act of God, an act of war, or an act or omission of a third party, and the person acted with due care;

(B) the destruction, loss, or injury was caused by an activity authorized by Federal or State law; or

(C) the destruction, loss, or injury was negligible.

(4) Limits to liability

Nothing in sections 4281–4289 of the Revised Statutes of the United States or section 30706 of title 46 shall limit the liability of any person under this chapter.

(b) Response actions and damage assessment

(1) Response actions

The Secretary may undertake or authorize all necessary actions to prevent or minimize the destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risk of such destruction, loss, or injury.

(2) Damage assessment

The Secretary shall assess damages to sanctuary resources in accordance with section 1432(6) of this title.

(c) Civil actions for response costs and damages

(1) The Attorney General, upon request of the Secretary, may commence a civil action against any person or vessel who may be liable under subsection (a) of this section for response costs and damages. The Secretary, acting as trustee for sanctuary resources for the United States, shall submit a request for such an action to the Attorney General whenever a person may be liable for such costs or damages.

(2) An action under this subsection may be brought in the United States district court for any district in which—

(A) the defendant is located, resides, or is doing business, in the case of an action against a person;

(B) the vessel is located, in the case of an action against a vessel; or

(C) the destruction of, loss of, or injury to a sanctuary resource occurred.

(d) Use of recovered amounts

Response costs and damages recovered by the Secretary under this section shall be retained by the Secretary in the manner provided for in section 9607(f)(1) of title 42, and

used as follows:

(1) Response costs

Amounts recovered by the United States for costs of response actions and damage assessments under this section shall be used, as the Secretary considers appropriate—

(A) to reimburse the Secretary or any other Federal or State agency that conducted those activities; and

(B) after reimbursement of such costs, to restore, replace, or acquire the equivalent of any sanctuary resource.

(2) Other amounts

All other amounts recovered shall be used, in order of priority—

(A) to restore, replace, or acquire the equivalent of the sanctuary resources that were the subject of the action, including for costs of monitoring and the costs of curation and conservation of archeological, historical, and cultural sanctuary resources;

(B) to restore degraded sanctuary resources of the national marine sanctuary that was the subject of the action, giving priority to sanctuary resources and habitats that are comparable to the sanctuary resources that were the subject of the action; and

(C) to restore degraded sanctuary resources of other national marine sanctuaries.

(3) Federal-State coordination

Amounts recovered under this section with respect to sanctuary resources lying within the jurisdiction of a State shall be used under paragraphs (2)(A) and (B) in accordance with the court decree or settlement agreement and an agreement entered into by the Secretary and the Governor of that State.

(e) Statute of limitations

An action for response costs or damages under subsection (c) of this section shall be barred unless the complaint is filed within 3 years after the date on which the Secretary completes a damage assessment and restoration plan for the sanctuary resources to which the action relates.

§1444. Authorization of appropriations

There are authorized to be appropriated to the Secretary—

(1) to carry out this chapter—

(A) $32,000,000 for fiscal year 2001;

(B) $34,000,000 for fiscal year 2002;

(C) $36,000,000 for fiscal year 2003;

(D) $38,000,000 for fiscal year 2004;

(E) $40,000,000 for fiscal year 2005; and

(2) for construction projects at national marine sanctuaries, $6,000,000 for each of fiscal years 2001, 2002, 2003, 2004, and 2005.

§1445. U.S.S. Monitor artifacts and materials

(a) Congressional policy

In recognition of the historical significance of the wreck of the United States ship Monitor to coastal North Carolina and to the area off the coast of North Carolina known as the Graveyard of the Atlantic, the Congress directs that a suitable display of artifacts and materials from the United States ship Monitor be maintained permanently at an appropriate site in coastal North Carolina.

(b) Disclaimer

This section shall not affect the following:

(1) Responsibilities of Secretary

The responsibilities of the Secretary to provide for the protection, conservation, and display of artifacts and materials from the United States ship Monitor.

(2) Authority of Secretary

The authority of the Secretary to designate the Mariner's Museum, located at Newport

News, Virginia, as the principal museum for coordination of activities referred to in paragraph (1).

§1445a. Advisory Councils

(a) Establishment

The Secretary may establish one or more advisory councils (in this section referred to as an “Advisory Council”) to advise and make recommendations to the Secretary regarding the designation and management of national marine sanctuaries. The Advisory Councils shall be exempt from the Federal Advisory Committee Act.

(b) Membership

Members of the Advisory Councils may be appointed from among—

(1) persons employed by Federal or State agencies with expertise in management of natural resources;

(2) members of relevant Regional Fishery Management Councils established under section 1852 of this title; and

(3) representatives of local user groups, conservation and other public interest organizations, scientific organizations, educational organizations, or others interested in the protection and multiple use management of sanctuary resources.

(c) Limits on membership

For sanctuaries designated after November 4, 1992, the membership of Advisory Councils shall be limited to no more than 15 members.

(d) Staffing and assistance

The Secretary may make available to an Advisory Council any staff, information, administrative services, or assistance the Secretary determines are reasonably required to enable the Advisory Council to carry out its functions.

(e) Public participation and procedural matters

The following guidelines apply with respect to the conduct of business meetings of an

Advisory Council:

(1) Each meeting shall be open to the public, and interested persons shall be permitted to present oral or written statements on items on the agenda.

(2) Emergency meetings may be held at the call of the chairman or presiding officer.

(3) Timely notice of each meeting, including the time, place, and agenda of the meeting, shall be published locally and in the Federal Register, except that in the case of a meeting of an Advisory Council established to provide assistance regarding any individual national marine sanctuary the notice is not required to be published in the Federal Register.

(4) Minutes of each meeting shall be kept and contain a summary of the attendees and matters discussed.

§1445b. Enhancing support for national marine sanctuaries

(a) Authority

The Secretary may establish a program consisting of—

(1) the creation, adoption, and publication in the Federal Register by the Secretary of a symbol for the national marine sanctuary program, or for individual national marine sanctuaries or the System;

(2) the solicitation of persons to be designated as official sponsors of the national marine sanctuary program or of individual national marine sanctuaries;

(3) the designation of persons by the Secretary as official sponsors of the national marine sanctuary program or of individual sanctuaries;

(4) the authorization by the Secretary of the manufacture, reproduction, or other use of any symbol published under paragraph (1), including the sale of items bearing such a symbol, by official sponsors of the national marine sanctuary program or of individual national marine sanctuaries;

(5) the creation, marketing, and selling of products to promote the national marine sanctuary program, and entering into exclusive or nonexclusive agreements authorizing entities to create, market or sell on the Secretary's behalf;

(6) the solicitation and collection by the Secretary of monetary or in-kind contributions from official sponsors for the manufacture, reproduction or use of the symbols published under paragraph (1);

(7) the retention of any monetary or in-kind contributions collected under paragraphs (5) and (6) by the Secretary; and

(8) the expenditure and use of any monetary and in-kind contributions, without appropriation, by the Secretary to designate and manage national marine sanctuaries.

Monetary and in-kind contributions raised through the sale, marketing, or use of symbols and products related to an individual national marine sanctuary shall be used to support that sanctuary.

(b) Contract authority

The Secretary may contract with any person for the creation of symbols or the solicitation of official sponsors under subsection (a) of this section.

(c) Restrictions

The Secretary may restrict the use of the symbols published under subsection (a) of this section, and the designation of official sponsors of the national marine sanctuary program or of individual national marine sanctuaries to ensure compatibility with the goals of the national marine sanctuary program.

(d) Property of United States

Any symbol which is adopted by the Secretary and published in the Federal Register under subsection (a) of this section is deemed to be the property of the United States.

(e) Prohibited activities

It is unlawful for any person—

(1) designated as an official sponsor to influence or seek to influence any decision by the Secretary or any other Federal official related to the designation or management of a national marine sanctuary, except to the extent that a person who is not so designated may do so;

(2) to represent himself or herself to be an official sponsor absent a designation by the Secretary;

(3) to manufacture, reproduce, or otherwise use any symbol adopted by the Secretary under subsection (a)(1) of this section, including to sell any item bearing such a symbol, unless authorized by the Secretary under subsection (a)(4) of this section or subsection (f) of this section; or

(4) to violate any regulation promulgated by the Secretary under this section.

(f) Collaborations

The Secretary may authorize the use of a symbol adopted by the Secretary under subsection (a)(1) of this section by any person engaged in a collaborative effort with the Secretary to carry out the purposes and policies of this chapter and to benefit a national marine sanctuary or the System.

(g) Authorization for non-profit partner organization to solicit sponsors

(1) In general

The Secretary may enter into an agreement with a non-profit partner organization authorizing it to assist in the administration of the sponsorship program established under this section. Under an agreement entered into under this paragraph, the Secretary may authorize the non-profit partner organization to solicit persons to be official sponsors of the national marine sanctuary system or of individual national marine sanctuaries, upon such terms as the Secretary deems reasonable and will contribute to the successful administration of the sanctuary system. The Secretary may also authorize the non-profit partner organization to collect the statutory contribution from the sponsor, and, subject to paragraph (2), transfer the contribution to the Secretary.

(2) Reimbursement for administrative costs

Under the agreement entered into under paragraph (1), the Secretary may authorize the non-profit partner organization to retain not more than 5 percent of the amount of monetary contributions it receives from official sponsors under the agreement to offset the administrative costs of the organization in soliciting sponsors.

(3) Partner organization defined

In this subsection, the term “partner organization” means an organization that—

(A) draws its membership from individuals, private organizations, corporations, academic institutions, or State and local governments; and

(B) is established to promote the understanding of, education relating to, and the conservation of the resources of a particular sanctuary or 2 or more related sanctuaries.

§1445c. Dr. Nancy Foster Scholarship Program

(a) Establishment

The Secretary shall establish and administer through the National Ocean Service the Dr. Nancy Foster Scholarship Program. Under the program, the Secretary shall award graduate education scholarships in oceanography, marine biology or maritime archeology, to be known as Dr. Nancy Foster Scholarships.

(b) Purposes

The purposes of the Dr. Nancy Foster Scholarship Program are—

(1) to recognize outstanding scholarship in oceanography, marine biology, or maritime archeology, particularly by women and members of minority groups; and

(2) to encourage independent graduate level research in oceanography, marine biology, or maritime archeology.

(c) Award

Each Dr. Nancy Foster Scholarship—

(1) shall be used to support graduate studies in oceanography, marine biology, or maritime archeology at a graduate level institution of higher education; and

(2) shall be awarded in accordance with guidelines issued by the Secretary.

(d) Distribution of funds

The amount of each Dr. Nancy Foster Scholarship shall be provided directly to a recipient selected by the Secretary upon receipt of certification that the recipient will adhere to a specific and detailed plan of study and research approved by a graduate

level institution of higher education.

(e) Funding

Of the amount available each fiscal year to carry out this chapter, the Secretary shall award 1 percent as Dr. Nancy Foster Scholarships.

(f) Scholarship repayment requirement

The Secretary shall require an individual receiving a scholarship under this section to repay the full amount of the scholarship to the Secretary if the Secretary determines that the individual, in obtaining or using the scholarship, engaged in fraudulent conduct or failed to comply with any term or condition of the scholarship.

(g) Maritime archeology defined

In this section the term “maritime archeology” includes the curation, preservation, and display of maritime artifacts.

§1445c–1. Dr. Nancy Foster Scholarship Program

(a) Establishment

The Secretary of Commerce shall establish and administer through the National Ocean Service the Dr. Nancy Foster Scholarship Program. Under the program, the Secretary shall award graduate education scholarships in marine biology, oceanography, or maritime archaeology, including the curation, preservation, and display of maritime artifacts, to be known as “Dr. Nancy Foster Scholarships”.

(b) Purpose

The purpose of the Dr. Nancy Foster Scholarship Program is to recognize outstanding scholarship in marine biology, oceanography, or maritime archaeology, particularly by women and members of minority groups, and encourage independent graduate level research in such fields of study.

(c) Award

Each Dr. Nancy Foster Scholarship award—

(1) shall be used to support a candidate's graduate studies in marine biology, oceanography, or maritime archaeology at a sponsoring institution; and

(2) shall be made available to individual candidates in accordance with guidelines issued by the Secretary.

(d) Distribution of funds

The amount of each Dr. Nancy Foster Scholarship shall be provided directly to each recipient selected by the Secretary upon receipt of certification that the recipient will adhere to a specific and detailed plan of study and research approved by the sponsoring institution.

(e) Funding

The Secretary shall make 1 percent of the amount appropriated each fiscal year to carry out the National Marine Sanctuaries Act [16 U.S.C. 1431 et seq.] available for Dr. Nancy Foster Scholarships.

(f) Scholarship repayment requirement

Repayment of the award shall be made to the Secretary in the case of fraud or noncompliance.

Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 et seq.

§2101. Findings

The Congress finds that—

(a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and

(b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

§2102. Definitions

For purposes of this chapter—

(a) the term “embedded” means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;

(b) the term “National Register” means the National Register of Historic Places maintained by the Secretary of the Interior under section 470a of title 16;

(c) the terms “public lands”, “Indian lands”, and “Indian tribe” have the same meaning given the terms in the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470aa–470ll);

(d) the term “shipwreck” means a vessel or wreck, its cargo, and other contents;

(e) the term “State” means a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and

(f) the term “submerged lands” means the lands—

(1) that are “lands beneath navigable waters,” as defined in section 1301 of this title;

(2) of Puerto Rico, as described in section 749 of title 48;

(3) of Guam, the Virgin Islands and American Samoa, as described in section 1705 of title 48; and

(4) of the Commonwealth of the Northern Mariana Islands, as described in section 801 of Public Law 94–241.[2]

§2103. Rights of access

(a) Access rights

In order to—

(1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research; and

(2) provide that reasonable access by the public to such abandoned shipwrecks be permitted by the State holding title to such shipwrecks pursuant to section 2105 of this title, it is the declared policy of the Congress that States carry out their responsibilities under this chapter to develop appropriate and consistent policies so as to—

(A) protect natural resources and habitat areas;

(B) guarantee recreational exploration of shipwreck sites; and

(C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.

(b) Parks and protected areas

In managing the resources subject to the provisions of this chapter, States are encouraged to create underwater parks or areas to provide additional protection for such resources. Funds available to States from grants from the Historic Preservation Fund shall be available, in accordance with the provisions of title I of the National Historic Preservation Act, for the study, interpretation, protection, and preservation of historic shipwrecks and properties.

§2104. Preparation of guidelines

(a) Purposes of guidelines; publication in Federal Register

In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within nine months after April 28, 1988, prepare and publish guidelines in the Federal Register which shall seek to:

(1) maximize the enhancement of cultural resources;

(2) foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;

(3) facilitate access and utilization by recreational interests;

(4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.

(b) Consultation

Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archeologists, historic preservationists, and fishermen).

(c) Use of guidelines in developing legislation and regulations

Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this chapter.

§2105. Rights of ownership

(a) United States title

The United States asserts title to any abandoned shipwreck that is—

(1) embedded in submerged lands of a State;

(2) embedded in coralline formations protected by a State on submerged lands of a State; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) Notice of shipwreck location; eligibility determination for inclusion in National Register of Historic Places

The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3) of this section.

(c) Transfer of title to States

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) Exception

Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) Reservation of rights

This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under—

(1) section 1311, 1313, or 1314 of this title; or

(2) section 414 or 415 of title 33.

§2106. Relationship to other laws

(a) Law of salvage and law of finds

The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies.

(b) Laws of United States

This chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies.

(c) Effective date

This chapter shall not affect any legal proceeding brought prior to April 28, 1988.

Sunken Military Craft Act of 2004, 10 U.S.C. §§ 113 et seq.

§1401. Preservation of title to sunken military craft and associated contents.

Right, title, and interest of the United States in and to any United States sunken military craft—

(1) shall not be extinguished except by an express divestiture of title by the United States; and

(2) shall not be extinguished by the passage of time, regardless of when the sunken military craft sank.

§1402. Prohibitions.

(a) Unauthorized Activities Directed at Sunken Military Craft.— No person shall engage in or attempt to engage in any activity directed at a sunken military craft that disturbs, removes, or injures any sunken military craft, except—

(1) as authorized by a permit under this title;

(2) as authorized by regulations issued under this title; or

(3) as otherwise authorized by law.

(b) Possession of Sunken Military Craft.— No person may possess, disturb, remove, or injure any sunken military craft in violation of—

(1) this section; or

(2) any prohibition, rule, regulation, ordinance, or permit that applies under any other applicable law.

(c) Limitations on Application.—

(1) Actions by united states.— This section shall not apply to actions taken by, or at the direction of, the United States.

(2) Foreign persons.— This section shall not apply to any action by a person who is not

a citizen, national, or resident alien of the United States, except in accordance with—

(A) generally recognized principles of international law;

(B) an agreement between the United States and the foreign country of which the person is a citizen; or

(C) in the case of an individual who is a crew member or other individual on a foreign vessel or foreign aircraft, an agreement between the United States and the flag State of the foreign vessel or aircraft that applies to the individual.

(3) Loan of sunken military craft.— This section does not prohibit the loan of United States sunken military craft in accordance with regulations issued by the Secretary concerned.

§1403. Permits.

(a) In General.— The Secretary concerned may issue a permit authorizing a person to engage in an activity otherwise prohibited by section 1402 with respect to a United States sunken military craft, for archaeological, historical, or educational purposes, in accordance with regulations issued by such Secretary that implement this section.

(b) Consistency With Other Laws.— The Secretary concerned shall require that any activity carried out under a permit issued by such Secretary under this section must be consistent with all requirements and restrictions that apply under any other provision of Federal law.

(c) Consultation.— In carrying out this section (including the issuance after the date of the enactment of this Act [Oct. 28, 2004] of regulations implementing this section), the Secretary concerned shall consult with the head of each Federal agency having authority under Federal law with respect to activities directed at sunken military craft or the locations of such craft.

(d) Application to Foreign Craft.— At the request of any foreign State, the Secretary of the Navy, in consultation with the Secretary of State, may carry out this section (including regulations promulgated pursuant to this section) with respect to any foreign sunken military craft of that foreign State located in United States waters.

§1404. Penalties.

(a) In General.— Any person who violates this title, or any regulation or permit issued under this title, shall be liable to the United States for a civil penalty under this section.

(b) Assessment and Amount.— The Secretary concerned may assess a civil penalty under this section, after notice and an opportunity for a hearing, of not more than $100,000 for each violation.

(c) Continuing Violations.— Each day of a continued violation of this title or a regulation or permit issued under this title shall constitute a separate violation for purposes of this section.

(d) In Rem Liability.— A vessel used to violate this title shall be liable in rem for a penalty under this section for such violation.

(e) Other Relief.— If the Secretary concerned determines that there is an imminent risk of disturbance of, removal of, or injury to any sunken military craft, or that there has been actual disturbance of, removal of, or injury to a sunken military craft, the Attorney General, upon request of the Secretary concerned, may seek such relief as may be necessary to abate such risk or actual disturbance, removal, or injury and to return or restore the sunken military craft. The district courts of the United States shall have jurisdiction in such a case to order such relief as the public interest and the equities of the case may require.

(f) Limitations.— An action to enforce a violation of section 1402 or any regulation or permit issued under this title may not be brought more than 8 years after the date on which—

(1) all facts material to the right of action are known or should have been known by the Secretary concerned; and

(2) the defendant is subject to the jurisdiction of the appropriate district court of the United States or administrative forum.

§1405. Liability for damages.

(a) In General.— Any person who engages in an activity in violation of section 1402 or any regulation or permit issued under this title that disturbs, removes, or injures any United States sunken military craft shall pay the United States enforcement costs and damages resulting from such disturbance, removal, or injury.

(b) Included Damages.— Damages referred to in subsection (a) may include—

(1) the reasonable costs incurred in storage, restoration, care, maintenance, conservation, and curation of any sunken military craft that is disturbed, removed, or injured in violation of section 1402 or any regulation or permit issued under this title; and

(2) the cost of retrieving, from the site where the sunken military craft was disturbed, removed, or injured, any information of an archaeological, historical, or cultural nature.

§1406. Relationship to other laws.

(a) In General.— Except to the extent that an activity is undertaken as a subterfuge for activities prohibited by this title, nothing in this title is intended to affect—

(1) any activity that is not directed at a sunken military craft; or

(2) the traditional high seas freedoms of navigation, including—

(A) the laying of submarine cables and pipelines;

(B) operation of vessels;

(C) fishing; or

(D) other internationally lawful uses of the sea related to such freedoms.

(b) International Law.— This title and any regulations implementing this title shall be applied in accordance with generally recognized principles of international law and in accordance with the treaties, conventions, and other agreements to which the United States is a party.

(c) Law of Finds.— The law of finds shall not apply to—

(1) any United States sunken military craft, wherever located; or

(2) any foreign sunken military craft located in United States waters.

(d) Law of Salvage.— No salvage rights or awards shall be granted with respect to—

(1) any United States sunken military craft without the express permission of the United States; or

(2) any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state.

(e) Law of Capture or Prize.— Nothing in this title is intended to alter the international law of capture or prize with respect to sunken military craft.

(f) Limitation of Liability.— Nothing in sections 4281 through 4287 and 4289 of the Revised Statutes ([former] 46 U.S.C. App. 181 et seq.) [see chapter 305 of Title 46, Shipping] or section 3 of the Act of February 13, 1893 (chapter 105; 27 Stat. 445; [former] 46 U.S.C. App. 192) [now 46 U.S.C. 30706], shall limit the liability of any person under this section.

(g) Authorities of the Commandant of the Coast Guard.— Nothing in this title is intended to preclude or limit the application of any other law enforcement authorities of the Commandant of the Coast Guard.

(h) Prior Delegations, Authorizations, and Related Regulations.— Nothing in this title shall invalidate any prior delegation, authorization, or related regulation that is consistent with this title.

(i) Criminal Law.— Nothing in this title is intended to prevent the United States from pursuing criminal sanctions for plundering of wrecks, larceny of Government property, or violation of any applicable criminal law.

§1407. Encouragement of agreements with foreign countries.

The Secretary of State, in consultation with the Secretary of Defense, is encouraged to negotiate and conclude bilateral and multilateral agreements with foreign countries with regard to sunken military craft consistent with this title.

§1408. Definitions.

In this title:

(1) Associated contents.—

The term ‘associated contents’ means—

(A) the equipment, cargo, and contents of a sunken military craft that are within its debris field; and

(B) the remains and personal effects of the crew and passengers of a sunken military craft that are within its debris field.

(2) Secretary concerned.—

The term ‘Secretary concerned’ means—

(A) subject to subparagraph (B), the Secretary of a military department; and

(B) in the case of a Coast Guard vessel, the Secretary of the Department in which the Coast Guard is operating.

(3) Sunken military craft.—The term ‘sunken military craft’ means all or any portion of—

(A) any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank;

(B) any sunken military aircraft or military spacecraft that was owned or operated by a government when it sank; and

(C) the associated contents of a craft referred to in subparagraph (A) or (B), if title thereto has not been abandoned or transferred by the government concerned.

(4) United states contiguous zone.— The term ‘United States contiguous zone’ means the contiguous zone of the United States under Presidential Proclamation 7219, dated September 2, 1999 [43 U.S.C. 1331 note].

(5) United states internal waters.— The term ‘United States internal waters’ means all waters of the United States on the landward side of the baseline from which the breadth of the United States territorial sea is measured.

(6) United states territorial sea.— The term ‘United States territorial sea’ means the waters of the United States territorial sea under Presidential Proclamation 5928, dated December 27, 1988 [43 U.S.C. 1331 note].

(7) United states waters.— The term ‘United States waters’ means United States internal waters, the United States territorial sea, and the United States contiguous zone.

APPENDIX B. STATE LEGISLATION

Archaeological Resources Protection Act, N.C.G.S. Ch. 70, Art. 2

§ 70-10. Short title.

This Article shall be known as "The Archaeological Resources Protection Act." (1981, c. 904, s. 2.)

§ 70-11. Findings and purpose.

(a) The General Assembly finds that:

(1) Archaeological resources on State lands are an accessible and irreplaceable part of the State's heritage;

(2) These resources are increasingly endangered because of their commercial attractiveness;

(3) Existing State laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and

(4) There is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.

(b) The purpose of this Article is to secure, for the present and future benefit of the people of North Carolina, the protection of archaeological resources and sites which are on State lands, excluding highway right-of-ways, and to foster increased cooperation and exchange of information among governmental authorities, the professional archaeological community, Indian Tribal governmental authorities and private individuals having collections of archaeological resources

and data. (1981, c. 904, s. 2.)

§ 70-12. Definitions.

As used in this Article, unless the context clearly indicates otherwise:

(1) "Archaeological investigation" means any surface collection, subsurface tests, excavation, or other activity that results in the disturbance or removal of archaeological resources.
(2) "Archaeological resource" means any material remains of past human life or activities which are at least 50 years old and which are of archaeological interest, including pieces of pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, rock carvings, intaglios, graves or human skeletal materials. Paleontological specimens are not to be considered archaeological resources unless found in an archaeological context.
(3) "State lands" means any lands owned, occupied, or controlled by the State of North Carolina, with the exception of those lands under short term lease solely for archaeological purposes, excluding highway right-of-ways. (1981, c. 904, s. 2.)

§ 70-13. Archaeological investigations.

(a) Any person may apply to the Department of Natural and Cultural Resources for a permit to conduct archaeological investigations on State lands. The application shall contain information the Department of Natural and Cultural Resources, in consultation with the Department of Administration, deems necessary, including the time, scope, location and specific purpose of the proposed work.

(b) A permit shall be issued pursuant to an application under subsection (a) of this section if, after any notifications and consultations required by subsection (d) of this section, the Department of Natural and Cultural Resources, in consultation with the Department of Administration, finds that:
(1) The applicant is qualified to carry out the permitted activity;
(2) The proposed activity is undertaken for the purpose of furthering archaeological knowledge in the public interest;
(3) The currently available technology and the technology the applicant proposes to use are such that the significant information contained in the archaeological resource can be retrieved;

(4) The funds and the time the applicant proposes to commit are such that the significant information contained in the archaeological resources can be retrieved;
(5) The archaeological resources which are collected, excavated or removed from State lands and associated records and data will remain the property of the State of North Carolina and the resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution;
(6) The activity pursuant to the permit is not inconsistent with any management plan applicable to the State lands concerned; and
(7) The applicant shall bear the financial responsibility for the reinterment of any human burials or human skeletal remains excavated or removed as a result of the permitted activities.

(c) A permit may contain any terms, conditions or limitations the Department of Natural and Cultural Resources, in consultation with the Department of Administration, deems necessary to achieve the intent of this Article. A permit shall identify the person responsible for carrying out the archaeological investigation.

(d) If a permit issued under G.S. 70-13(a) may result in harm to, or destruction of, any religious or cultural site, as determined by the Department of Natural and Cultural Resources, in consultation with the Department of Administration, before issuing such permit, the Department of Natural and Cultural Resources, in consultation with the Department of Administration, shall notify and consult with, insofar as possible, a local representative of an appropriate religious or cultural group. If the religious or cultural site pertains to Native Americans, the Department of Natural and Cultural Resources, in consultation with the Department of Administration, shall notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director of the North Carolina Commission of Indian Affairs shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community. Such notification shall include, but not be limited to, the following:
(1) The location and schedule of the forthcoming investigation;

(2) Background data concerning the nature of the study; and

(3) The purpose of the investigation and the expected results.

(e) A permit issued under G.S. 70-13 may be suspended by the Department of Natural and Cultural Resources, in consultation with the Department of Administration, upon the determination that the permit holder has violated any provision of G.S. 70-15(a) or G.S. 70-15(b). A permit may be revoked by the Department of Natural and Cultural Resources, in consultation with the Department of Administration, upon assessment of a civil penalty under G.S. 70-16 against the permit holder or upon the permit holder's conviction under G.S. 70-15. (1981, c. 904, s. 2; 1991, c. 461, s. 1; 2015-241, s. 14.30(s).)

§ 70-13.1. Criminal record checks of applicants for permit or license.

(a) The following definitions apply to this section:

(1) Applicant. – A person or entity applying for a permit or license under G.S. 70-13 to conduct any type of archaeological investigation on State lands.

(2) Criminal history. – A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears upon an applicant's fitness to conduct archaeological investigations under G.S. 70-13. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers and Court Officers; Article 6, Homicide; Article 7B, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 19C, Financial Identity Fraud; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in

Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots, Civil Disorders, and Emergencies; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302, or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) All applicants shall consent to a criminal history record check. Refusal to consent to a criminal history record check or to the use of fingerprints or other identifying information may constitute grounds for the Department of Natural and Cultural Resources to deny a permit or a license to an applicant. The Department of Natural and Cultural Resources shall be responsible for providing to the North Carolina Department of Public Safety the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Public Safety. If the applicant is not an individual, the applicant shall provide fingerprints for the principals, officers, directors, and controlling persons of the applicant. Each set of fingerprints shall be certified by an authorized law enforcement officer. The Department of Natural and Cultural Resources shall keep all information obtained under this section confidential.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar the issuance of a permit or a license. When determining whether to issue a permit or license to an applicant, the Department of Natural and Cultural Resources shall consider all of the following factors regarding the conviction:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of conviction.

(4) The circumstances surrounding the commission of the crime, if known.

(5) The nexus between the criminal conduct of the person and the person's responsibilities pursuant to the application.

(6) The incarceration, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.

(7) The subsequent commission by the person of a crime. (2005-367, s. 4; 2012-12, s. 2(dd); 2014-100, s. 17.1(o); 2015-181, s. 47; 2015-241, s. 14.30(s).)

§ 70-14. Rule-making authority; custody of resources.

The North Carolina Historical Commission, in consultation with the Department of Administration, may promulgate regulations to implement the provisions of this Article and to provide for the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from State lands pursuant to this Article, and the ultimate disposition of those resources. (1981, c. 904, s. 2.)

§ 70-15. Prohibited acts and criminal penalties.

(a) No person may excavate, remove, damage or otherwise alter or deface any archaeological resource located on State lands unless he is acting pursuant to a permit issued under G.S. 70-13.

(b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, exchange, transport or receive any archaeological resource excavated or removed from State lands in violation of the prohibition contained in G.S. 70-15(a).

(c) Any person who knowingly and willfully violates or employs any other person to violate any prohibition contained in G.S. 70-15(a) or G.S. 70-15(b) shall upon conviction, be fined not more than two thousand dollars ($2,000) or imprisoned not more than six months, or both, in the discretion of the court.

(d) Each day on which a violation occurs shall be a separate and distinct offense. (1981, c. 904, s. 2.)

§ 70-16. Civil penalties.

A civil penalty of not more than five thousand dollars ($5,000) may be assessed by the Department of Administration, in consultation with the Department of Natural and Cultural Resources, against any person who violates the provisions of G.S. 70-15. In determining the amount of the penalty, the Department shall consider the extent of the harm caused by the violation and the cost of rectifying the damage. Any person assessed shall be notified of the assessment by registered or certified mail. The notice shall specify the reasons for the assessment. If the person assessed fails to pay the amount of the assessment to the Department within 30 days after receipt of notice, the Department may institute a civil action in the Superior Court of Wake County to recover the amount of the assessment.

The Department may use the assessed funds to rectify the damage to archaeological resources. The clear proceeds of all assessed funds not used to rectify the damage shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1981, c. 904, s. 2; 1987, c. 827, s. 215; 1998-215, s. 2; 2015-241, s. 14.30(s).)

§ 70-17. Forfeiture.

All archaeological resources with respect to which a violation of G.S. 70-15(a) or 70-15(b) occurred, and all vehicles and equipment which were used in connection with such violation shall be subject to forfeiture to the State of North Carolina in the same manner as vehicles and equipment subject to forfeiture under G.S. 90-112. (1981, c. 904, s. 2.)

§ 70-18. Confidentiality.

Information concerning the nature and location of any archaeological resource, regardless of the ownership of the property, may be made available to the public under Chapter 132 of the North Carolina General Statutes or under any other provision of law

unless the Department of Natural and Cultural Resources determines that the disclosures would create a risk of harm to such resources or to the site at which such resources are located. (1981, c. 904, s. 2; 2015-241, s. 14.30(s).)

§ 70-19. Cooperation with private individuals.

The Department of Natural and Cultural Resources shall take any action necessary, consistent with the purposes of this Article, to foster and improve the communication, cooperation, and exchange of information between:

(1) Private individuals having collections of archaeological resources and data which were obtained through legal means, and

(2) Professional archaeologists and associations of professional archaeologists concerned with the archaeological resources of North Carolina and of the United States. (1981, c. 904, s. 2; 2015-241, s. 14.30(s).)

§ 70-20. Delegation of responsibilities.

If the Department of Administration and the Department of Natural and Cultural Resources agree, the responsibilities, in whole or in part, of the Department of Natural and Cultural Resources under this Article may be delegated through a memorandum of understanding to the Department of Administration. Such a memorandum of understanding will be subject to periodic review at the initiation of either party to the memorandum. (1981, c. 904, s. 2; 2015-241, s. 14.30(s).)

§§ 70-21 through 70-25. Reserved for future codification purposes.

§ 70-21. Cemeteries on State lands.

(a) To preserve the sanctity of cemeteries located on State lands, the head of each State agency shall have the following duties and responsibilities:

(1) To identify and inventory all known cemeteries on State lands allocated to that State agency.

(2) To furnish a copy of the inventory to the State Property Office and the Department of Natural and Cultural Resources.

(b) State agencies are not required to provide State funds or other resources to maintain cemeteries on State land, except when required by law, regulation, or ordinance; directed by court order; or necessary to correct a known safety hazard to the public.

(c) State agencies may allow a family member or other interested person to maintain cemeteries and erect signs, fencing, grave markers, monuments, and tombstones within the designated boundaries of the cemetery if this activity does not constitute a safety hazard to the public. The family member or person shall obtain approval from the respective State agency and shall be responsible for any expense incurred by the activity. (2015-241, s.14.30(c); 2015-285, s. 1.)

North Carolina Environmental Policy Act of 1971, N.C.G.S. Ch. 113A, Art. 1

§ 113A-1. Title.

This Article shall be known as the North Carolina Environmental Policy Act of 1971. (1971, c. 1203, s. 1; 1991, c. 431, s. 1.)

§ 113A-2. Purposes.

The purposes of this Article are: to declare a State policy which will encourage the wise, productive, and beneficial use of the natural resources of the State without damage to the environment, maintain a healthy and pleasant environment, and preserve the natural beauty of the State; to encourage an educational program which will create a public awareness of our environment and its related programs; to require agencies of the State to consider and report upon environmental aspects and consequences of their actions involving the expenditure of public moneys or use of public land; and to provide means to implement these purposes. (1971, c. 1203, s. 2; 1991 (Reg. Sess., 1992), c. 945, s. 1.)

§ 113A-3. Declaration of State environmental policy.

The General Assembly of North Carolina, recognizing the profound influence of man's activity on the natural environment, and desiring, in its role as trustee for future generations, to assure that an environment of high quality will be maintained for the health and well-being of all, declares that it shall be the continuing policy of the State of North Carolina to conserve and protect its natural resources and to create and maintain conditions under which man and nature can exist in productive harmony. Further, it shall be the policy of the State to seek, for all of its citizens, safe, healthful, productive and aesthetically pleasing surroundings; to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety; and to preserve the important historic and cultural elements of our common inheritance. (1971, c. 1203, s. 3.)

§ 113A-4. Cooperation of agencies; reports; availability of information.

The General Assembly authorizes and directs that, to the fullest extent possible:

(1) The policies, rules, and public laws of this State shall be interpreted and administered in accordance with the policies set forth in this Article; and

(2) Every State agency shall include in every recommendation or report on any action involving significant expenditure of public moneys or use of public land for projects and programs significantly affecting the quality of the environment of this State, a detailed statement by the responsible official setting forth the following:

The direct environmental impact of the proposed action;

Any significant adverse environmental effects which cannot be avoided should the proposal be implemented;

Mitigation measures proposed to minimize the impact;

Alternatives to the proposed action;

The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and

Any irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented.

(2a) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any agency which has either jurisdiction by law or special expertise with respect to any environmental impact involved. The failure of an agency to provide comments within the comment period established under this subdivision or to request an extension for a specific period of time set forth in the request shall be treated by the responsible official as a conclusion by that agency that there is no significant environmental impact. Any unit of local government or other interested party that may be adversely affected by the proposed action may submit written comment. The responsible official shall consider written comment from units of local government and interested parties that is received within the established comment period. Copies of such detailed statement and such comments shall be made available to the Governor, to such agency or agencies as he may designate, and to the appropriate multi-county

regional agency as certified by the Secretary of Administration, shall be placed in the public file of the agency and shall accompany the proposal through the existing agency review processes. A copy of such detailed statement shall be made available to the public and to counties, municipalities, institutions and individuals, upon request.

(3) The Governor, and any State agency charged with duties under this Article, may call upon any of the public institutions of higher education of this State for assistance in developing plans and procedures under this Article and in meeting the requirements of this Article, including without limitation any of the following units of the University of North Carolina: the Water Resources Research Institute, the Institute for Environmental Studies, the Triangle Universities Consortium on Air Pollution, and the School of Government at the University of North Carolina at Chapel Hill. (1971, c. 1203, s. 4; 1987, c. 827, s. 125; 1991, c. 431, s. 2; 1991 (Reg. Sess., 1992), c. 945, s. 2; 2006-264, s. 29(g); 2015-90, s. 1.)

§ 113A-5. Review of agency actions involving major adverse changes or conflicts.

Whenever, in the judgment of the responsible State official, the information obtained in preparing the statement indicates that a major adverse change in the environment, or conflicts concerning alternative uses of available natural resources, would result from a specific program, project or action, and that an appropriate alternative cannot be developed, such information shall be presented to the Governor for review and final decision by him or by such agency as he may designate, in the exercise of the powers of the Governor. (1971, c. 1203, s. 5.)

§ 113A-6. Conformity of administrative procedures to State environmental policy.

All agencies of the State shall periodically review their statutory authority, administrative rules, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit or hinder full compliance with the purposes and provisions of this Article and shall propose to the Governor such measures as may be necessary to bring their authority, rules, policies and procedures into conformity with the intent, purposes and procedures set forth in this Article. (1971, c. 1203, s. 6; 1987, c. 827, s. 126.)

§ 113A-7. Other statutory obligations of agencies.

Nothing in this Article shall in any way affect nor detract from specific statutory obligations of any State agency

(1) To comply with criteria or standards of environmental quality or to perform other statutory obligations imposed upon it,

(2) To coordinate or consult with any other State agency or federal agency, or

(3) To act, or refrain from acting contingent upon the recommendations or certification of any other State agency or federal agency. (1971, c. 1203, s. 7.)

§ 113A-8. Major development projects.

(a) The governing bodies of all cities, counties, and towns acting individually, or collectively, may by ordinance require any special-purpose unit of government or private developer of a major development project to submit detailed statements, as defined in G.S. 113A-4(2), of the impact of such projects for consideration by those governing bodies in matters within their jurisdiction. Any such ordinance may not be designed to apply to only a particular major development project, and shall be applied consistently.

(b) Any ordinance adopted pursuant to this section shall exempt those major development projects for which a detailed statement of the environmental impact of the project or a functionally equivalent permitting process is required by federal or State law, regulation, or rule.

(c) Any ordinance adopted pursuant to this section shall establish minimum criteria to be used in determining whether a statement of environmental impact is required. A detailed statement of environmental impact may not be required for a project that does not exceed the minimum criteria and any exceptions to the minimum criteria established by the ordinance.

(d) Any ordinance adopted pursuant to this section shall exempt from its requirements the certain cases for which an environmental document is not required as set forth in G.S. 113A-12. (1971, c. 1203, s. 8; 1991, c. 431, s. 3; 2014-90, s. 5.)

§ 113A-8.1. Surface water transfers.

An environmental assessment shall be prepared for any transfer for which a petition is filed in accordance with G.S. 143-215.22L. The determination of whether an environmental impact statement is needed with regard to the proposed transfer shall be made in accordance with the provisions of this Article. (1998-168, s. 6; 2007-484, s. 43.7C; 2007-518, s. 4.)

§ 113A-9. Definitions.

As used in this Article, unless the context indicates otherwise, the term:NC General Statutes - Chapter 113A Article 1 3

(1) "Environmental assessment" (EA) means a document prepared by a State agency to evaluate whether the probable impacts of a proposed action require the preparation of an environmental impact statement under this Article.

(2) "Environmental document" means an environmental assessment, an environmental impact statement, or a finding of no significant impact.

(3) "Environmental impact statement" (EIS) means the detailed statement described in G.S. 113A-4(2).

(4) "Finding of no significant impact" (FONSI) means a document prepared by a State agency that lists the probable environmental impacts of a proposed action, concludes that a proposed action will not result in a significant adverse effect on the environment, states the specific reason or reasons for such conclusion, and states that an environmental impact statement is not required under this Article.

(5) "Major development project" shall include but is not limited to shopping centers, subdivisions and other housing developments, and industrial and commercial projects, but shall not include any projects of less than ten contiguous acres in extent.

(6) "Minimum criteria" means a rule that designates a particular action or class of actions for which the preparation of environmental documents is not required.

(7) "Public land" means all land and interests therein, title of which is vested in the State of North Carolina, in any State agency, or in the State for the use of any State agency or political subdivision of the State, and includes all vacant and unappropriated land, swampland, submerged land, land acquired by the State by virtue of being sold for taxes or by any other manner of acquisition, or escheated land.

(7a) "Significant expenditure of public moneys" means expenditures of public funds greater than ten million dollars ($10,000,000) for a single project or action or related group of projects or actions. For purposes of this subdivision, contributions of funds or in-kind contributions by municipalities, counties, regional or special-purpose government agencies, and other similar entities created by an act of the General Assembly and in-kind contributions by a non-State entity shall not be considered an expenditure of public funds for purposes of calculating whether such an expenditure is significant.

(8) "Special-purpose unit of government" includes any special district or public authority.

(9) "State agency" includes every department, agency, institution, public authority, board, commission, bureau, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include local governmental units or bodies such as cities, towns, other municipal corporations or political subdivisions of the State, county or city boards of education, other local special-purpose public districts, units or bodies of any kind, or private corporations created by act of the General Assembly, except in those instances where programs, projects and actions of local governmental units or bodies are subject to review, approval or licensing by State agencies in accordance with existing statutory authority, in which case local governmental units or bodies shall supply information which may be required by such State agencies for preparation of any environmental statement required by this Article.

(10) "State official" means the Director, Commissioner, Secretary, Administrator or Chairman of the State agency having primary statutory authority for specific programs, projects or actions subject to this Article, or his authorized representative.

(11) "Use of public land" means land-disturbing activity of greater than 10 acres that results in substantial, permanent changes in the natural cover or topography of those lands that includes:

The grant of a lease, easement, or permit authorizing private use of public land; or

The use of privately owned land for any project or program if (i) the State or any agency of the State has agreed to purchase the property or to exchange the property for public land and (ii) the use meets the other requirements of this subdivision. (1971, c. 1203, s. 9; 1991 (Reg. Sess., 1992), c. 945, s. 3; 2015-90, s. 2.)

§ 113A-10. Provisions supplemental.

The policies, obligations and provisions of this Article are supplementary to those set forth in existing authorizations of and statutory provisions applicable to State agencies and local governments. In those instances where a State agency is required to prepare an environmental document or to comment on an environmental document under provisions of federal law, no separate environmental document shall be required to be prepared or published under this Article so long as the environmental document or comment meets the provisions of this Article. (1971, c. 1203, s. 10; 1991 (Reg. Sess., 1992), c. 945, s. 4; 2015-90, s. 3.)

§ 113A-11. Adoption of rules.

(a) The Department of Administration shall adopt rules to implement this Article.

(b) Each State agency shall adopt rules that establish minimum criteria. An agency may include a particular action or class of actions in its minimum criteria only if the agency makes a specific finding that the action or class of actions has no significant long-term impact on the environment. Rules establishing minimum criteria shall be consistent with rules adopted by the Department of Administration. (1991 (Reg. Sess., 1992), c. 899, s. 1; c. 945, s. 7(b); 2015-90, s. 4.)

§ 113A-12. Environmental document not required in certain cases.

Notwithstanding any other provision in this Article, no environmental document shall be required in connection with:

(1) The construction, maintenance, or removal of an electric power line, water line, sewage line, stormwater drainage line, telephone line, telegraph line, cable television

line, data transmission line, natural gas line, or similar infrastructure project within or across the right-of-way of any street or highway.

(2) An action approved under:

a. A general permit issued under G.S. 113A-118.1, 143-215.1(b)(3), or 143-215.108(c)(8).

b. A Coastal Habitat Protection Plan under G.S. 143B-279.8.

c. A special order pursuant to G.S. 143-215.2 or G.S. 143-215.110.

d. An action taken to address an emergency under G.S. 143-215.3 or other similar emergency conditions.

e. A remedial or similar action to address contamination under Chapter 130A or 143 of the General Statutes, including a brownfield agreement entered into under G.S. 130A-310.32.

f. A certificate of convenience and necessity under G.S. 62-110.

g. An industrial or pollution control project approval by the Secretary of Commerce under Chapter 159C of the General Statutes.

h. A project approved as a water infrastructure project under Chapter 159G of the General Statutes.

i. A certification issued by the Division of Water Resources of the Department of Environmental Quality under the authority granted to the Environmental Management Commission by G.S. 143B-282(a)(1)u. lease or easement granted by a State agency for:

(3) A lease or easement granted by a State agency for:

a. The use of an existing building or facility.

b. Placement of a wastewater line or other structures or uses on or under submerged lands pursuant to a permit granted under G.S. 143-215.1. c. A shellfish cultivation lease granted under G.S. 113-202.

d. A facility for the use or benefit of The University of North Carolina System, the North Carolina community college system, the North Carolina public school systems, or one or more constituent institutions of any of those systems.

e. A health care facility financed pursuant to Chapter 131A of the General Statutes or receiving a certificate of need under Article 9 of Chapter 131E of the General Statutes.

(4) The construction of a driveway connection to a public roadway.

(5) Any State action in connection with a project for which public lands are used and/or public monies are expended if the land or expenditure is provided as an incentive for the project pursuant to an agreement that makes the incentives contingent on prior completion of the project or activity, or completion on a specified timetable, and a specified level of job creation or new capital investment.

(6) A major development as defined in G.S. 113A-118 that receives a permit issued under Article 7 of Chapter 113A of the General Statutes.

(7) The issuance of an executive order under G.S. 166A-19.30(a)(5) waiving the requirement for an environmental document.

(8) The redevelopment or reoccupation of an existing building or facility, so long as any additions to the existing building or facility do not increase the total footprint to more than one hundred fifty percent (150%) of the footprint of the existing building or facility and so long as any new construction does not increase the total footprint to more than one hundred fifty percent (150%) of the footprint of the existing building or facility.

(9) Facilities created in the course of facilitating closure activities under Part 2I of Article 9 of Chapter 130A of the General Statutes.

(10) Any project or facility specifically required or authorized by an act of the General Assembly.

(11) Any project undertaken as mitigation for the impacts of an approved project or to mitigate or avoid harm from natural environmental change, including wetlands and buffer mitigation projects and banks, coastal protections and mitigation projects, and noise mitigation projects. (1991 (Reg. Sess., 1992), c. 945, ss. 5, 7(a); c. 1030, s. 51.15; 2010-186, s. 1; 2010-188, s. 1; 2011-398, s. 59(a); 2014-90, s. 4; 2014-100, s. 14.7(j); 2015-90, s. 5; 2015-241, s. 14.30(c).)

§ 113A-13. Administrative and judicial review.

The preparation of an environmental document required under this Article is intended to assist the responsible agency in determining the appropriate decision on the proposed action. An environmental document required under this Article is a necessary part of an application or other request for agency action. Administrative and judicial review of an environmental document is incidental to, and may only be undertaken in connection with, review of the agency action. No other review of an environmental document is allowed. (1991 (Reg. Sess., 1992), c. 945, ss. 5, 7(a).)

§§ 113A-14 through 113A-20. Reserved for future codification purposes.

Salvage of Abandoned Shipwrecks and Other Archaeological Sites, N.C.G.S. Ch. 21, Art. 3

§ 121-22. Title to bottoms of certain waters and shipwrecks, etc., thereon declared to be in State.

Subject to Chapter 82 of the General Statutes, entitled "Wrecks" and to the provisions of Chapter 210, Session Laws of 1963, and to any statute of the United States, the title to all bottoms of navigable waters within one marine league seaward from the Atlantic seashore measured from the extreme low watermark; and the title to all shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts which have remained unclaimed for more than 10 years lying on the said bottoms, or on the bottoms of any other navigable waters of the State, is hereby declared to be in the State of North Carolina, and such bottoms, shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts shall be subject to the exclusive dominion and control of the State. (1967, c. 533, s. 1.)

§ 121-23. Department is custodian of underwater personal property of the State and may adopt rules concerning the property.

The Department of Natural and Cultural Resources is the custodian of shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts to which the State has title under G.S. 121-22. The Department of Natural and Cultural Resources may adopt rules necessary to preserve, protect, recover, or salvage any or all of these properties. (1967, c. 533, s. 2; 1973, c. 476, s. 48; 1993, c. 249, s. 1; 2015-241, s. 14.30(s).)

§ 121-24. Department authorized to establish professional staff.

The Department of Natural and Cultural Resources is also authorized to establish a professional staff for the purpose of conducting and/or supervising the surveillance, protection, preservation, survey and systematic underwater archaeological recovery of underwater materials as defined in G.S. 121-22 hereof. (1967, c. 533, s. 3; 1973, c. 476, s. 48; 2015-241, s. 14.30(s).)

§ 121-25. License to conduct exploration, recovery or salvage operations.

(a) Any qualified person, firm or corporation desiring to conduct any type of exploration, recovery or salvage operations, in the course of which any part of a derelict vessel or its contents or other archaeological site may be removed, displaced or destroyed, shall first make application to the Department of Natural and Cultural Resources and obtain a permit or license to conduct such operations. If the Department of Natural and Cultural Resources shall find that the granting of such permit or license is in the best interest of the State, it may grant such applicant a permit or license for such a period of time and under such conditions as the Department may deem to be in the best interest of the State. Except as otherwise provided in subsection (b) of this section, such permit or license may include but need not be limited to any of the following:

(1) Payment of monetary fee to be set by the Department.

(2) That a portion or all of the historic material or artifacts be delivered to custody and possession of the Department.

(3) That a portion of all of such relics or artifacts may be sold or retained by the licensee.

(4) That a portion or all of such relics or artifacts may be sold or traded by the Department.

Permits or licenses may be renewed upon or prior to expiration upon such terms as the applicant and the Department may mutually agree. Holders of permits or licenses shall be responsible for obtaining permission of any federal agencies having jurisdiction, including the United States Coast Guard, the United States Department of the Navy and the United States Army Corps of Engineers prior to conducting any salvaging operations.

(b) All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to Chapter 132 of the General Statutes. (1967, c. 533, s. 4; 1973, c. 476, s. 48; 2005-367, s. 2; 2015-218, s. 4(a); 2015-241, s. 14.30(s); 2016-94, s. 16.2.)

§ 121-25.1. Criminal record checks of applicants for permit or license.

(a) The following definitions apply to this section:

(1) Applicant. – A person or entity applying for a permit or license under G.S. 121-25 to conduct any type of exploration, recovery, or salvage operations of any part of a derelict vessel or its contents or other archaeological site.

(2) Criminal history. – A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears upon an applicant's fitness to conduct activities related to the surveillance, protection, preservation, and archaeological recovery of property subject to the exclusive dominion and control of the State under G.S. 121-22. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers and Court Officers; Article 6, Homicide; Article 7B, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 19C, Financial Identity Fraud; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots, Civil Disorders, and Emergencies; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302, or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) All applicants shall consent to a criminal history record check. Refusal to consent to a criminal history record check or to the use of fingerprints or other identifying information may constitute grounds for the Department of Natural and Cultural Resources to deny a permit or a license to an applicant. The Department of Natural and Cultural Resources shall be responsible for providing to the North Carolina Department of Public Safety the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Public Safety. If the applicant is not an individual, the applicant shall provide fingerprints for the principals, officers, directors, and controlling persons of the applicant. Each set of fingerprints shall be certified by an authorized law enforcement officer. The Department of Natural and Cultural Resources shall keep all information obtained under this section confidential.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar the issuance of a permit or a license. When determining whether to issue a permit or license to an applicant, the Department of Natural and Cultural Resources shall consider all of the following factors regarding the conviction:

(1) The level and seriousness of the crime.

(2) The date of the crime.

(3) The age of the person at the time of conviction.

(4) The circumstances surrounding the commission of the crime, if known.

(5) The nexus between the criminal conduct of the person and the person's responsibilities pursuant to the application.

(6) The incarceration, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.

(7) The subsequent commission by the person of a crime. (2005-367, s. 3; 2012-12, s. 2(ss); 2014-100, s. 17.1(o); 2015-181, s. 47; 2015-241, s. 14.30(s).)

§ 121-26. Funds received by Department under § 121-25.

Any funds which may be paid to or received by the Department of Natural and Cultural Resources under the terms of G.S. 121-25 hereof may be allocated for use by the Department of Natural and Cultural Resources for continuing its duties under this Article, subject to the approval of the Department of Administration. (1967, c. 533, s. 5; 1973, c. 476, s. 48; 1975, c. 879, s. 46; 2015-241, s. 14.30(s).)

§ 121-27. Law-enforcement agencies empowered to assist Department.

NC General Statutes - Chapter 121 Article 3 3

All law-enforcement agencies and officers, State and local, are hereby empowered to assist the Department of Natural and Cultural Resources in carrying out its duties under this Article. (1967, c. 533, s. 6; 1973, c. 476, s. 48; 2015-241, s. 14.30(s).)

§ 121-28. Violation of Article a misdemeanor.

Any person violating the provisions of this Article or any rules or regulations established thereunder shall be guilty of a Class 1 misdemeanor. (1967, c. 533, s. 8; 1993, c. 539, s. 917; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 121-29 through 121-33. Reserved for future codification purposes.

APPENDIX C. PRIVATEER CASES

14 U.S. 238
4 L.Ed. 80
1 Wheat. 238
***L'Invincible.*—The CONSUL OF FRANCE, and HILL & M'COBB, *Claimants*.**

March 11, 1816

APPEAL from the circuit court for the district of Massachusetts.

The French private armed ship L'Invincible, duly commissioned as a cruiser, was, in March, 1813, captured by the British brig of war La Mutine. In the same month she was recaptured by the American privateer Alexander; was again captured, on or about the 10th of May, 1813, by a British squadron, consisting of the frigates Shannon and Tenedos; and, afterwards, in the same month, again recaptured by the American privateer Young

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Teazer, carried into Portland, and libelled in the district court of Maine for adjudication, as prize of war. The proceedings, so far as material to be stated, were as follows: At a special term of the district court, held in June, 1813, a claim was interposed by the French consul on behalf of the French owners, alleging the special facts above mentioned, and claiming restitution of the ship and cargo, on payment of salvage. A special claim was also interposed by Mark L. Hill, and Thomas M'Cobb, citizens of the United States, and owners of the ship Mount Hope, alleging, among other things, that the said ship, having on board a cargo on freight, belonging to citizens of the United States, and bound on a voyage from Charleston, S. C. to Cadiz, was, on the high seas, in the latter part of March, 1813, in violation of the law of nations, and of treaties, captured by L'Invincible, before her capture by La Mutine, and carried to places unknown to the claimants, whereby the said ship Mount Hope, and cargo, became wholly lost to the owners, and thereupon praying, among other things, that after payment of salvage, the residue of said ship L'Invincible, and cargo, might be condemned and sold for the payment of the damages sustained by the claimants. At the same term, by consent, an interlocutory decree of condemnation to the captors passed against said ship L'Invincible, and she was ordered to be sold, and one moiety of the proceeds, after deducting expenses, was ordered to be paid to the captors, as salvage, and the other moiety to be brought into court, to abide the final decision of the respective claims of

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the French consul and Messrs. Hill & M'Cobb. The cause was then continued for a further hearing unto September term, 1813, when Messrs. Maisonarra & Devouet, of Bayonne, owners of L'Invincible, appeared under protest, and in answer to the libel and claim of Messrs. Hill & M'Cobb alleged, among other things, that the ship Mount Hope was lawfully captured by L'Invincible, on account of having a British license on board, and of other suspicious circumstances, inducing a belief of British interests, and ordered to Bayonne for adjudication; that (as the protestants believed) on the voyage to Bayonne the Mount Hope was recaptured, by a British cruiser, sent into some port of Great Britain, and there finally restored by the court of admiralty to the owners, after which she pursued her voyage, and safely arrived, with her cargo, at Cadiz, and the protestants thereupon prayed that the claim of Messrs. Hill & M'Cobb might be dismissed. The replication of Messrs. Hill and M'Cobb denied the legality of the capture, and the having a British license on board the Mount Hope, and alleged embezzlement and spoliation by the crew of L'Invincible, upon the capture; admitted the recapture by a British cruiser, and the restitution by the admiralty upon payment of expenses, and prayed that the protestants might be directed to appear absolutely and without protest. Upon these allegations the district court overruled the objections to the jurisdiction of the court, and compelled the owners of L'Invincible to appear absolutely, and without protest, and thereupon the

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owners appeared absolutely, and alleged the same matters in defence which were stated in their answer under protest, and prayed the court to assign Messrs. Hill & M'Cobb to answer interrogatories touching the premises, which was ordered by the court. Accordingly, Messrs. Hill & M'Cobb made answer to the interrogatories proposed, except an interrogatory which required a disclosure of the fact, whether there was a British license on board, which M'Cobb (who was master of the Mount Hope at the time of the capture) declined answering, upon the ground that he was not compelled to answer any question, the answer to which would subject him to a penalty, forfeiture, or punishment; and this refusal, the district court, on application, allowed. Hill, in answer to the same interrogatory, denied any knowledge of the existence of a British license. The cause was, thereupon, heard on the allegations and evidence of the parties, and the district court decreed that Messrs. Hill & M'Cobb should recover against the owners of L'Invincible the sum of 9,000 dollars damages, and the costs of suit. From this decree the owners appealed to the circuit court, and in that court their plea to the jurisdiction was sustained, and the claim of Messrs. Hill & M'Cobb dismissed, with costs. An appeal was, thereupon, entered by them to this court.

Dexter, for the appellants. The sole question is, whether the district court of Maine had jurisdiction. It is a case where a citizen, against whose property

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a tort has been committed on the high seas, appears in his own natural forum, and the *res*, which was the instrument of the wrong done, is within the territorial jurisdiction of his own country, and in possession of the court for other (lawful) purposes when he applies for justice. 1. An injury of this nature is either to be redressed by a process *in rem* or *in personam*, and in either case, application must be made where the *thing*, or *person*, is found. The action is transitory in both cases; where the party proceeds *in rem*, the possession of the thing gives jurisdiction to the tribunal having that possession. It is said, that in prize proceedings, the forum of the captor is the only one having jurisdiction. But what is the extent of the principle, and what are the exceptions to the rule? The rule is not of a nature peculiar to prize proceedings, but is rather a corollary from the general principles of admiralty jurisdiction. The locality of the question of prize or no prize must have been originally determined by the *fact* of the property being carried *infra proesidia* of the captor's country, and in possession of its courts. I agree that the possession of the thing does not give jurisdiction to a *neutral* country, and the reason is, because the county *is neutral*. But this has only been recently settled; and in the reign of Charles II. the question was referred to the crown lawyers in England, (then neutral,) whether the property of English subjects, unjustly taken by foreign cruisers, should not be restored to them by the English court.

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It is, however, now determined, that unless there has been a breech of neutrality in the capture, the courts of a neutral state cannot *restore*, much less *condemn*. But this concession does not shake the position, that local jurisdiction is founded upon the possession of the *res*, which in this case having escaped from the former captor, the action becomes transitory, and follows the thing. There are several decisions of this court, all confirming, either directly or by analogy, the position now taken. In the famous report of Sir George Lee, & co., on the memorial of the king of Prussia's minister, relative to the non-payment of the Silesian loan, which was intended to maintain the strongest maritime pretensions of Great Britian, the only passage that even glances at the doctrine of the exclusive jurisdiction of the courts of the captor's country is, that all captors are bound to submit their seizures to adjudication, and that the *regular and proper* court is that of their own country. But this principle is sustained rather by the authority of usage and treaties, than by elementary writers; and yet, all the other incidental questions are illustrated by multifarious citations of elementary books, equally respected in Prussia as in England. The reporters do not fairly meet the menace

of the Prussian monarch, to set up courts of prize in his own dominions; but content themselves with asserting that it would be irregular, absurd, and impracticable. Ibid 133, The Mary Ford.

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Had it been at that time settled by European jurists of authority, the question would not have been made; or if made, would have been satisfactorily answered. The general principle has been rather *assumed*, than *proved:* And the practice of one nation, at least, contradicts it; for the ordinance of Louis XIV. restores the property of French subjects brought into the ports of France.[a] 2. Suppose the

[a] *Ordonnance de la Marine*, liv. 3. tit. 9., *Des Prises*, art. 15. The same provision is contained in the 16th article of the Spanish ordinance of 1718; and Valin considers the restitution of the effects as a just recompense for the benefit rendered to the captor, in granting him an asylum in the ports of the neutral country to whose subjects those effects belong. But, Azuni contests this opinion, and maintains that the obligation to restore in this case is founded on the universal law of nations. Part 2, c. 4. art. 3. s. 18. And it must be confessed, that the reasons on which Valin rests his opinion are by no means satisfactory; so that the French and Spanish ordinances are evidently mere municipal regulations, which have not been incorporated into the code of public law, and cannot be justified upon sound principles. It is an observation, somewhere made by M. Portalis, that such regulations are not, properly speaking, to be considered *laws*, but are essentially variable in their nature, *pro temporibus et causis*, and are to be tempered and modified by judicial wisdom and equity. These ordinances are indeed supported by the practice of the Italian states, and the theory of certain Italian writers. Among the latter are Galliani and Azuni, both of whom maintain, each upon different grounds, the right of the neutral power, within whose territorial jurisdiction a prize is brought, to adjudicate upon the question of prize or no prize, so far as the property of its own subjects are concerned. They are, however, opposed by their own countryman, Lampredi, who, after assigning the reasons for his dissent, concludes thus,—'*Egli*' (the neutral) *dunque dovr a rispettare questo possesso* (that of the captor) *lasciando che i giudici costituiti dal Sovrano del predatore lo dichiarino o legittimo, o illegittimo, e cosi o liberino la preda, o la fucciano passare in dominio del predatore, purche questo giudizio si faccia fuori del suo territorio, ove nessuno usurpar pu o i dirriti spettanti al sommo impero. Efalso adunque in dirrito quello, che asserisce il Galiani, ed il progetto, ch'egli propone sul giudizio delle prede non si portrebbe eseguire senza lesione dei diritti sovrani. Lampredi*, p. 228. Since the decision of the case to which this note is appended, the following may be considered as the only exceptions to the general rule, that the question of prize or no prize, with all its incidents, is only to be determined in the courts of the captor's nation established in his country, or in that of an ally or co-

belligerant. 1st. The case of a capture made by the cruisers of the belligerants within the jurisdiction of a neutral power; and 2d, That of a capture made by armed vessels fitted out in violation of its neutrality, and where the captured property, or the capturing vessel, is brought into its ports. The obvious foundation of these exceptions is to be discovered in the right and the duty of every neutral state to maintain its neutrality impartially, and neither to do nor suffer any act which might tend to involve it in the war.

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question of prize or no prize to be exclusively within the jurisdiction of the courts of the capturing power, yet that question does not arise in the present case. This is a question of *probable cause*. If the commander of L'Invincible took *without* probable cause, he had no right; if he took *with* probable cause, then the claimants have sustained no injury, and ought not to recover damages; consequently, no injury can result from the court taking cognizance of the suit. As to the spoliation after the capture, that is still less a question of prize. 3. But be the general principles as they may, the jurisdiction having attached for other purposes on recapture, the former owner of a vessel unlawfully taken and despoiled by the prize, comes in and claims damages under the law of nations.

Pinkney, contra. If there by any rule of public

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law better established than another, it is, that the question of prize is solely to be determined in the courts of the captor's country. The report on the memorial of the king of Prussia's minister, refers to it as the customary law of the whole civilized world. The English courts of prize have recorded it; the French courts have recorded it; this court has recorded it. It pervades all the adjudications on the law of prize, and it lays, as an elementary principle, at the very foundation of that law. The whole question, then, is, whether this case be an exception to the general rule. The positive law of nations has ordained the rule; the natural law of nations has assigned the reasons on which it is founded; and *Rutherforth*, in his Institutes,[d] explains those reasons, which arise from the amenability of governments to each other. A cruiser is amenable only to the government by whom he is commissioned; that government is amenable to the power whose subjects are injured by him; and after the ordinary prize judicature is exhausted, they are to apply to their own sovereign for redress. The principal object of that judicature is the examination into the conduct of the captors. The question of property is merely incidental. But, whatever the question may be, it is to be judged exclusively by the courts of the capturing power. It is contended, on the other side, that this jurisdiction

must be exerted *in rem;* but the jurisdiction to which *Rutherforth* refers is much more extensive, not confining it to the question whether the property be translated. If the

[d] 2 *Rutherforth's Institutes* 594.

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thing be within the possession of the court, then it exerts a jurisdiction *in rem*, by restitution, or condemnation, as the case may be. But if not, then it exerts it on the person, and inquires into the manner in which the captor has used his commission, and whether any wrong has been done to friends, under colour of its authority. It is a gratuitous assumption, that prize jurisdiction is always *in rem*, as that of the ordinary court of admiralty usually is. The commissioned captor cannot be responsible to any but his own sovereign; from him he receives the law which forms his rule of conduct. Sir William Scott expressly admits that his king can give him the law, and the judges of other European countries practically admit the same thing. *A fortiori*, can the sovereign give it to his delegated cruisers; he being answerable over, in the first instance, diplomatically, and finally by war, to the injured nation. The captor is responsible only through the courts of his own country. 2. Is this case an exception to the general rule? The reasons of the allowed exceptions do not apply to this case. Thus the cases are, of violation of neutral territory; or where a commission is issued to subjects of the neutral country; or, lastly, of a prize brought into its territorial limits with neutral property on board. In the case of Talbot v. Jansen the commission was null, and captures under it were void; it was equivalent to no commission at all. Here is no pretence that the commission was null; that she had been fitted out here; or that the thing captured had been brought within the grasp of our municipal law; or that the capture was made within our limits. In

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Del Col v. Arnold the ground of the decision was, that the thing was brought voluntarily into our limits, and the wrong done within those limits. The judgment must be supported on that ground, or it cannot be supported at all. As to the Betsey, its authority is doubtful, and it cannot be referred to any intelligible principle, unless it be that the belligerant captor submits to the neutral jurisdiction, by bringing the property within it. The Cassius,[e] is directly in point for the captors in the case now before the court. Why was the libellant's application refused in that case? Because the thing captured was not brought in; thereby showing that, in the present case, the prize not having been brought in, damages cannot be awarded against the captor. As to the ordinance of Louis XIV., it goes no further than this court did in the case of the Betsey. The same authority has been practically assumed among the Italian states; but further no nation, ancient or

modern, has gone. The natural, customary, and conventional law of nations, are all equally adverse to it. The claimants have a remedy, correspondent to the extent of their injury, in the courts of France. The prize jurisdiction is as effectually exerted when the property *is not*, as when *it is*, within its control. The cases are multiplied where the thing is even lost, of an application compelling the captor to proceed to adjudication; if he fails to show that the capture was lawful, he is mulcted in costs and damages.[f] The cruisers of

[e] 3 *Dall.* 121.

[f] 1 *Bob.* 93. The Betsey

every nation are bound to obey the instructions of the sovereign power, whether lawful or not. The condemnations under the British orders in council of November, 1793, were reversed by the lords of appeal, and mere dry restitution decreed, without damages, because the cruisers were justified by the instructions. But the commissioners under the 7th article of the British treaty of 1794, gave damages for what the lords of appeal were obliged judicially to refuse them, upon the authority of *Rutherforth*, and upon the ground that the British government was answerable over to the injured power. In the present case, if justice should be refused in the courts of France, the French government would be answerable over to this country. The process is here, in effect, *in personam*, and it is as if the captor were here. You go beyond retaining your own property merely, and lay your hand on his; which is his by the municipal code only: by the law of nations it is the property of the state. It is certain he was not originally responsible personally, and the capture and recapture can have made no difference. The acts exerted over him by the enemy could not have changed his responsibility; nor can the captor's having failed to proceed to adjudication in France, for the claimants may compel him; nor the bringing in of his vessel, for, as to him, it was involuntary. 3. *Probable cause* is emphatically a question of prize or no prize; but it is not always the same by the law of different countries. The law of France must, therefore, be looked into, and applied to the case, which the French courts only are competent to expound. If their

exposition does injustice to the party, his remedy is by application to his own government. So, also, is the question of spoliation a question of prize; and the prize court, having jurisdiction of the principal matter, has jurisdiction of all its incidents.

Dexter, in reply. 1. There is only one authority produced to show that the prize jurisdiction is exclusively in the courts of the capturing power. *Rutherforth* speaks only of cases where the proceeding is to condemn, or restore, the captured property. When he, or any other writer, gives the reasons for his opinion, the latter is worth just as much as the former, and no more. What is the reason? He says it cannot be known before trial that forcible possession was lawful; and if unlawful, it could not give jurisdiction. It may be answered, in every case where jurisdiction is gained by possession, it is unknown before trial whether it was obtained lawfully, or by force, or fraud. All right of jurisdiction from possession is thus equally denied. The other party cannot be injured by submitting to the jurisdiction while that uncertainty remains. If it shall appear that the possession was unlawfully acquired, he will be restored to his right by the exercise of jurisdiction. *Rutherforth* asserts, that the true ground of prize jurisdiction is, that the state of the captor is responsible to other states for his misconduct. It may be answered, that when the state has only granted a lawful commission, and has not assented to any unlawful act done by colour of it, such state is not responsible, though the act be unlawful.

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For the naked unauthorized act, then, the state is not accountable. The unjust judgment of a neutral state, condemning the property, might make the latter state answerable, but not the former. The reasoning goes on the supposition that the state of the captor might relieve itself from responsibility by doing justice, in restoring the property. This can only be done where the property can be reached by it. Holding jurisdiction would rather relieve the state of the captor from responsibility; for either the injury of the complaining party would be repaired, or the courts of his own country would determine that he had not suffered any. There is no distinction between the property being lawfully brought in, as in this case, or voluntarily, as in the case of the Betsey. The injured party has an election to proceed *in personam* against the owners, or *in rem* against the inanimate instrument of the wrong. 2. There may be a jurisdiction to *restore*, without invading the exclusive prize jurisdiction of the captor's country. Let the court take jurisdiction, and if it turns out to be a question of prize or no prize, then dismiss the suit. Suppose the question to be, whether the captor had a commission, must we not proceed further, and see what is the extent of that commission? And if the act done exceed its limits, has not the neutral state a right to adjudge costs and damages to its citizens injured, without any authority from the captor's sovereign? 3. The vessel is in judicature, rightfully and lawfully. The party now protesting against the jurisdiction, had submitted to it for another purpose. He claims his property upon the payment of salvage.

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The obvious answer to his demand is, When you have discharged all liens, you shall have it. The court of admiralty, having jurisdiction for another purpose, like a court of chancery in the case of a mortgage, has a right to do complete equity. Why is restitution decreed in the case of violated territory? Because the courts of the neutral state, having jurisdiction for the principal purpose of avenging its violated sovereignty, also takes jurisdiction of all the incidents.

March 11th.

JOHNSON, J., delivered the opinion of the court.

It would be difficult to distinguish this case, in principle, from those of the Cassius and the Exchange,[g] decided in this court. The only circumstance, in fact, in which they differ, is, that in those cases, the vessels were the property of the nation; in *this* it belongs to private adventurers. But the commission under which they acted was the same; the same sovereign power which could claim immunities in those cases equally demands them in this; and although the privateer may be considered a volunteer in the war, it is not less a part of the efficient national force, set in action for the purpose of subduing an enemy. There may be, indeed, one shade of difference between them, and it

[g] February Term, 1812. In this case it was determined that a public vessel of war, belonging to the Emperor Napoleon, which was before the property of a citizen of the United States, and, as alleged, wrongfully seized by the French, coming into our ports, and demeaning herself in a friendly menner, was exempt from the jurisdiction of this country, and could not be reclaimed by the former owner in its tribunals.

is that which is suggested by *Rutherforth* in the passage quoted in the argument. The hull, or the owners of the privateer, may, perhaps, under some circumstances, be subject to damages in a neutral court after the courts of the captor have decided that the capture was not sanctioned by his sovereign. But, until such a decision, the seizure by a private armed vessel is as much the act of the sovereign, and entitled to the same exemption from scrutiny, as the seizure by a national vessel. In the case of the Cassius, which belonged to the French republic, the vessel was finally prosecuted and condemned on an information *qui tam*, under the act of Congress for an illegal out-fit, and thus had applied to her, under the statute, the principle which dictated the decision in the case of Talbot v. Jansen with relation to a private armed vessel. As to the restitution of prizes, made in violation of neutrality, there could be no reason suggested for creating a distinction between the national and the private armed vessels of a

belligerent. Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerant rights, her own dignity and security require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her, it is immaterial in whom the property of the offending vessel is vested. The commission under which the captors act is the same, and that alone communicates the right of capture even to a vessel which is national property.

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But it is contended that, admitting the general principle, that the exclusive cognizance of prize questions belongs to the capturing power, still the peculiar circumstances of this case constitute an exception, inasmuch as the recapture of the Mount Hope puts it out of the power of the French courts to exercise jurisdiction over the case. This leads us to inquire into the real ground upon which the exclusive cognizance of prize questions is yielded to the courts of the capturing power. For the appellants, it is contended, that it rests upon the *possession* of the subject matter of that jurisdiction; and as the loss of possession carries with it the loss of capacity to sit in judgment on the question of prize or no prize, it follows, that the rights of judging reverts to the state whose citizen has been devested of his property. On the other hand, I presume, by the reference to Rutherforth, we are to understand it to be contended that it is a right conceded by the customary law of nations, because the captor is responsible to his sovereign, and the sovereign to other nations.

But we are of opinion that it rests upon other grounds; and that the views of Vattel on the subject are the most reconcilable to reason, and the nature of things, and furnish the easiest solution of all the questions which arise under this head. That it is a consequence of the equality and absolute independence of sovereign states, on the one hand, and of the duty to observe uniform impartial neutrality, on the other.

Under the former, every sovereign becomes the acknowledged arbiter of his own justice, and cannot,

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consistently with his dignity, stoop to appear at the bar of other nations to defend the acts of his commissioned agents, much less the justice and legality of those rules of conduct which he prescribes to them. Under the latter, neturals are bound to withhold their interference between the captor and the captured; to consider the fact of possession as conclusive evidence of the right. Under this it is, also, that it becomes unlawful to devest a captor of possession even of the ship of a citizen, when seized under a charge of having trespassed upon belligerant rights.

In this case the capture is not made as of a vessel of the neutral power; but as of one who, quitting his neutrality, voluntarily arranges himself under the banners of the enemy. On this subject there appears to be a tacit convention between the netural and belligerant; that, on the one hand, the neutral state shall not be implicated in the misconduct of the individual; and on the other, that the offender shall be subjected to the exercise of belligerant right. In this view the situation of a captured ship of a citizen is precisely the same as that of any other captured neutral; or, rather, the obligation to abstain from interference between the captor and captured becomes greater, inasmuch as it is purchased by a concession from the belligerant, of no little importance to the peace of the world, and particularly of the nation of the offending individual. The belligerant contents himself with cutting up the unneutral commerce, and makes no complaint to the netural power, not even

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where the individual rescues his vessel, and escapes into his own port after capture.

Testing this case by these principles, it will be found that, to have sustained the claim of the appellants, the court below would have violated the hospitality which nations have a right to claim from each other, and the immunity which a sovereign commission confers on the vessel which acts under it; that it would have detracted from the dignity and equality of sovereign states, by reducing one to the condition of a suitor in the courts of another, and from the acknowledged right of every beligerant to judge for himself when his own rights on the ocean have been violated or evaded; and, finally, that it would have been a deviation from that strict line of neutrality which it is the universal duty of neutrals to observe—a duty of the most delicate nature with regard to her own citizens, inasmuch as through their misconduct she may draw upon herself the imputation of secretly supporting one of the contending parties. Under this view of the law of nations on this subject, it is evident that it becomes immaterial whether the *corpus* continue *sub potestate* of the capturing power, or not. Yet, if the recapture of the prize necessarily draws after it consequences so fatal to the rights of an unoffending individual as have been supposed in the argument, it may well be asked, shall he be referred for redress to courts which, by the state of facts, are rendered incompetent to afford redress?

The answer is, that this consequence does not follow from the recapture. The courts of the captor

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are still open for redress. The injured neutral, it is to be presumed, will there receive indemnity for a wanton or illicit capture; and if justice be refused him, his own nation is bound to vindicate, or indemnify him.

Some confusion of idea appears to hang over this doctrine, resulting chiefly from a doubt as to the mode in which the principle of exclusive cognizance is to be applied in neutral courts to cases as they arise; and this obscurity is increased by the apparent bearing of certain cases decided in this court in the years 1794 and 1795.

The material questions necessary to be considered, in order to dissipate these doubts, are, 1st. Does this principle properly furnish a plea to the jurisdiction of the admiralty courts? 2d. If not, then does not jurisdiction over the subject matter draw after it every incidental or resulting question relative to the disposal of the proceeds of the *res subjecta?*

The first of these questions was the only one settled in the case of Glass v. The Betsey, and the ease was sent back with a view that the district court should exercise jurisdiction, subject, however, to the law of nations on this subject as the rule to govern its decision.

And this is certainly the correct course. Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction. But sitting and judging, as such courts do, by the law of nations, the moment it is ascertained to be a seizure by a commissioned cruiser, made in the legitimate exercise of the rights

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of war, their progress is arrested; for this circumstance is, in those courts, a sufficient evidence of right.

That the mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction, is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to devest possessions; to wit, those in which her own right to stand neutral is invaded: and there is no case in which the court of a neutral may not claim the right of determining whether the capturing vessel be, in fact, the commissioned cruiser of a belligerant power. Without the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture. The case of Talbot v. Jansen, as well in the reasoning of the judges as in the final decision of the case, is fully up to the support of this doctrine. But it is supposed that the case of the Mary Ford supports the idea, that as the court had acknowledged jurisdiction over the question of salvage, its jurisdiction

extended over the whole subject matter, and authorized it to proceed finally to dispose of the residue between the parties litigant.

That case certainly will not support the doctrine to the extent contended for in this case. It is true, that the court there lay down a principle, which, in its general application is unquestionably correct, and which, considered in the abstract, might be supposed applicable to the present case. But this presents only one of innumerable cases which occur in

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our books to prove how apt we are to misconceive and misapply the decisions of a court, by detaching those decisions from the case which the court propose to decide. The decision of the supreme court in that case is in strict conformity with that of the circuit court in the present case. For when the court come to apply their principle, they do not enter into the question of prize between the belligerants, but decree the residue to the last possessor: thus making the fact of possession, as between the parties litigant, the criterion of right; and this is, unquestionably, consistent with the law of nations. Those points, which can be disposed of without any reference to the legal exercise of the rights of war, the court proceeds to decide; but those which necessarily involve the question of prize or no prize, they remit to another tribunal.

It would afford us much satisfaction could we, with equal facility, vindicate the consistency of this court in the case of Del. Col v. Arnold. To say the least of that case, it certainly requires an apology. We are, however, induced to believe, from several circumstances, that we have transmitted to us but an imperfect sketch of the decision in that case. The brevity with which the case is reported, which we are informed had been argued successively at two terms, by men of the first legal talents, necessarily suggests this opinion; and when we refer to the case of the Cassius, decided but the term preceding, and observe the correctness with which the law applicable to this case, in principle, is laid down in

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the recital to the prohibitions, we are confirmed in that opinion.

But the case itself furnishes additional confirmation. There is one view of it in which it is reconcilable to every legal principle. It appears that, when pursued by the Terpsicore, the Grand Sachem was wholly abandoned by the prize crew, and left in possession of one of the original American crew, and a passenger; that, in their possession, she was driven within our territorial limits, and was actually on shore when the prize crew resumed their possession, and plundered and scuttled her. Supposing

this to have been a case of total dereliction, (an opinion which, if incorrect, was only so on a point of fact, and one in support of which much might to said, as the prize crew had no proprietary interest, but only a right founded on the fact of possession,) it would follow, that the subsequent resumption of possession was tortious, and subjected the parties to damages. On the propriety of the seizure of the Industry, to satisfy those damages, the court give no opinion, but place the application of the proceeds of the sale of this vessel on the ground of consent; a principle, on the correctness of the application of which to that case, the report affords no ground to decide.

But, admitting that the case of the Grand Sachem was decided under the idea that the courts of the neutral can take cognizance of the legality of belligerant seizure, it is glaringly inconsistent with the acknowledged doctrine in the case of the Cassius and of Talbot v. Jansen, decided the term next

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preceding; and in the Mary Ford, decided at the same term with that of the Grand Sachem. The subject has frequently, since that term, been submitted to the consideration of this court, and the decision has uniformly been, that it is a question exclusively proper for the courts of the capturing power.

Sentence affirmed.

20 U.S. 283
5 L.Ed. 454
7 Wheat. 283

The SANTISSIMA TRINIDAD, and the ST. AN DE

March 12, 1822

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APPEAL from the Circuit Court of Virginia.

This was a libel filed by the consul of Spain, in the District Court of Virginia, in April, 1817, against eighty nine bales of cochineal, two bales of jalap, and one box of vanilla, originally constituting part of the cargoes of the Spanish ships Santissima Trinidad and St. Ander, and alleged, to be unlawfully and piratically taken out of those vessels on the high seas by a squadron consisting of two armed vessels called

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the Independencia del Sud and the Altravida, and manned and commanded by persons assuming themselves to be citizens of the United Provinces of the Rio de la Plata. The libel was filed, in behalf of the original Spanish owners, by Don Pablo Chacon, consul of his Catholic Majesty for the port of Norfolk; and as amended, it insisted upon restitution principally for three reasons: (1.) That the commanders of the capturing vessels, the Independencia and the Altravida, were native citizens of the United States, and were prohibited by our treaty with Spain of 1795, from taking commissions to cruize against that power. (2.) That the said capturing vessels were owned in the United States, and were originally equipped, fitted cut, armed and manned in the United States, contrary to law. (3.) That their force and armament had been illegally augmented within the United States.

A claim and answer was given in by James Chaytor, styling himself Don Diego Chaytor, in which he asserted that he was commander of the Independencia, that she was a public armed vessel belonging to the government of the United Provinces of Rio de la Plata, and that he was duly commissioned as her commander; that open war existed between those Provinces and Spain; that the property in question was captured by him, as prize of war, on the high seas, and taken out of the Spanish ships the Santissima Trinidad and the St. Ander, and put on board of the Independencia; and that he, afterwards, in March 1817, came into the port of Norfolk with his capturing ship, where she was received

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and acknowledged as a public ship of war, and the captured property, with the approbation and consent of the government of the United States, was there landed for safe keepting in the custom house store. The claimant admitted that he was a native citizen of the United States, and that his wife and family have constantly resided at Baltimore; but alleged, that in May, 1816, at the city of Buenos Ayres, he accepted a commission under the government of the United Provinces, and then and there expatriated himself by the only means in his power, viz. a formal notification of the fact to the United States consul at that place. He denied that the capturing vessel, the Independencia, was owned in the United States, or that she was fitted out, equipped, or armed, or her force augmented, in the ports of the United States, contrary to law. He denied, also, that the Altravida was owned in the United States, or that she was armed, equipped, or fitted out in the United States, contrary to law; or that she aided in the capture of the property in question. He further asserted, that the captured property had been libelled and duly condemned as prize in the tribunal of prizes of the United Provinces, at Buenos Ayres, on the 6th of February, 1818. He denied the illegal enlistment of his crew in the United States; but admitted that several persons there entered themselves on board as seamen in December, 1816, representing themselves to be, and being, as he supposed, citizens of the United Provinces, or in their service, and then transiently in the United States; and that he refused to receive citizens of this country, and

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actually sent on shore some who had clandestinely introduced themselves on board.

It appeared by the evidence in the cause, that the capturing vessel, the Independencia, was originally built and equipped in the port of Baltimore as a privateer, during the late war between the United States and Great Britain, and was then rigged as a schooner, and called the Mammoth, and was fitted out to cruize against the enemy. After the peace she was converted into a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners, who were also inhabitants of Baltimore, and being armed with twelve guns, constituting part of her original armament, she was sent from that port under the command of the claimant, Chaytor, ostensibily on a voyage to the northwest coast of America, but in reality to Buenos Ayres. By the written instructions given to the supercargo on this voyage, he was authorized, by the owners, to sell the vessel to the government of Buenos Ayres if he could obtain a suitable price. She arrived at Buenos Ayres, having committed no act of hostility, but sailing under the protection of the United States flag during the outward voyage. At Buenos Ayres the vessel was sold to the claimant, and two other persons; and, soon afterwards in May, 1816, assumed the flag and character

of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres, and the claimant made known these facts to the crew, asserting that he had become a citizen of Buenos Ayres, and had received

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a commission to command the vessel as a national ship; and invited the crew to enlist in the same service; and the greater part of them, accordingly, enlisted. From this period, the public agents of the government of the United States, and other foreign governments at that port considered the vessel as a public ship of war, and this was her avowed character and reputation. No bill of sale to the government of Buenos Ayres was produced, but the claimant's commission from that government was given in evidence.

Upon the point of the illegal equipment and augmentation of force of the capturing vessels in the ports of the United States, different witnesses were examined on the part of the libellant, whose testimony was extremely contradictory; but it appeared from the evidence, and was admitted by the claimant, that after the sale at Buenos Ayres, in May, 1816, the Independencia departed from that port under his command, on a cruize against Spain; and after visiting the coast of Spain, put into Baltimore early in the month of October of the same year, having then on board the greater part of her original crew, among which were many citizens of the United States. On her arrival at Baltimore she was received as a public ship, and underwent considerable repairs in that port. Her bottom was new coppered, some parts of her hull were recaulked, part of her water ways replaced, a new head was put on, some new sails and rigging to a small amount, and a new mainyard were obtained; some bolts were driven into the hull, and the mainmast (which had been

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shivered by lightning) was taken out, reduced in length, and replaced in its former station. For the purpose of making these repairs, her guns, ammunition, and cargo, were discharged under the inspection of an officer of the customs; and when the repairs were made, the armament was replaced, and a report made by the proper officer to the collector, that there was no addition to her armament. The Independencia again left Baltimore in the latter part of December, 1816, having at that time on board a crew of 112 men; and on or about the 8th of February following, sailed from the Capes of the Chesapeake on the cruize in which the property in question was captured. During the stay of the Independencia at Baltimore, several persons were enlisted on board her, and the claimaut's own witnesses proved that the number was about thirty.

On her departure from Baltimore, the Independencia was accompanied by the Altravida, as a tender or despatch vessel. This last was formerly a privateer called the Romp, and had been condemned by the District Court of Virginia for illegal conduct, and was sold under the decree of Court, together with the armament and munitions of war then on board. She was purchased ostensibly for one Thomas Taylor, but immediately transferred to the claimant, Chaytor. She soon afterwards went to Baltimore, and was attached to the Independencia as a tender, having no separate commission, but acting under the authority of the claimant. Some of her guns were mounted, and a crew of about twenty-five men put on board at Baltimore. She dropped

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down to the Patuxent a few days before the sailing of the Independencia, and was there joined by the latter, and accompanied her on her cruize.

The District Court, upon the hearing of the cause, decreed restitution to the original Spanish owners. That sentence was affirmed in the Circuit Court, and from the decree of the latter the cause was brought by appeal to this Court.

Feb. 28*th.*

Mr. *Winder*, for the appellant, (1.) argued upon the facts to show that there had been no such illegal outfit or augmentation of the force of the capturing vessel in our ports, as would entitle the original Spanish owners to resitution of the captured property, on the ground of a violation of our neutrality by the captors.

2. He argued that even supposing the claimant, Chaytor, to be a native citizen of the United States, the capture was not invalidated by the circumstance of his commanding the capturing vessel. Being apublic ship of a foreign state, this Court could not, upon its own principles, inquire into her conduct further than to see that she had a regular commission, signed by the proper authorities of that state. The Exchange, 7 *Cranch*, 116. It is perfectly consistent with the law and universal practice of nations for neutral subjects to take commissions in foreign wars. *Vattel, Droit des Gens, l.* 3. *c.* 2 *s.* 13. 14. 16. *l.* 3. *c.* 7: *s.* 228. 230. *Bynk, Q. J. Pub. l.* 1. *c.* 22. *Du Ponceau's Transl p.* 175. This Court has determined that an alien may command a private armed vessel

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of the United States, and cruize against their enemy, though it happens to be his own native country. The Mary and Susan, 1 *Wheat. Rep.* 57. So also the prize ordinance of Buenos Ayres declares, that all officers of commissioned vessels or

privateers belonging to that state, although they may be foreigners, shall enjoy all the privileges of citizens, whilst thus employed. Wheat. Rep. Appx. Note II. 30.

But it may be said that the Spanish treaty of 1795, renders such an act criminal, and all its consequences void, and therefore this Court cannot listen to the claim of a citizen who has thus violated the supreme law of the land.

The answer to this is, that the treaty shows the idea of the contracting parties, that independently of its stipulations, their respective citizens and subjects might take commissions to cruize against each other without violating the pre-existing law of nations. The sole effect of the treaty is, to subject them to be treated as pirates by the opposite party, if it thinks fit. It excludes them from the protection of their own government, leaves them at the mercy of the opposite party, and excuses the government of the offenders from all responsibility to the other for their misconduct. They are not made pirates by the treaty, but only made liable to be considered as such by the party against whom they act. Would not the government in whose service they held commissions, have a right to retaliate, if they were treated as pirates, either by their own government, or by that

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against which they acted; since by the law of nations the belligerent might grant to them as foreigners, and they might accept the commissions?

The treaty operates only between the contracting parties, and cannot interfere with the lawful powers and rights of other nations, under the law of nations; and between the parties, it only operates to give the belligerent, so far as the neutral contracting party is concerned, a right to treat the citizen as a pirate, without complaint from his government. It dispenses the offended party, so far as the other is concerned, from the obligation to observe the rules of civilized warfare, *quoad* its *citizen* thus implicated; but it can have no effect upon the rights of the other belligerent *quoad* the *officer* of that belligerent. The party, whose citizens or subjects they are, is not bound to treat the supposed offenders as pirates, and our Courts cannot so treat them in the absence of an act of Congress. The United States are not bound so to treat or consider them. They are simply bound to leave them to the discretion of Spain, and there the effect of the treaty stops. The prohibition of the treaty has its prescribed peril and effect, and cannot, at least judicially, be extended further. To make the treaty bind the United States to restore a prize made by one of its citizens under a commission from a foreign government would be to make a treaty stipulation between Spain and the United States operate to interfere with the undoubted rights of a third foreign power who is no party to

the treaty. It would abridge and annul the effect of a commission, which, by the unquestioned law of

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nations, he had a right, within his own territory, to grant

The acts of Congress to protect the neutrality of the United States have nothing to do with it, because none of them extend to, or pretend to extend to, the acceptance of a commission in a foreign country by a citizen of this. And the silence of Congress on the subject is a strong legislative exposition of the treaty; for in making provision to preserve the neutrality of the United States generally, and especially in relation to the contest between Spain and her colonies, they have not rendered criminal such acceptance of a commission, and as they have manifested a spirit of some severity on this subject, and are silent on such a case, it is strong evidence that Congress did not feel bound to add any thing to the treaty; since, if they were bound, they would have done so in obedience to this treaty obligation of neutrality as they have done in other cases. Where the law stops, the Courts of justice must stop; *expressum facit tacitum ceassare*. The plain object of the law was, even in cases within it, to affect the offending citizen; not to affect the foreign government who employs him; or, in other words, not to authorize a judicial interference with its belligerent acts. The statute committed to the judiciary all that the legislature intended to be within their competency. The rest it reserved for national adjustment by forbearing to snbmit it to the judiciary. The law must be taken as it is, not expanded by inference. To put a judicial rider upon it, is to legislate. The inference which

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would vacate a capture under the commission would be a supplement to the law, would be to legislate on a distinct subject, *i. e.* the effect of a belligerent act by a foreign state. The law is a restraining law, *in terrorem*, aimed at the citizens only. The inference deals with a third party, a sovereign state, who is not subject to our jurisdiction; and acts in a way which the law does not prescribe; for the law authorizes nothing but the punishment of the individual. If more had been intended, more would, and ought to have been done; for the whole subject was well understood from 1794, to 1819, when the last act was passed. There is no positive municipal rule giving judicial jurisdiction as to such a commission, or any commission, even within the law, with reference to the effect of restoring a prize made under it. Every belligerent state has a right to decide upon the means of annoyance, which it organizes against its enemy within its own territory. If its commission to make war can be subject to ordinary judicial question in a neutral tribunal, where it cannot be heard and cannot condescend to appear, it is not a

sovereign act. But the granting such a commission is the very highest act of sovereignty, and is peculiarly above ordinary judicial control in foreign countries. The legality, the force and effect of the commission itself, must defy ordinary judicial inquiry, or the belligerent can only authorize war so far forth as neutral tribunals shall think fit to suffer it.

A judicial recognition of the legality of the capture in question by a Court of prize at Buenos Ayres would undoubtedly have put the capture out of

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reach of our Court. But the sentence of such a Court is no more a sovereign act, than the granting the commission. It does but ascertain the granting of the commission, and gives to it no new force or validity. The belligerent state is just as much answerable for the wrong done to the neutral state, if any there be, in granting the commission, after the sentence as before. A judicial sentence, in a case of prize, binds for no other reason, than that it is the act of the state to which the Court belongs. That it is a judicial sentence is of no importance. It is the sovereignty of the state, and its right of decision which gives to the sentence its conclusive character, in the view of foreign tribunals: and all this applies equally to the act of granting a commission, within the territory of the belligerent.

All the cases of this class, which have been decided in this Court, turn exclusively upon the fact of an illegal equipment of the capturing vessel within our ports, except that of the *Bello Corrunes*, in which the judgment does indeed refer to the national character of the claimant, Barnes, as repelling his right to claim. 6 *Wheat. Rep.* 125. 169.

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But as the facts of that case will show that it might have been determined on the ground of the illegal equipment of the capturing vessel, without giving a construction to the treaty, or ascertaining the national character of the claimant, all that is said by the learned judge who pronounced the opinion of the Court in that case, on these subjects, may be considered as *obiter dictum*.

3. But the claimant, in the case now before the Court, had ceased to be a citizen, before he accepted the commission, and made the capture in question. He had expatriated himself, and become a citizen of Buenos Ayres, by the only means in his power, an actual residence in that country, with a declaration of his intention to that effect. This act is countenanced by the general usage of nations, and was not forbidden by any law of his own country. By the British law, not only are privateers and merchant

vessels allowed to enlist foreign seamen, but the mere fact of two years service during war makes them Bristish subjects. 5 *Wheat. Rep. Appx. note III*, 130. A resident neutral in a belligerent country is subjected to the disabilities of the country in which he resides, so far as respects the opposite belligerent, and his trade is considered liable to caputre and condemnation was enemy's property. Shall he not then be entitled to the correspondent advantages of his situation? The hostile character is fixed upon him by residence even if he goes to the belligerent country, with the desire of preserving his neutral character. Shall he not then be entitled to all the advantages of that character, when it is his avowed purpose and object to acquire it? Length of time generally decides the character of the residence of a neutral to be belligerent or not: but it is taken merely as evidence of his intention, and if that intention is unequivocally manifested in any other mode, his character is instantly fixed. *Wheat. Dig. Cas. tit. Prize*, IV.

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4. This capture being made by a public ship, which has come into our ports, together with her prize goods, under the express permission of our government, the Court cannot interfere to restore the captured property to the original owners upon the ground that the capturing vessel has committed a violation of our neutrality. The ship itself must certainly be exampt from the local jurisdiction. The Exchange, 7 *Cranch*, 116. And if the ship be exempt, it is difficult to perceive how any other property of the same sovereign, which he has acquired and holds *jure coronae*, can be subjected to the local jurisdiction by being brought into the territory under the same permission. Still less can the prizes made by a ship which is herself exempt from the jurisdiction of the local tribunals be subjected to that jurisdiction. These prizes are as much the property of the sovereign, *jure coronae*, as the ships by which they are taken and brought in.

The illegal augmentation of her force by the capturing vessel in our ports, cannot forfeit the immunity to which she is entitled by the law and usage of nations. Enlistments of men for this purpose, are not presumed to be made with the assent of the belligerent sovereign, and are not to be imputed to him. *Vattel, Droit des Gens, l.* 3. *s.* 15. It is, therefore, an offence which is not to be visited on the sovereign or his property. Reprisals cannot lawfully be made, until application to him for redress has been made. Courts of justice cannot interfere in such a case, because the sovereig cannot condescend to appear in them, and they have no

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regular means of knowing how far he approves of what has been done by his officers. But, upon remonstrance and diplomatic discussion, the whole affair may be heard, and remedies applied fit for the occasion. Judicial decision, if it can interfere at

all, is inflexible; and when the fact is established, must make entire restitution of the captured property, however insignificant may be the augmentation of force by neutral means. Besides, it is bringing into judgment the highest concerns of nations to be determined by the testimony of the basest of mankind. The enlistment of a single seaman on board a single ship of a large squadron, may draw after it the restitution of a whole enemy's fleet. The only safe course then is, to leave matters of this sort to negotiation, or at least not to take cognizance of them in Courts of justice, unless upon the application of the offended state, as in the analogous case of a capture within neutral territory. The Anne, 3 *Wheat. Rep.* 435.

5. But, at all events, the condemnation of the prize goods, which took place at Buenos Ayres, in a Court of the captor, is conclusive to preclude this Court from taking jurisdiction of a question which has already been determined in a competent tribunal.

Mr. *Tazewell*, contra, stated, that three principal errors were alleged by the appellant in the decrees of the Courts below: 1. That the facts assumed by those Courts did not warrant the decrees. 2. That

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the condemnation in the tribunal of prizes at Buenos Ayres precluded the Courts of this country from inquiring into the legality of the capture. 3. That our Courts have no authority to make that inquiry because the facts of the case involve the sovereign rights of an independent state.

As to the first objection, it is not necessary to discuss it until the last is disposed of. Jurisdiction must be shown to exist, before its rightful exercise can be proved. He would, therefore, invert the order of the argument, and examine the last mentioned proposition before the others. It would be shown to be the only question of real difficulty in the cause.

The argument on this proposition concedes to the neutral *sovereign*, or state, the very right which it denies to the neutral *judiciary*. Now, to the belligerent sovereign, the effect is precisely the same, whether the interference with his rights be by the executive and legislative departments, or by the judiciary alone. In either case his rights are examined into, and he may be deprived of them. To the neutral state, also, the effect is the same in both cases, so far as foreign states are concerned; since, in both, the nation is equally responsible for the act done. It is no answer to the reclamation of a foreign sovereign to say, that he has been injured by the judiciary only. To him all the departments of the government make but one sovereignty. This is

represented by the executive, of which the judiciary is regarded but as an emanation. It may be, and undoubtedly is, a matter of great moment to the

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neutral state itself, that its powers be legitimately exercised by those only to whom they have been confided by the municipal constitution. But this is a mere domestic inquiry, in which no foreign state has any concern, nor ought to be permitted to enter. Is it not strange, then, that it should now be presented to us in a litigation between two foreign subjects?

The question being raised, however, it must be discussed; not for the sake of the parties, but of the Court itself. Let us then concede what the argument asserts, and it has no application to the cause. For justice is blind, and knows not of the existence of the sovereign, or of his rights, until made manifest by its own record. Nor will it notice even what its own record may disclose, unless the matter be therein duly and orderly set forth, *i. e.* by proper parties—in proper time—and in proper form. How, then, is this fact of sovereign right to be duly and orderly disclosed, so as to be made manifest to the Courts of justice, and to shut the judicial eyes to every other fact in the cause? This, although apparently a mere technical question, is one of great importance, especially on account of the practice which has been hitherto pursued by the Courts of the United States in cases of this sort. And at the very threshold of the inquiry it is plain, that the sovereign who denies the authority of the Court to decide, must not *answer*. If he does, he voluntarily submits to, nay, invites the exercise of the very authority which he denies can be exerted. His averments, too, may be traversed, and issue being joined on the

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traverse, must be decided in some way; and so his sovereignty denied by judicature. Neither can he plead in *abatement*, or any dilatory exception; for he may be decreed to answer over. Neither may he *protest;* for the question cannot be raised by a naked protest; and if he couples his protest with an answer, if he does not so overrule his protest, his answer leaves him as before. If he adopts the practice pursued in the case of the *Cassius*, United States v. Peters, 3 *Dall.* 123 and *suggests* his exemption upon the record, he will be met, as in that case, by a replication to his suggestion, and it becomes a mere plea in abatement; for whatsoever one party may affirm, the other may deny.

These are the only known modes of *defence*, and none of them can the foreign sovereign adopt, without abandoning the exemption claimed for him by the

argument. What then must he do? He must not defend himself in judicature at all. He must apply to the sovereign of that tribunal where his rights are drawn in question, and refer to his accountability. This sovereign, if he sees fit, will suggest for him; if he does not, he will refuse to do so, and meet the consequences. To a suggestion coming from this quarter there can be no replication; for he who makes it is no party in interest. Nor is proof necessary to establish it; for it comes duly authenticated. Such was the course pursued in the memorable case of the *Exchange*, 7 *Cranch*, 116 where a suggestion of the sovereign rights of the Emperor

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Napoleon was made by the executive government; although proof of the commission of the commander of the vessel was unnecessarily superadded. This is the only proper mode in which the matter of sovereign right can, duly and orderly, be set before the Court. It avoids all the technical difficulties of pleading and practice, and places the matter where, according to the argument, it ought to rest, with the sovereign.

This course has not, however, been adopted here; and therefore the Court will not take judicial cognizance of the fact of sovereign right, involved in the determination of the cause: and the argument insisted on, even if abstractly true, has no application to the cause, as presented upon the record. The matter is reduced to a mere question of practice, settled by the form of the pleadings, which it is now too late to amend.

Suppose, however, it were *res integra*. The Court must contrive some proper form in which subjects of this sort may be brought before it. In adjusting this form, it is a sound and a safe rule to be followed, to attain the object by *known*, rather than by *untried* means; to adhere to ancient forms, as far as may be done; and, if possible, to alter nothing. If this be so, whatever may be the rule adopted by the Court, the case will still be found exposed to the objection before stated: for the record will not show any information derived from *our* sovereign, but the very reverse. It is only important then to examine the question, whether the information of the sovereign or executive government be the proper and only

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standard to which the Court must refer, in matters wherein not our own people, but foreign states are concerned. Whatever the theory may be on this subject, all know that, in point of fact, Courts of justice do and must decide upon the rights of sovereigns, and that even in governments the most absolute. For these Courts must necessarily decide upon the rights of private individuals and corporations, and these are oft-times

so interwoven with the rights of their sovereigns, that to decide upon the one, is to decide upon the other, not only in *form*, but *effect* also. Treaties and war create and destroy rights; and nations as well as individuals, derive their rights from these public transactions, which therefore the tribunals of justice must pass upon. Such, among many others, was the case of the *Amiable Isabella*, where the sovereign rights of Spain and the United States were involved, and were determined by this Court. 6 *Wheat. Rep.* 1, 50. The rights of sovereigns must then be settled by Courts, and may be settled in different modes. This supposition constitutes a part of our complex system of government. Sovereign rights may be settled, not only in the Federal Courts, but in the State Courts: and to guard against the effects of a conflict of opinion in such cases between the different local tribunals, appeals are brought from the State Courts to this Court. It would be in vain, however, to translate a cause here from the State Courts, if this Court might decide it differently from the other departments of the government. This must not be, however. The

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people, although sovereign, can have but one will; and that will must be spoken by all their agents, or our government is a many-headed monster. The question, then, at last results in this: In what department of the government does this will, in relation to *foreign* states, reside? For wherever it does reside, that will must be uttered here, or we shall have two conflicting wills on the same matter. Now, I care not *where* it resides, if it resides any where: and the argument and necessity both prove that it must reside *somewhere*. If then it resides *here*, in this Court, the argument is radically defective: for then it follows that judicature may decide on sovereign rights. And if it resides not here, but elsewhere, it must be communicated from thence hither, and constitute the law of the Court; or our government is a monstrous anarchy. Some mode of communication between the executive government and the judiciary must be contrived. The only doubt is how this communication is to be made. And whatever course may be a proper one, none has been adopted in the present case, and the Court cannot therefore take notice that any sovereign rights of Buenos Ayres are involved in the cause. You cannot know the fact, and must proceed as if it did not exist. This does not impugn judicial independence. The judiciary are not independent of the law. They utter the legislative will of the people, when declared by the legislature: they pursue its executive will when communicated by the executive department. All nations have felt the necessity of some such course; the only question is as to the form, which must depend upon the municipal

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constitution and the practice of each particular country. Thus, in England all rights of prize are originally vested in the crown. Hence, the Courts of Prize take their

law from the King's instructions. The captors cannot proceed to adjudication against the will of the crown. Hence, in the case of the Swedish convoy, the condemnation of the captured property for resistance to the exercise of the right of search was limited to the merchant vessels, although the same penalty would have been applicable to the convoying frigates, had not the crown interposed its prerogative, and from reasons of state, caused the latter to be restored to the foreign sovereign. The Maria, 1 *Rob.* 340.

Heretofore the subject has been examined as a technical question of pleading and practice merely. Let us now examine it as one of evidence. Of whom then is this exemption from judicial investigation affirmed? A sovereign state. But is Buenos Ayres a sovereign state?

This Court has repeatedly decided that it will not undertake to determine who are sovereign states: but will leave that question to be settled by the other departments of the government, who are charged with the external affairs of the country, and the relations of peace and war. Rose v. Himely, 4 *Cranch*, 241. 292. Gelston v. Hoyt, 3 *Wheat. Rep.* 246. 224. United States v. Palmer, 3 *Wheat. Rep.* 610. 634. It may, however, be said that both the judiciary and the executive have concurred in affirming the sovereignty of the Spanish Colonies, now in revolt against the mother country.

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But the obvious answer to this objection is, that the Court, following the executive department, have merely declared the notorious fact that a civil war exists between Spain and her American Provinces; and this so far from affirming, is a denial of the sovereignty of the latter. It would be a *public*, and not a *civil* war, if they were sovereign states . The very object of the contest is, to decide whether they shall be sovereign and independent, or not. All that the Court has affirmed is, that the existence of this civil war gave to both parties all the rights of war against each other. But belligerent rights are not regalian rights. Now, in the case last cited, The United States v. Palmer, 3 *Wheat. Rep.* 635. the Court decided that the seal of this supposed sovereign state might be proved like any other matter *in pais*. If it were really a sovereign state, the seal would prove itself. The more the subject is examined, the more apparent will it be, what confusion and mischiefs must flow from the judicial department assuming the right to acknowledge the existence of her sovereignties, especially in the present mutable state of the world. Cases of depositions and restorations are continually occurring, of revolutions and counter-revolutions, which present the most complicated questions of strict right and political expediency, the determination of which must be left to the other departments of the government.

But if it were true in fact, and well pleaded, that the *res* now in controversy is a sovereign's right; still, it would not be correct to say, the *all* sovereign

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rights are exempt from judicial examination. There must be some exceptions to the universality of the rule. The exemption only applies to the regalian rights of the sovereign; those which are necessary to maintain his faith, dignity, and security, and to none else. Such are his august person, his ministers, his armies and fleets. These are protected from the interference of foreign judicatures, because they are essentially necessary for these purposes; they make up sovereignty itself. And nothing else which is not within the reason, is within the rule of exemption. Suppose a royal stag or horse escapes into a foreign state, and is there sold in market overt as an estray; or suppose the ship of a foreign sovereign is wrecked on our coasts, and a claim for salvage of the materials interposed. Would you stay your hand from a dread of the sacredness of the subject matter? The privilege of sovereignty cannot protect these cases. No authority can be shown to prove it; on the contrary, the authorities are clearly the other way. Thus, all prizes made in war are the property of the sovereign, *jure coronae*, and this, whether the prize be taken by a public or a private ship. But it is not to be argued (in this Court at least) that such prizes may not be taken out of the hands of the captors (whose possession is that of their sovereign) and restored by the neutral tribunal, within whose jurisdiction they may happen to come, if made by *privateers* in violation of neutral territory or of neutral rights. And if so, why may not prizes made by *public* ships be restored under like circumstances? They both come

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within the same reason, and, therefore, should fall within the same exception to the general rule. The rule, then, if true at all, must be limited as I have stated; and if so, it will not apply to the present case. It may, indeed, protect the public ship herself, but not her prize goods. These are not the regalian rights of the sovereign; they are a mere accidental, military possession, which are not indispensably necessary to maintain his faith, dignity, or security.

Again; the argument which asserts exemption for sovereign rights does not confine itself to the rights of a belligerent, but equally applies to all sovereigns, whether in peace or war. But if a wrong doing sovereign may claim this exemption, what becomes of the rights of the injured sovereign? Must he submit, or hold his hand, and ask redress of the offender? Every objection which applies to the one, exists in equal effect as to the other; and if the tort-feasor may not pursue this course, he must not, by his own act, constrain the injured party to adopt it. To guard against this conflict of

dignities, the public law has wisely settled the rule, that each sovereign is supreme at home; all are equal on the high seas, except in war, and then the comity of nations, and the necessity of the case, refers it to the *arbitrium* of the captors. But this rule of comity protects not violators of the neutral territory, within which its sovereign is supreme; for the implied pledge given to a foreign state, of exemption from the local jurisdiction, is violated the moment it infringes our laws, treaties, and sovereign rights. The fiction of extraterritoriality

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only applies to the peaceful observers of this implied pledge. The implication is repelled, and the pledge forfeited by abusing the rights of hospitality and asylum. This exception to the rule is recognized distinctly by the Court in the case of the *Exchange*, 7 *Cranch*, 116 and it was upon this ground that the Court has interfered in the whole class of captures made by means of illegal armaments in our ports. The Divina Pastora, 4 *Wheat. Rep.* 52. and cases collected in note *a. Ib. p.* 65. The question in every one of these cases was not as to the character of the wrong doer, but as to the nature of the act done, and the *locus in quo*, it was committed. No inquiry was ever made whether the capturing vessel was public or private; but only whether our neutrality had been violated. And the principle to be extracted from them all is, that the neutral tribunal may properly restore any prize brought within its territory, which has been made in violation of neutral laws, or rights, or obligations. Within this principle the present case is found; and, therefore, it is not universally true, that the rights of sovereigns are exempt from judicial examination.

The argument we are discussing concedes, that the injured sovereign himself may restore, although it denies the power of making restitution to his Courts. But the effect to both parties is precisely the same, whether the restitution be made by sovereign or Court, as has been already shown. Still, granting that it may be done by the sovereign only;

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who is sovereign here, *quoad hoc*? It must be the judiciary: since wherever individual rights are involved, whether arising under war, or treaty, or municipal regulations, the judiciary in this country must decide. See 3 *Dall.* 13. Where indeed no case is made upon which the judiciary can act, then the executive may interfere, as it did in the commencement of the European war in 1793, in the case of the *Grange*. But even here the genius of our institutions requires, that the preliminary inquiry should be made through the judiciary, which is the proper tribunal to make such examinations, in which private rights are for the most part involved. Such was the course pursued in the

case of *Thomas Nash* alias *Robbins*. The parties, one of whom was the king of Great Britian, could not appear in Court; the executive acted therefore by judicial means, and the facts being judicially ascertained, it proceeded to carry into effect the treaty. Speech of Mr. now Chief Justice) MARSHALL, 6 *Wheat. Rep. Appx.*-

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If then the sovereign must submit to his co-equal sovereign, as the argument concedes, and the judiciary is invested with this portion of sovereignty, the case is clear, and the argument has no application to it. Nor does this reasoning exclude the executive action, but yields to it in every instance where no case is made adapted for judicial determination; and even where such a case is made, the executive may interpose by *suggestion*, by which the Court will be bound as they would by an act of the legislature in a case fit for the exertion of legislative power.

But suppose the judiciary not to be sovereign as to this matter. Yet, whoever be the sovereign, as to it, he need not act directly; but may delegate his power of decision and action to another: still it is the sovereign who acts. If the executive be sovereign, this delegation is effected by *suggestion*, or the want of it, as the case may be. If he means that the judiciary should decide for him in a particular way, he suggests it. But if he is content to take the lead from the judiciary, and to adopt its construction, he declines to suggest. In the latter case, the judiciary acts according to the sovereign will, because he adopts theirs. In the former, the same thing is effected, for the judiciary adopt his. By this means that harmony is produced which can be effected by no other.

But if it be thought that the legislature is the true sovereign, *quoad hoc*, then the legislative will has been distinctly expressed in the Neutrality Act of 1794, c. 226. It is in vain to contend that this statute does not apply to public or national ships. For not only are its terms sufficiently copious to embrace *any* ship, but their context plainly shows that they were designed to apply especially to such ships. Here the learned counsel analyzed the act, in order to show that it extended to public, as well as private armed ships; and insisted that this construction was confirmed by the consideration that both the cases were equally within the mischief intended to be provided against, which was the violation of our own territory, and of neutral relations and obligations. Nor was there any weight in the argument which

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would confine the authority of the Court under the act to captures made within our territorial jurisdiction. For although the 6th section expressly gives cognizance over that class of cases, the history of the law on the subject plainly proves that this was

merely an affirmative position, and was not meant as an exclusion of judicial authority in other cases. The provision was meant to define the territorial jurisdiction of the Union, and to settle a supposed doubt with the Courts, which did not exist in fact. It was therefore merely declaratory of the law in that case, and could not be intended as a restriction upon the general authority of the Courts. If this were not so, what would become of the cases, occurring before this statute was passed? or of the numerous cases since decided, of captures *without* our limits, by means acquired *within* them? This series of adjudications manifestly shows that the Courts exercise their power independently of the statute, the sole effect of which is (of the 6th section at least) to recognize an existing authority in a particular case, and not to limit it to that case only.

But even if this be not so, what is a capture within our waters? Is it not to all legal purposes made within our territory, when the captor is within and the prize without, the potential force being exerted within? or where the actual force is exerted without, by boats sent from within? And if so, it proceeds solely on the ground that the *locus in quo* is to be fixed, not by the place of seizure, which in both the supposed cases is without, but by the source from whence the exerted force proceeds. Consequently, a capture

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made actually on the high seas, by means acquired here, is a capture within our territory.

It is clear then, upon principle, that the property even of a sovereign acquired in war, within a neutral territory, or by means therein illegally obtained, may be subjected to judicature, and restored: and this whether the prize is made by a public or a private cruizer. Nor is the dignity of sovereigns injuriously affected by such a proceeding, which being *in rem*, the sovereign is not constrained to defend himself before the Courts of justice, but may properly apply to the other sovereign for redress, by whose suggestion, duly made, the judiciary must be bound.

That which is thus clear upon principle is equally established by authority. In the history of transactions of this nature, it will be found, that wherever the neutral state interferes to vindicate its own neutrality, no distinction is made whether that neutrality be infringed by a public or a private ship.[a] Both

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France and England restore the property of their subjects found on board of prize ships sent into their ports by the vessels of other powers, and that whether the capturing vessels are public or private. Ord. de la Mar. art. 9, des Prises, 15; 2 Sir L. Jenkins' Life

780. During the beginning of the war of the revolution, the prizes sent into France by the *Alliance* frigate were restored by the tribunals of that country, if the property of her friends. In the case of the Swedish convoy, in the English High Court of Admiralty, the crown declined proceeding against the Swedish frigates, as has been before mentioned; otherwise, Sir W. Scott declared, that he would have condemned

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even those public ships. 1 Rob. 377. But how could he, unless they were subject to judicature? It may be said, that they were regarded as *qua* belligerent, having forfeited their neutral character by attempting a resistance to the right of search. Be it so. Then we may, *vice versa*, condemn a public ship, or her prizes, for unneutral conduct, by which they lose their extra-territorial character conferred on them by a fiction which ought no longer to be regarded than it subserves the purposes of justice. There are numerous examples to show that there is nothing so sacred in the rights of sovereigns as to prevent judicature from dealing with them, both directly and incidentally. In the case of *Duckworth* v. *Tucker*, the sovereign rights of Portugal were determined by the English Court of C. B., in a private controversy between two British Admirals about prize money. 2 Taunt. 33. In the *Canton of Berne* v. *The Bank of England*, that state appeared as an actor in the High Court of Chancery, which had the control of the fund, which the government of Berne laid claim to, as a part of its public treasure. 9 Ves. 347. As to the case of the *Exchange*, in this Court, it must be repeated that it does not go on any extravagant notion of the exemption of sovereign rights from judicial scrutiny; but on the ground of preserving the national faith, and that the ship entered under the pledge of an implied license which she had not forfeited by any misconduct. Had she done so, she

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would have been condemned as unhesitatingly as the most insignificant privateer. It is only necessary to recur to the case of the *Cassius*, a public armed ship of the French republic, and to the words used by the Court respecting that case in the *Invincible*, 1 Wheat. 253, to show that it never has recognized any distinction in this respect between public and private armed ships.

The learned counsel then proceeded to examine the testimony in the cause, to show that it clearly established the fact of an illegal outfit and augmentation of force, by the capturing vessels in our ports; and, lastly, answered the argument attempted to be drawn from the alleged condemnation at Buenos Ayres, by stating, that the decree was not established in proof, and that if it were so, it could not avail as a bar to the present proceedings, as the property was at the time in the custody of our Court,

and had been actually sold by consent of the claimant who now sets up the decree in the foreign tribunal.

Mr. *Webster*, on the same side, (1.) argued, that there was no force in the general objection set up by the captors, that the ship which made the capture being a public ship; we could not examine into her acts, because it would be to interfere with the sovereign rights of the state to which she belongs. He denied that there was any such general principle, and no book, or case, or even *dictum* could be found to

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support it. Judicature deals with sovereign rights perpetually, in our Courts, in England, and in every country, and in every case where the government is a party to the suit. Is it meant that judicature cannot deal with sovereign rights, neither domestic nor foreign? All history shows the contrary. If it were so, no sovereign could come into Court. The great political powers of government, as those of peace and war cannot indeed be submitted to judicial decision; but proprietary interests, in which the public are concerned, are settled every where by the tribunals of justice, as in the familiar instances of inquests of office, and writs of intrusion. So an ejectment may be brought for the crown lands, the most favourite fief. And nothing can be more sovereign than the right of prize, *jure belli;* it is a great branch of the prerogative; yet every body may contest it, and the king must claim, and if he cannot make out a title he must lose it. Any jewel in any king's diadem may become the subject of judicial discussion. The extent and rights of the prerogative are discussed in every Court in England; and all the powers of this government are discussed in this Court, and in all the State tribunals. The government of the United States, and of the States, are sovereign, and cannot be sued; but in a contest between individuals or corporations, the sovereign rights of the Union and the several States may be decided.

Judicature may then deal collaterally with sovereign rights, and wherever the sovereign himself is *actor;* wherever he brings the suit. The true proposition,

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therefore, must be, that the Prince cannot personally be sued in his own Courts, or in foreign tribunals. As to the domestic forum, two reasons are given why the king cannot be summoned or arrested in any civil or criminal suit. The first is, his supereminency; and the second, that justice is administered by him, and in his name.

These reasons do not apply to a foreign country. He has no supremacy there, nor is justice administered in his name. Sovereignty is local; and when the sovereign transcends the limits of his land, he transcends the limits of his prerogative.

The reason why he is not amenable to the foreign tribunal grows out of international law, and does not spring from the municipal code. It is not for want of jurisdiction ample enough to reach him; but that having come into the territory of another sovereign, under his permission, either express or implied, it would be a violation of the public faith to subject his person to any kind of restraint. The same immunity is extended to his ambassador, for the same reason; and to support this immunity, the fiction of extra-territoriality has been invented, and applied to the cases of the army, or navy, or single ship of a sovereign coming into the territory of another. Being there under the license of the local sovereign, they are at liberty to remain and depart unmolested. Not that the foreign sovereignty exerts itself within the territory of another state, but that the local sovereignty is suspended from motives of comity, and a regard to the plighted faith of the nation. The exemption probably extends even to private merchant

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vessels; which proves clearly that it does not rest on any right of sovereignty. But the permission may be withdrawn both as to these, and as to public vessels, if the indulgence be abused to the injury of the power by which it is granted. No neutral nation is *bound* to admit the belligerent ships of war within its waters, unless under treaty stipulations; and it may concede the privilege on such terms and conditions as it thinks fit. The presumption or fiction under which the license was granted ceases, the moment the license is revoked; and the license is revoked as soon as the terms and conditions on which it was granted are violated. Still less can a mere general permission to the ships of a foreign state to come into our waters, be construed into a license to violate our laws, and treaties, and neutral obligations. Nor is it necessary here even to contend that the ship herself is subject to the local jurisdiction. We proceed against her prize goods, found within our territory. It is alleged, that they are held by the right of a foreign sovereign, or under a sovereign, and it is impossible to avoid inquiring into the foundation of this right. It is the inherent vice of the opposite argument, that it concedes this position; and in making that concession it yields the inevitable corollary that this sovereign right is not exempt from judicature.

2. If we proceed then to examine into the foundation of the right, we shall find that the Spanish consul here claims, in behalf of his fellow subjects, their property, which has been taken from them by a cruizer sailing under the flag of the enemy of Spain,

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but equipped in our ports, and manned with our citizens, contrary to our municipal laws and the 6th and 14th articles of our treaty with Spain. The true

interpretation of the 6th article raises our national duty, wherever a capture is made by our citizens of Spanish property, which is afterwards brought within our jurisdiction. We are to endeavour to protect the vessels and effects of Spanish subjects which *shall be within the extent of our jurisdiction* by sea or by land,' as an act distinct from that of using our 'efforts to recover and cause to be restored to the right owners their vessels and effects which *may have been taken from them within the extent of said jurisdiction*.' It is a reciprocal duty of both states, and without invoking the aid of this article, we should find it difficult to maintain our claim upon Spain for the property of our citizens carried into her ports by French cruizers, and condemned by French tribunals within her territory. As to the 14th article, it is pretended that it attaches a mere personal penalty to the offending party, and operates merely to abandon our citizens, who may violate it, to be punished as pirates at the will of Spain. But the mutual prohibition to the citizens or subjects of each power from taking commissions to cruize against the other makes such conduct unlawful to every intent and purpose. The penalty of being punished as pirates is merely superadded as a consequence which would not necessarily have followed from the prohibition without a special provision to that effect. But the invalidity of the captures made under a commission thus unlawfully taken is a necessary

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and inevitable consequence of the prohibition itself. This article cannot therefore be considered as merely monitory: the words are promissory; they express the undertaking of the two governments and their reciprocal duty. Nor is it confined to captures made by private armed vessels. It is true that the first clause of the article speaks of 'any commission or letters of marque, for arming any ship or ships *to act as privateers*.' But in the Spanish counterpart of the second clause, these last words *que obren como corsarios* are dropped, although they are retained in the English. The Spanish counterpart speaks generally of '*patente para armar* ALGUN BUQUE O BUQUES *con el fin de persequir los subditos de S. M. catolica*,' which obviously extends to public as well as private cruizers. As to our municipal laws, they are not confined to acts done within the limits of the United States. They are full of provisions making it unlawful for our citizens (without those limits) to fit out and arm, or command and enter on board of, a foreign cruizer intended to be employed against powers in amity with us. *Act of* 1797, c. 1. *Act of* 1817, *c.* 58. *s.* 2. *Act of* 1818, *c.* 83. *s.* 4.*s* 10. Whether, therefore, the offence in this case was committed within or without the United States, the illegal equipment or augmentation is within the statutes, and consequently the property acquired under it must be restored to the true owners.

3. What gives additional strength to this national obligation, is the fact that the claimant in the present cause, and those for whom he claims as captors,

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are citizens of the United States, who claim a title to property acquired in violation of the laws and treaties of their own country, in a Court of that country.

But it is said that the claimant, Chaytor, has ceased to be a citizen of this country by what is called an act of *expatriation*, (but which ought rather to be called *emigration*,) and has become a citizen of Buenos Ayres. Now it cannot, and certainly ought not to be denied, that men may remove from their own country in order to better their condition, or to avoid civil and religious persecution. But it does not follow that under all circumstances, and for all possible reasons, a person may shake off his allegiauce to the land which gave him birth. The slavish principle of perpetual allegiance growing out of the feudal system, and this fanciful novelty of a man being authorized to change his country and his alle giance at his own will and pleasure, are both equally removed from the truth on this subject. Whatever doubtful cases may be supposed, this much may be affirmed with certainty. that there must be an actual change of the party's domicil, and that this must be done, not merely with the intention of remaining in his adopted country, but it must not be coupled with a design fraudently to evade the laws of his native country. No act whatever of a foreign government can dispense with the allegiance of a citizen, and authorize him to violate our penal code or our treaties with other nations. This is a prior, paramount obligation, which must be first fulfilled, before he assumes any new and inconsistent duties. Even if there had been, in this case, an actual *bona*

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fide change of domicil, *animo manendi*, so as to entitle the claimant to all the privileges of commercial inhabitancy under the law of prize or the revenue laws, it does not follow that he can with impunity levy war against the United States or their friends. And even if it be admitted that he might defend his adopted country, it does not follow that he may attack his native country, or those whom she is bound to protect. Can it be sufficient to legalize such an act that he has made his election, and that the foreign government has ratified it? Is it not manifest that it was done, *cum dolo et culpa*, for no other purpose than to evade and violate our laws? In this respect, it is impossible to distinguish between the neutrality acts, and other laws, such as the statutes of treason, or any other the most intimately connected with the national safety and existence. But it is unnecessary to dwell upon this point, as it is the settled doctrine of this Court, that a citizen of the United States cannot claim in their Courts, the property of foreign nations in amity with them, captured by him in war, even if the capturing vessel be in other respects lawfully equipped and commissioned (The Bello Corrunes, 6 *Wheat. Rep.* 152. 169); and that an act of expatriation cannot be set up to justify such a capture, where

the removal from his own country was with the fraudulent intent of violating its laws. Talbot v. Janson, 3 *Dall.* 133. 153. 164.

Even admitting that foreign armed vessels may, in the absence of any express prohibition, enter our ports for the purpose of refreshment, or of making repairs, and will not thereby be subject to the local

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law and judicature, it does not, therefore, follow that they may make extraordinary repairs so as to be transformed in the species. The implied license may extend to a mere replacement of the original force; but it cannot extend to such an augmentation of the force as would be inconsistent with the neutral character of the power granting the license. It cannot extend to acts done subsequent to the vessel entering the neutral port; in other words, to a violation of the license itself. The vessel may remain in the same condition as she came, but she may not increase her capacity for war by the addition of neutral means, either in munitions or men. Nor does it follow, in any supposable case, that because the capturing ship herself cannot be made answerable to the jurisdiction of the local tribunals for violating the laws and treaties of the neutral state, that her prizes are entitled to a similar exemption. The do not stand on the same principle or reason. The ship of war ought not to be detained from the public service of the sovereign to whom she belongs. Neither his dignity nor safety will permit it. But neither the prize vessels or goods captured by her are necessarily connected with his military power.

5. As to the facts of the illegal equipment and augmentation of the force of the capturing vessels in our ports, they are sufficiently established by the testimony. Although there may be some discrepancies in their evidence as to certain immaterial circumstances; yet, as they all concur in proof of the material facts, and their testimony is uncontradicted even by the claimant's witnesses as to some of the

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most important, they are entitled, in this respect, to credit. Their testimony, taken in connection with the *res gesta*, which are admitted on all hands, satisfies the rule which the Court has laid down in this class of causes, that the fact of illegal equipment in violation of our neutral duties, must be proved beyond all reasonable doubt.

6. Lastly: As to the pretended condemnation at Buenos Ayres. Independent of the objection which has already been stated to it, the question which has been here raised as to the capture having been made by military means obtained within our neutral territory, could not possibly have occurred in the course of the prize

proceedings in the Court of the belligerent state. The goods being confessedly the property of its enemy, and liable to capture and condemnation as prize of war, the plea that the capture was made in violation of our neutrality could not be set up by the Spanish owner. Being an enemy, he had *no persona standi in judicio* for that purpose. The government of the United States must have interposed a claim upon this ground, or have authorized the Spanish claimant to interpose it. Unless this were done, the goods were clearly liable to condemnation as prize of war, as they would be in the analogous case of a capture actually made within the neutral territory itself; where, unless the objection is made by authority of the neutral government, it cannot be made by the enemy owner, who, in his character of enemy, is not injured by it. We need not, therefore, directly impeach the validity of the condemnation at Buenos Ayres, so far as the rights

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of the two belligerents merely are concerned. We only repudiate the claim of one of our own citizens, who comes into our Court, and sets up the foreign sentence, which was obtained by him in fraud of our laws, as an excuse for the violation of those laws. To the Prize Court of Buenos Ayres it was sufficient that, as captor, he had a right to stand upon his commission issued by that state, and to insist upon the condemnation of his prize taken *jure belli*. But in this Court that very commission disables him from claiming any title acquired under if, for reasons which could not be urged in the Prize Court of Buenos Ayres, where the Spanish owner could not appear at all unless by authority of the government of the United States. It is not, therefore, a *res adjudicata*. Nor is the claimant a *bona fide* purchaser of the prize goods, ignorant of the fraudulent and illegal conduct of the party by whom they were captured and sold to him. The claimant, Chaytor, is himself that party, and he can no more set up the sentence of condemnation for his protection, that he can the pretended act of naturalization to cover his crime in confederating with one of the belligerents to violate the laws, and treaties, and most solemn obligations of his own country.

Mr. *D. B. Ogden*, for the appellant, in reply, stated that he should, for the purposes of the argument, take it for granted that the capturing vessel, the Independencia, was in point of fact a public ship belonging to the government of Buenes Ayres. The flag and commission are conclusive evidence of that fact.

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It is contended, on the other side, that the Court is bound to interfere and restore the captured property, to the original Spanish owners, because it is said that, though the rights of a sovereign are involved, yet as he cannot appear in a Court of justice to claim,

these rights must be determined without hearing one of the parties, who is most materially interested in asserting them. And it is said, that the foreign sovereign must state his claim to the executive government, and that it must be brought to the notice of the Court by a suggestion from the latter. So that according to this doctrine, the Courts of this country, could never listen to the complaints of foreign states, who had no minister to represent them here; and their property may be condemned, and their most sacred rights violated, without their being present, or heard. But we never meant to contend, that sovereign rights could not be discussed and determined in a Court of justice, and that this suit could not be maintained, because the sovereign rights of Buenos Ayres might be incidentally drawn in question: but because this was a public armed ship of that state, coming into our waters, with her prize goods, under the express or implied permission of our government; and while here she was exempt from the jurisdiction of the local tribunals.

But we are told that Buenos Ayres has not yet been acknowledged by the government of this country as an independent state; that she is a mere revolted colony of Spain, and her cruizing vessels cannot be entitled to the privileges and immunities of the public ships of an old established sovereignty. The answer to this position is, that

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though the independence of the South American provinces has not yet been acknowledged by our government, the existence of a civil war between these revolted colonies and the mother country has been acknowledged, and this Court has followed the executive government in considering them entitled to all the rights of war against their enemy. Such is the consequence which the writers on the law of nations attribute to a civil war between two portions of an empire. It is assimilated to a public war. They are belligerents in respect to each other; and all other powers, who take no part in the contest, are bound to all the duties of neutrality towards both. Whether, therefore, Buenos Ayres be a sovereign state, in the strict sense of the term is quite immaterial for the present purpose. It is sufficient that she is a belligerent entitled to use against her enemy every species of military means. Among these, are the armed and commissioned ships of war, sailing under the public authority of that country, and admitted into the ports of this, with the same privileges as are enjoyed by the national ships of Spain. Being at war, the colonies are belligerents, and as belligerents they are entitled to all the rights of war, and we are bound to all the correspondent duties of the neutrality we profess to maintain. In the case of the *U. S. v. Palmer* 3 *Wheat. Rep.* 636 this Court lays down the principle that 'when a civil war rages in a foreign nation, one part of which separates itself from the established government, the Courts of the Union must view

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such newly constituted government, as it is viewed by the legislative and executive departments of the government of the United States. If the government of the Union remains neutral, but recognizes the existence of a civil war, the Courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.' Why can they not consider these acts of hostility as criminal? Because war authorizes them, and they are directed by the new government against its enemy? In other words, because they are lawful: And if they are lawful for one purpose, it is difficult to understand how they can be unlawful for any other. If these acts are authorized by the laws of war, they must produce all the consequences of legal acts. They must vest a good title, *jure belli*, in the prizes taken by authority of the new government from its enemy. And that this is the necessary consequence of the principle is apparent from the words used by the Court in the *Divina Pastora*, 4 *Wheat. Rep.* 52 which was itself a case of prize, and where the proprietary interest acquired in war came directly in judgment. The Court there says, that 'the government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the Courts of the Union are bound to consider as lawful those acts, which war authorizes, and which the new governments in South America may direct against their enemy.' Here the question was not, whether the

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existence of the civil war would excuse from the penalties of piracy those who might act under the authority of the new government, but whether a capture made under that authority was valid by the law of nations. So, also, in the case of the *Estrella*, 5 *Wheat. Rep.* 298 of the commission was explicitly recognized by the Court, and of course the authority of the government by whom it was issued was admitted.

In the case now in judgment, it is insisted, on the part of the respondent, that the Court is bound to restore the property to the original Spanish owner, by the true construction of the treaty of 1795. As to the 6th article, it is certainly a very forced interpretation, which makes it imply our duty to restore all Spanish ships and goods which may happen to be found within our territory, although the title may have been changed by a previous capture, *jure belli*, on the high seas. The article is evidently confined to wrongful acts done within our territorial limits. We are 'to endeavour to protect the vessels and effects of Spanish subjects which shall be within the extent of our jurisdiction,' but we are not to restore vessels and effects which have ceased to be Spanish by a lawful capture in war, without the extent of our jurisdiction. Nor have the United States insisted upon such an interpretation of the article as against Spain. We

claim indemnity from Spain for condemnation of our vessels and effects by the French consuls in her ports, because to exercise the authority of a prize tribunal, is the highest act of sovereignty, and Spain having permitted it to be done by foreigners within her territory, it is the same thing as if her

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own national tribunals had inflicted the wrong. The provision in this article is merely declaratory of the pre-existing law of nations, which always considers every sovereign as bound to protect the property of his friends within his territorial jurisdiction, and as responsible for whatever injuries he permitted to be there inflicted upon them. As to the 14th article, it is manifestly confined to privateers, and was not intended to extend to the case of a person entering the public military, or naval service of one of the contracting parties to commit hostilities against the other, and still less to authorize the seizure of a public ship of war or her prizes. This article was evidently intended to abridge a pre-existing right; and that it was a pre-existing right appears from the uniform practice of the whole civilized world. But it is confined in its terms to privateers and letters of marque, and by no fair rule of construction can it be extended to public ships.

Nor is the Court bound to restore, because the claimant, Chaytor, is a citizen of this country, and has violated its laws. Here the learned counsel entered into a minute analysis of the Neutrality Acts, to show that they were merely penal against the party, or the capturing vessel. But here the penalty would begin and end with the person of the captor, for the capturing vessel being a public ship belonging to a foreign state, she could not be forfeited without its being considered an act of reprisals in the nature of war against that state. Once being admitted with her prizes into our ports, she may remain as long as the executive government thinks proper to allow it

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In this respect there is no distinction between the public ship herself and her prizes. Here the prize goods taken by her from the enemies of the state, under whose commission she was cruizing, were landed and deposited in the custom house stores, by the express permission of the government. It is novel doctrine that prize ships and prize goods are no part of the regalian possessions of a sovereign. They may be, and frequently are, absolutely necessary to his safety. They may be the principal means by which he is enabled to carry on the war, and a chief source of his revenue. How is it, then, that they are not equally exempt from the jurisdiction of the local tribunals, with the guns, and spars, and rigging of the ship herself, which may be landed in the same manner for the purpose of making repairs? Are they not brought within the territory under the same permission, express or implied? If an army had a right of passage

through a neutral territory, can it be doubted that it would extend to its military chest, and its booty previously acquired? If the fiction of extraterritoriality will protect the ship, which is the principal, why will it not protect the prize goods which are the incidents? The permission to enter may, indeed, be qualified by any condition the neutral state thinks fit to impose; such, for example, as that contained in the law of France, that prize goods which may have been taken from the subjects of the state or its allies should be restored. But this Court has expressly repudiated that principle in the case of

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the *Invincible*, 1 *Wheat. Rep.* 238 and it is for the executive and legislative departments to impose such restrictions as they think fit upon the admission into our ports of armed vessels, public or private, with their prizes. In the case of the *Exchange*, which has been so often referred to, the Court in summing up its opinion says: 'It seems, then, to be a principle of public law, that national ships of war, entering the ports of a friendly power open to their reception, are to considered as exempted by the consent of that power from its jurisdiction.' The ship herself being exempted from the local jurisdiction, she remains a part of the territory of her own country, and if she brings in with her prize ships, or prize goods, they are to be considered as in the possession of that country. That they are so, is apparent from the established doctrine of this Court, that prize ships or goods, though lying in a neutral territory, may be condemned in a competent Court of the belligerent state, by whose cruizers they were captured. Indeed, the writers on the law of nations expressly state the privilege of bringing in their prizes to be a part of the permission. *Vattel, Droit des Gens, l.* 3. *c.* 7. But how can this be if the immunity does not extend to every thing on board? Here the goods were taken *jure belli*. Whether they are good prize depends upon the adjudication of the captor's Court, which is the only competent tribunal to determine that question. They are in his possession for the purpose of proceeding to adjudication,

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even while they are locally within the neutral territory. Either the condemnation at Buenos Ayres is a sufficient adjudication, or not. If it be so, then the appellant is entitled to the goods under it. If it be not, still he is entitled to the possession of the goods, in order that he may proceed against them in the most regular manner, which he has been hitherto prevented from doing by this very suit.

March 12*th.*

Mr. Justice STORY delivered the opinion of the the Court.

Upon the argument at the bar several questions have arisen, which have been deliberately considered by the Court; and its judgment will now be pronounced. The first in the order, in which we think it most convenient to consider the cause, is, whether the Independencia is in point of fact a public ship, belonging to the government of Buenos Ayres. The history of this vessel, so far as is necessary for the disposal of this point, is briefly this: She was originally built and equipped at Baltimore as a privateer during the late war with Great Britain, and was then rigged as a schooner, and called the Mammoth, and cruized against the enemy. After the peace she was rigged as a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners, (who are inhabitants of Baltimore, and being armed with twelve guns, constituting a part of her original armament, she was despatched from that port, under the command of the claimant, on a voyage, ostensibly to the Northwest Coast, but in reality to Buenos Ayres.

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By the written instructions given to the supercargo on this voyage, he was authorized to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag, during the voyage. At Buenos Ayres the vessel was sold to Captain Chaytor and two other persons; and soon afterwards she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres; and Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres; and had received a commission to command the vessel as a national ship; and invited the crew to enlist in the service; and the greater part of them accordingly enlisted. From this period, which was in May, 1816, the public functionaries of our own and other foreign governments at that port, considered the vessel as a public ship of war, and such was her avowed character and reputation. No bill of sale of the vessel to the government of Buenos Ayres is produced, and a question has been made principally from this defect in the evidence, whether her character as a public ship is established. It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause introduced, to corroborate it. The only point is, whether supposing them true, they afford satisfactory evidence of her public character. We are of opinion that they do. In general the commission of a public ship, signed

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by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the Courts

of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the government. If we add to this the corroborative testimony of our own and the British Consul at Buenos Ayres, as well as that of private citizens, to the notoriety of her claim of a public character; and her admission into our own ports as a public ship, with the immunities and privileges belonging to such a ship, with the express approbation of our own government, it does not seem too much to assert, whatever may be the private suspicion of a lurking American

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interest, that she must be judicially held to be a public ship of the country whose commission she bears.

There is another objection urged against the admission of this vessel to the privileges and immunities of a public ship, which may as well be disposed of in connexion with the question already considered. It is, that Buenos Ayres has not yet been acknowledged as a sovereign independent government by the executive or legislature of the United States, and, therefore, is not entitled to have her ships of war recognized by our Courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports under the law of nations must be considered as equally the right of

each; and as such must be recognized by our Courts of justice, until Congress shall prescribe a different rule. This is the

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doctrine heretofore asserted by this Court, and we see no reason to depart from it.

The next question growing out of this record, is whether the property in controversy was captured in violation of our neutrality, so that restitution ought, by the law of nations, to be decreed to the libellants. Two grounds are relied upon to justify restitution: *First*, that the Independencia and Altravida were originally equipped, armed, and manned as vessels of war in our ports; *Secondly*, that there was an illegal augmentation of the force of the Independencia within our ports. Are these grounds, or either of them, sustained by the evidence?

If the cause stood solely upon the testimony of the witnesses who have been examined on behalf of the libellants, we should have great hesitation in admitting the conclusions which have been drawn from it. The witnesses, indeed, speak directly and uniformly either to the point of illegal equipment, or illegal augmentation of force within our ports. But their testimony is much shaken by the manifest contradictions which it involves, and by declarations of facts, the falsity of which was entirely within their knowledge, and has been completely established in proof. It has been said, that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true under circumstances; but it is a doctrine which can be received only under many qualifications, and with great caution. If the circumstances

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respecting which the testimony is discordant be immaterial, and of such a nature, that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and Courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno, falsus in omnibus*. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the

difference between right and wrong, between truth and falsehood? The contradictions in the testimony of the witnesses of the libellants have been exposed at the bar with great force and accuracy; and they are so numerous that, in ordinary cases, no Court of justice could venture to rely on it without danger of being betrayed into the grossest errors. But in a case of the description of that before the Court, where the sovereignty and rights of a foreign belligerent nation are in question, and where the exercise of jurisdiction over captures made under its flag, can be justified only by clear proof of the violation of our neutrality, there are still stronger reasons for abstaining

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from interference, if the testimony is clouded with doubt and suspicion. We adhere to the rule which has been already adopted by this Court, that restitution ought not to be decreed upon the ground of capture in violation of our neutrality, unless the fact be established beyond all reasonable doubt.

But the present case does not stand upon this testimony alone. It derives its principal proofs altogether from independent sources, to the consideration of which the attention of the Court will now be directed.

The question as to the original illegal armament and outfit of the Independencia may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws on our national neutrality. If captured by a Spanish ship of war during the voyage she would have been justly condemned as good prize, and for being engaged in a traffick prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bona fide* sale, (and there is nothing in the evidence before us to contradict it,) there is no pretence to say, that the original outfit on the

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voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid.

The more material consideration is as to the augmention of her force in the United States, at a subsequent period. It appears from the evidence, and, indeed, is admitted by Captain Chaytor, that after the sale in May, 1816, the Independencia sailed

for Buenos Ayres under his command, on a cruise against Spain; and after visiting the coast of Spain, she put into Baltimore early in the month of October of the same year, having then on board the greater part of her original crew, among whom were many Americans. On her arrival at Baltimore, she was received as a public ship, and there underwent considerable repairs. Her bottom was new coppered, some parts of her hull were recaulked, part of the water-ways were replaced, a new head was put on, some new sails and rigging to a small amount, and a new mainyard was obtained, some bolts were driven into the hull, and the mainmast, which had been shivered by lightning, was taken out, reduced in length, and replaced in its former station. In order to make these repairs, her guns, ammunition and cargo were discharged under the inspection of an officer of the customs, and when the repairs were made, the armament was replaced, and a report made by the proper officer to the collector, that there was no addition to her armament. The Independencia left Baltimore in the latter part of December, 1816, having then on board a crew of 112 men; and about the 8th of January following, she sailed from the Capes of the Chesapeake on the cruise on which

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the property in question was captured, being accompanied by the Altravida, as a tender, or despatch vessel. It will be necessary, hereafter, to make more particular mention of the Altravida; but, for the present, the observations of the Court will be confined to the Independencia. It is admitted by the claimant, that during her stay at Baltimore, several persons were enlisted on board the Independencia, and his own witnesses prove that the number was about thirty.

The first observation that occurs on this part of the case is, that here is a clear augmentation of force within our jurisdiction. The excuse offered is, that the persons so enlisted, represented themselves, or were supposed to be, persons in the service of Buenos Ayres. Of this, however, there is not the slightest proof. The enlistment of men being proved, it is incumbent on the claimant to show that they were persons who might lawfully be enlisted; and as the burden of proof rests on him, the presumption necessarily arising from the absence of such proof is that they were not of that character. It is not a little remarkable that not a single officer of the Independencia has been examined on this occasion. They are the persons who, from their situation, must have been acquainted with the facts; and the total omission to bring their testimony into the cause can scarcely be accounted for but upon a supposition extremely unfavourable to the innocence of the transaction.

Another observation which is drawn from the predicament of this case is, that if, as the claimant asserts,

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the original voyage to Buenos Ayres, was a mere commercial adventure, the crew must have been composed principally of Americans or residents in our country. They enlisted at Buenos Ayres on board the Independencia, as officers and seamen for the purposes of warfare, and there is no evidence in the case as to the length of time of their engagements, or of the place where the crime was to terminate. Why are the documents on this subject, for documents must exist, in the possession of the claimant; why are they not produced? If the cruise was to terminate at Buenos Ayres, or at a specific period of time, the fact would have a material bearing on the merits of the cause. Yet though the pressure of this point must, at all times, have been forcibly felt, there has not, up to the present moment, been the slightest effort to relieve it from the darkness which thus surrounds it. Under such circumstances, the natural conclusion would seem to be that the crew were to be discharged, and the cruize to terminate at Baltimore. This was their native or adopted home, the place where they first embarked on board the Mammoth, and that to which most of them must be supposed solicitous to return. The conduct of the vessel indicated the same intent. She underwent general repairs, some of which could hardly be deemed of great necessity, and must have been induced by the consideration that Baltimore was a port peculiarly well fitted for naval equipments. During the repairs (a period of two months) the crew were necessarily on shore; and it is scarcely to be supposed that they were held together by

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any common bond of attachment, or that they had so far lost the common character of seamen as not to be easily led into some other employment or enterprise, which should yield immediate profit. What proof, indeed, is there that the same crew which came to Baltimore sailed again in the Independencia on her new cruise? It is stated only as hearsay by one or two of the claimant's witnesses, who had no means, and do not pretend to any means of accurate knowledge of the fact. If true, it might have been proved by the officers of the ship, by the muster roll of the crew, and by the shipping articles; and these are wholly withdrawn from the cause, without even an apology for their absence. It would certainly be an unreasonable credulity for the Court, under such circumstances, to believe that the actual augmentation of force was not far greater than what is admitted by the party, and that there was either an innocence of intention or act in the enlistments. The Court is, therefore, driven to the conclusion, that there was an illegal augmentation of the force of the Independencia in our ports, by a substantial increase of her crew; and this renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an illegal increase of her armament.

If any doubt could be be entertained as to the Independencia, none can be as to the predicament of the Altravida. This vessel was formerly a privateer, called the Romp, and was condemned for illegal conduct by the District Court of Virginia; and under the decree of the Court, was sold, together with the armament

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and munitions of war then on board. She was purchased ostensibly for a Mr. Thomas Taylor, but was immediately transferred to Captain Chaytor. She soon afterwards went to Baltimore, and was attached as a tender to the Independencia, having no separate commission, but acting under the authority of Captain Chaytor. Part of her armament was mounted, and a crew of about twenty-five men were put on board at Baltimore. She dropped down to the Patuxent a few days before the sailing of the Independencia, and was there joined by the latter, and accompanied her on a cruise in the manner already mentioned. Here, then, is complete evidence from the testimony introduced by the claimant himself of an illegal outfit of the Altravida, and an enlistment of her crew within our waters for the purposes of war. There is no pretence that the crew was transferred to her from the Independencia, for the claimants own witnesses admit that a few only were of this description. The Altravida must be considered as attached to, and constituting a part of the force of the Independencia, and so far as the warlike means of the latter were increased by the purchase, her military force must be deemed to be augmented. Not the slightest evidence is offered of the place or circumstances under which the enlistment of the crew took place. It consisted, according to the strong language of the testimony, of persons of all nations; and it deserves consideration, that throughout this voluminous record, not a scintilla of evidence exists to show that any person on board of either vessel was a

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native of Buenos Ayres. We think, then, that the fact of illegal augmentation of force, by the equipment of the Altravida, is also completely established in proof.

What, then, are the consequences which the law attaches to such conduct, so far as they respect the property now under adjudication? It is argued on the part of the libellant, that it presents a *casus foederis* under our treaty with Spaiu. The sixth and fourteenth articles are relied upon for this purpose. The former is in our judgment exclusively applicable to the protection and defence of Spanish ships within our territorial jurisdiction, and provides for the restitution of them when they have been captured within that jurisdiction. The latter article provides, that no subject of Spain 'shall apply for, or take any commission or letter of marque for arming any ship or ships to act as *privateers*,' against the United States, or their citizens, or their property, from any

prince or state with which the United States shall be at war; and that no citizen of the United States 'shall apply for, or take any commission or letters of marque, for arming any ship or ships to act *as privateers*' against the King of Spain, or his subjects, or their property, from any prince or state with which the said king shall be at war. 'And if any person of either nation shall take such commission or letter of marque, he shall be punished as a *pirate*.' In the Spanish counterpart of the treaty, the word 'privateers' in the first clause has the corresponding word 'corsarios;' but in the second clause, no such word is to be found. But it is obvious

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that both clauses were intended to receive, and ought to receive, the same construction; and the very terms of the article confine the prohibition to commissions, &c. to *privateers*. It is not for this Court to make the construction of the treaty broader than the apparent intent and purport of the language. There may have existed, and probably did exist, reasons of public policy which forbade an extension of the prohibition to public ships of war. It might well be deemed a breach of good faith in a nation to enlist in its own service an acknowledged foreigner, and at the same time subject him by that very act, and its own stipulations, to the penalties of piracy. But it is sufficient for the Court, that the language of the treaty does not include the case of a public ship, and we do not perceive that the apparent intention or spirit of any of its provisions, justifies such an interpolation. The question, then, under the Spanish treaty, may be dismissed without further commentary.

This view of the question renders it unnecessary to consider another which has been discussed at the bar respecting what is denominated the right of expatriation. It is admitted by Captain Chaytor, in the most explicit manner, that during this whole period his wife and family have continued to reside at Baltimore; and so far as this fact goes, it contradicts the supposition of any real change of his own domicil. Assuming, for the purposes of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country, as to which we give no

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opinion, it is perfectly clear, that this cannot be done without a *bona fide* change of domicil under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. It is unnecessary to go into a farther examination of this doctrine; and it will be sufficient to ascertain its

precise nature and limits, when it shall become the leading point of a judgment of the Court.

And here we are met by an argument on behalf of the claimant, that the augmentation of the force of the Independencia within our ports, is not an infraction of the law of nations, or a violation of our neutrality; and that so far as it stands prohibited by our municipal laws the penalties are personal, and do not reach the case of restitution of captures made in the cruize, during which such augmentation has taken place. It has never been held by this Court, that an augmentation of force or illegal outfit affected any captures made after the original cruize was terminated. By analogy to other cases of violations of public law the offence may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruize, the doctrine of this Court has long established that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character

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of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. It does not lie in the mouth of wrongdoers, to set up a title derived from a violation of our neutrality. The cases in which this doctrine has been recognized and applied, have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported: More especially as no inclination exists on the part of the Court to question the soundness of these decisions. If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own Courts or the Courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our Courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent

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for Congress to apply at its pleasure the proper remedy.

It is further contended by the claimant, that the doctrine heretofore established has been confined to cases of captures made by privateers; and that it has never been applied to captures by public ships, and in reason and policy ought not to be so applied. The case of the *Cassius*, in 3 *Dall. Rep.* 121., has been supposed at the bar to authorize such an interpretation of the doctrine. That was the case of a motion for a prohibition to the District Court to prohibit it from exercising jurisdiction on a libel filed against the Cassius, a public armed ship of France, to obtain compensation in damages *in rem*, for an asserted illegal capture of another vessel belonging to the libellants on the high seas, and sending her into a French port for adjudication, as prize. The libel alleged that the Cassius was originally equipped and fitted for war in a port of the United States contrary to our laws, and the law of nations. But there was no allegation that she had been originally fitted out by her present commander, or after she became the property of the French government. The principal question was, whether our Courts could sustain a libel for compensation *in rem* against the *capturing vessel* for an asserted illegal capture as prize on the high seas, when the prize was not brought into our ports, but was carried into a port *infra proesidia* of the captors. The Court granted the prohibition; but as no reasons were assigned for the judgment, the only ground that can be gathered, is that which is apparent on the face of the writ of prohibition,

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where it is distinctly asserted, that the jurisdiction in cases of this nature exclusively belongs to the Courts of the capturing power, and that neither the public ships of a nation, nor the officers of such ships are liable to be arrested to answer for such captures in any neutral Court. The doctrine of that case was fully recognized by this Court in the case of the *Invincible*, (1 *Wheat R.* 238.;) and it furnishes a rule for the exemption of a public ship from proceedings *in rem*, in our Courts for illegal captures on the high seas, in violation of our neutrality; but in no degree exempts her *prizes* in our ports from the ample exercise of our jurisdiction.

Nor is there in reason or in policy any ground for a distinction between captures in violation of our nemtrality by public ships, and by privateers. In each case the injury done to our friend is the same; in each the illegality of the capture is the same; in each the duty of the neutral is equally strong to assert its own rights, and to preserve its own good faith, and to take from the wrongdoer the property he has unjustly acquired, and reinstate the other party in his title and possession which have been tortiously devested. This very point was directly asserted by this Court in its judgment in the causes of the Invincible. Mr. Justice JOHNSON there said, 'as to the restitution of prizes made in violation of neutrality, there could be no reason suggested for creating a

distinction between the national and the private armed vessels of a belligerent. Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerent rights, her own dignity and security

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require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her it is immaterial in whom the property of the offending vessel is vested. The commission under which the captors act is the same, and that alone communicates the right of capture, even to a vessel which is national property.' We are satisfied of the correctness of this doctrine, and have no disposition to shake it. In cases of violation of neutral territorial jurisdiction no distinction has ever been made between the capture of public and private armed ships; and the same reason which governs that, applies with equal force to this case.

An objection of a more important and comprehensive nature has been urged at the bar, and that is, that public ships of war are exempted from the local jurisdiction by the universal assent of nations; and that as all property captured by such ships is captured for the sovereign, it is, by parity of reasoning, entitled to the like exemption; for no sovereign is answerable for his acts to the tribunals of any foreign sovereign.

In the case of the *Exchange*, (7 *Cranch*, 116.) the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire.

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But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels. To be sure, a foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoy a

personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation. But there is nothing in the law of nations which forbids a foreign sovereign, either on account of the dignity of his station, or the nature of his prerogative, from voluntarily becoming a party to a suit in the tribunals of another country, or from asserting there any personal, or proprietary, or sovereign rights, which may be properly recognized and enforced by such tribunals. It is a mere matter of his own good will and pleasure; and if he happens to hold a private domain within another territory, it may be that he cannot obtain full redress for any injury to it, except through the instrumentality of its Courts of justice. It may therefore

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be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction of himself or his Courts: and that the exceptions to this rule are such only as by common usage, and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would indeed be strange, if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. We are of opinion that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws.

The last question which has been made at the bar, on which it is necessary to pronounce an opinion, is as to the effect of the asserted condemnation of the

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property in controversy, at Buenos Ayres, during the pendency of this suit. Assuming, for the purpose of argument, that the condemnation was regularly made, and is duly authenticated, we are of opinion that it cannot oust the jurisdiction of thie Court, after it had once regularly attached itself to the cause. By the seizure and possession of

the property, under the process of the District Court, the possession of the captors was devested, and the property was emphatically placed in the custody of the law. It has been since sold, by consent of the parties, under an interlocutory decree of the Court, and the proceeds are deposited in its registry, to abide the final adjudication. Admitting, then, that property may be condemned in the Courts of the captor, while lying in a neutral country, (a doctrine which has been affirmed by this Court,) still it can be so adjudicated only while the possession of the captor remains; for if it be devested, in fact, or by operation of law, that possession is gone which can alone sustain the jurisdiction. *A fortiori*, where the property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign Court can, by its adjudication, rightfully take away its jurisdiction, or forestall and defeat its judgment. It would be an attempt to exercise a sovereign authority over the Court having possession of the thing, and take from the nation the right of vindicating its own justice and neutrality.

Upon the whole, it is the opinion of the Court that the decree of the Circuit Court be affirmed, with costs.

[a] *Lee on Capt.* 116. 121. 123. edit. of 1803. 'In the year 1654, a captain of a *Dutch man-of-war* met with an English ship at sea, running into the port of Leghorn, and seized her even when she was coming to anchor; the Duke of Tuscany complained of this to the State General, but without redress. He, however, showed his resentment of it by *condemning the ship which had taken the Englishman.' p.* 121.

This book, (*Lee on Captures*,) which is called in the preface, 'an enlarged translation of the principal part of Bynkershoek's *Quoestiones Juris Publici*,' is in fact little more than a very poor translation of that treatise. In the original text of Bynkershoek, it by no means appears that it was a *public* ship which had taken the Englishman in a neutral port. His words are: 'Ex factis, quae postea inciderunt, etiam haec videntur probasse Ordines Generales; quum enim anno 1654, *Navarcha Hollandus* navem Anglicam, in mari deprehensum et ad portum Liburnensem fugientem, occupasset, etiam tunc, cum navis Anglica jam funem in terram projecerat, Dux quidem Tusciae ea de re questus est ad Ordines Generales, sed nequicquam questum esse legimus. Vide tamen, an non ipse dux id postea vindicaverit; publicata nempe nave, quae opportunitatem proebuerat occupandae istius Anglicae. (*Q.J. Pub. l.* 1. c. viii. *p.* 64. *Edit. Lugd. Batav.* 1752.) which Mr DUPONCEAU, in his elegant and accurate translation, thus renders: 'From facts which afterwards took place, the States General appear to have approved thus much; for when in the year 1654, a *Dutch commander* met an English vessel on the high seas, and pursued her flying into the port of Leghorn, where he took her at the moment she was coming to anchor, the Grand Duke of Tuscany complained of it to the States General, but we read that he complained in vain. He, however, afterwards, took satisfaction by condemning *the Dutch vessel* that had

made the pursuit and occasioned the capture of the English one.' *Dupenceau's Bynk. p.* 63.

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Fifield *versus* The Insurance Company of the State of Pennsylvania.

Supreme Court of Pennsylvania.

CERTIFIED from the Court at *Nisi Prius.*

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Gibbons and *G. W. Biddle,* for plaintiffs in error.

E. Spencer Miller and *B. Gerhard,* for defendants in error.

The opinion of the court was delivered by WOODWARD, C. J.

This was an action of covenant upon a marine policy of insurance, issued 24th November 1860, for one year, upon the plaintiff's interest, valued at $3000, in the brig John Welsh, valued at $12,000. The perils insured against were the *seas, fires, pirates, rovers, assailing thieves, jettison, &*c., and the language of the excepting clause in one of the provisoes was "that the said company shall not be liable for any claim for or loss by *seizure, capture, or detention,* or the *consequences of any attempt thereat."*

The brig sailed from Philadelphia, in May 1861, to Trinidad de Cuba, and there took in a cargo of sugar and sailed thence for Falmouth, England. On the 6th July, being about two hundred and fifty miles from the Nantucket shoals, she was captured by a stranger vessel, which floated French colours when first seen, but which ran up the secession flag before the capture, and which proved to be the privateer Jeff Davis, cruising under letters of marque issued by authority of the so-called Confederate States. The Jeff Davis subsequently captured the Enchantress, and afterwards her crew were themselves captured and brought to Philadelphia, where, under the name of William Smith and others, they were indicted, tried and convicted, but not sentenced, for piracy, in the Circuit Court of the United States. Their offence was laid as committed against the Enchantress, not the John Welsh. By direction of the President of the United States they were subsequently exchanged with the Confederate States as prisoners of war.

Upon this very brief statement of the leading facts of this case, the question arises whether the loss of the John Welsh is to be regarded as a piratical loss or a capture *jure belli.* The circumstances of her capture were fully detailed on Smith's trial, and such acts of depredation and robbery were shown as would constitute the crime of

piracy, unless the commission under which they were committed was such as to take away their piratical character. In passing upon this question we are authorized and requested by counsel on both sides to make use of the printed

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report of Smith's trial, and of "the history of the times." It appears from the evidence on Smith's trial, that the Congress of the Confederate States had authorized the President of that so-called government to issue, to private armed vessels, letters of marque and general reprisal, and that in pursuance of such authority, commissions and instructions had been issued to the crew of the Jeff Davis, and that she was sailing under this authority when the John Welsh was captured. These instructions pointed to a war on the commerce of the United States alone, and enjoined the strictest regard to the rights of all neutral powers.

A pirate is usually defined as *hostis humani generis,* but a more accurate description of the offence of piracy is that it is robbery or forcible depredation upon the sea, *animo furandi.* It is usually contrasted with captures *jure belli,* as in the case of The United States *v.* Klintock, 5 Wheat. 150. The distinction between privateering and piracy is the distinction between captures *jure belli* under colour of governmental authority and for the benefit of a political power organized as a government *de jure* or *de facto,* and mere robbery on the high seas committed from motives of personal gain, like theft or robbery on land. In the one instance the acts committed enure to the benefit of the commissioning power, and in the other to the benefit of the perpetrators merely. By the Constitution of the United States, Congress is authorized to define and punish piracies and felonies committed on the high seas, and several Acts of Congress have been passed upon the subject from 1790 down to 1861. See Brightly's Digest of U. S. Statutes. Privateering, on the other hand, has in all our history been claimed and defended as lawful warfare on public enemies. It is the substitute for enormous naval establishments. It was largely practised in our revolutionary struggle, is expressly recognized in the Federal Constitution, and when the principal maritime powers of Europe declared at the Congress of Paris in 1856, that "privateering is and remains abolished," we refused to accede to the declaration, and the state papers of the time, from the pens of General Cass, our minister to France, and of the late Judge Marcy, then secretary of state, contain the most unanswerable arguments against the surrender of our right of privateering. As late as the 3d March 1863, Congress authorized the President to issue letters of marque and reprisal "in all domestic and foreign wars."

Thus strongly is the distinction marked in our jurisprudence between piracy and privateering, and the question is to which of these heads this case belongs. If the

Jeff Davis was not a privateer she was a pirate, and if she was a privateer she was made so by the commission she bore. The legal effect of that commission, therefore, must depend upon the *status* of the Southern

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Confederacy. That it is a government *de jure,* no man who is faithful to the Constitution of the United States will for a moment contend. But is it not a government *de facto?*

I do not find this kind of government sharply defined in any writers on public law, but I suppose that any government, however violent and wrongful its origin, which is in the actual exercise of sovereignty over a territory and people large enough for a nation, must be considered as a government *de facto.* Vattel tells us that any nation which governs itself under what form soever without any dependence on foreign power, is a sovereign state. And our American ideas will accept from foreign nations no other authentication of the right to rule, than the fact of ruling. General Jackson, in his message of December 1836, in setting forth the uniform policy and practice of this government to recognize the prevailing party, in all foreign disputes, told Congress that "all questions relative to the government of foreign nations, whether of the old or new world, have been treated by the United States *as questions of fact only."* And this sentiment has been repeated numberless times in our state papers. There is no doubt, therefore, that the Federal Government is accustomed to concede, not only belligerent rights, but civil authority also, to governments *de facto.*

Nor does it appear that an interval of peace is essential to the constitution of a government *de facto,* as was argued. The time of recognising a new power is decided by each existing government for itself, and it may be delayed by the fact that the new power has had no peace, and a season of peace may be indispensable also to consolidate its administration; but where, as here, the inquiry relates merely to the *existence* of the new power, it would be very difficult to say that it did not exist, because it did not exist in peace. To make war is one of the highest attributes of sovereignty, and quite as demonstrative evidence of vital existence as deeds of peace. The original thirteen states confederated in 1777, but did not achieve peace until 1783, and during those six years were in constant war, yet who doubts now — who ever did doubt — that in all that interval they were a government *de facto?*

The "history of the times" tells us how the so-called government of the Confederate States came into existence. Certain states having acceded to the Federal Union with other states under a constitution, perpetual and irrepealable, except by common consent, did in 1860 and 1861, without the consent of the other states, and in

flagrant violation of the Federal compact, secede from that Federal Union and confederate together under the name of the Confederate States of America, and set up over themselves, in a written constitution, a general government, whose seat or capital is the city of Richmond, and whose asserted jurisdiction

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is co-extensive with the territories of the seceded states. I have never seen their constitution, but I understand it resembles our own in many points, and that it establishes all the departments and functionaries of a regular republican government. It is a very unquestionable part of the history of the times that this government has carried on war, offensive and defensive, for more than three years, and that its belligerent rights have been recognised by the principal states of Europe, though, as a civil power, it has not obtained recognition by any of the nations of the earth.

Now, when we find such a government actually exercising sovereignty over a territory larger and a people more numerous than those of our original thirteen states, is it possible that, if the *status* of that government must be declared, anything less can be said of it than that it is a government *de facto?*

Obvious as the answer to this question may seem to be, it encounters, nevertheless, this serious difficulty. If secession did not dissolve the Union, as to the seceded states, and place them beyond the pale of the Constitution, then they are still under the Constitution, which in its tenth article declares that "no state shall enter into any treaty, alliance, or *confederation; grant letters of marque and reprisal,* coin money, emit bills of credit," &c. &c. How can they be a *de facto* government any more than a government *de jure* under the Constitution of the United States? How can two sovereignties co-exist for the same purposes, any more than two magnitudes can occupy the same space at the same time? The Federal Government and the state governments, both sovereign in their respective spheres, can co-exist over the same people, because governmental purposes and powers are divided between them, and so long as they exercise only the powers which they respectively possess under the Constitution, they move in harmonious orbits. Thoughtless men sometimes allege that people cannot be subject to two sovereignties, and thence infer that state sovereignty is a doctrine subversive of the just authority of the Federal Government; but if they would look upon their children, who are subject to one sovereignty at home and to another in school, they would see the riddle solved, and would learn how governments, existing for different purposes and clothed with different powers, may both be sovereign to the extent of their respective powers and to the advantage of those who are subject to both jurisdictions. But the Confederate Government exists for the *same purposes,* within the seceded states, for which the Federal Government was established, and hence the

inconsistency. The one must displace the other. If the Federal Government, who alone has power under our constitution to issue letters of marque and reprisal, still exists in the seceded states, however its functions may be hindered and suspended, I see not

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how the government of the Confederate States can have power to issue letters of marque and reprisal. It is a governmental power expressly lodged with the Federal Government, and unless secession has had the effect to withdraw it, there it exists still in all the plenitude and exclusiveness of the original grant.

The legal consequences of secession, in this particular, have not been distinctly and authoritatively declared. Sometimes secession is treated as a nullity, and the acts and ordinances of secession are ignored. According to this view the Southern States are still integral portions of the Federal Union, and all that has happened within them is mere insurrectionary resistance of the constitution and laws of the United States. If this be so, it must follow that the United States is the supreme government over the seceded territory, for its appropriate purposes, both *de jure* and *de facto* — its functions indeed temporarily suspended in certain districts, but its existence unimpaired. This view seems to me as fatal to the *de facto* pretensions of the Confederate States as to the rightfulness of their dominion. Assuredly they have no right to issue letters of marque and reprisal, if another government, clothed with the exclusive right, exists among them.

The other view of secession is that it was a revolution which took the seceded states entirely out of the Union, and made them, in respect to the Federal Government, foreign states. In the language of a distinguished Congressional leader, "having organized a distinct and hostile government, they have by force of arms risen from the condition of insurgents to the position of an independent power *de facto* — the Constitution and Union are abrogated so far as they are concerned, and, as between two belligerents, they are under the laws of war and the laws of nations alone."

These are the two views of secession on which the public men of the country divide, and between which some of them oscillate. Which shall the judicial mind adopt? I answer, that view, if it can be ascertained, which the political departments of the Federal Government have adopted. Not that the judiciary is ever, upon principle, to surrender its independence of judgment to the executive and legislative departments, but, since the foreign relations of the Federal Government are wholly intrusted to the President and Congress, the judiciary must accept them, just as they have been recognised and established by the President and Congress. It is only from the acts and declarations of these departments that we can know, judicially, what governments exist,

and what rights we concede to them. This rule of decision was recognised by Ch. J. Marshall, in United States *v.* Palmer, 3 Wheat. 634, and in Foster *v.* Nielson, 2 Peters 307, and was very distinctly reasserted by Mr. Justice Grier, in the Prize Cases, 2 Black 670.

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But even upon this principle it would be very difficult so to generalize the various, discrepant, and sometimes inconsistent measures that have been taken against the rebellion as to enable us to declare whether the President and Congress regard the seceded states within or without the Union. Fortunately such a generalization is not necessary for the purposes of this particular case, because we have a fact here which is decisive of this case, however inconclusive it might prove in a larger application in connection with other facts. I allude to the fact that, after the conviction of the crew of the Jeff Davis for piracy in a court of justice, the President interposed and restored them to the authorities of the Confederate States. The depredations upon the Enchantress, for which they were convicted of piracy, were the same in character and legal effect as those committed against the John Welsh. The capture of one vessel was no less piratical than the other. Guilty of piracy, the President might have pardoned them for reasons of state, but he did not — he treated them as public enemies, and thus, in this instance, recognised the belligerent rights of the power that sent them forth, and the validity of the commission under which they sailed. No declaration could be more emphatic that they were not pirates, and because it came from that department to whom it is our duty to look for a definition of our relations with all surrounding powers, whether friends or enemies, we accept it and follow it instead of the judicial proceeding which resulted in the conviction of piracy.

I am very far from wishing to deduce too large inferences from this executive act, and am careful to make no *general* application of it. I would not infer from it alone, that the President meant to recognise the Southern Confederacy even as a government *de facto,* nor that he considered secession a revolution that placed the states outside of the Union, and I have no doubt that as a measure of policy it was dictated by motives of prudence and humanity; but in its bearing upon this particular case I cannot doubt that it was a recognition of the authority under which the Jeff Davis sailed. If all other vessels sailing under the same authority should be considered piratical, nay, if this very cruiser should hereafter be so considered and treated, yet, for the time present, and as to the transaction now under investigation, I must regard the capture of the John Welsh as a capture *jure belli* and not piratical. That deference which is due to the constituted authorities of the country demands this conclusion. And the reasonings of the Supreme Court of the United States in the Prize Cases, 2 Black 670, of this court in Chester's Case, 7 Wright 492, and of the Supreme Court of

Massachusetts, in Dole *v.* The New England Ins. Co., MS., as well as the debates in the House of Lords upon the President's proclamation of blockade of 19th April 1861, as given in the notes to Lawrence's last

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edition of Wheaton's International Law, pp. 248-255, all tend to support this conclusion.

That I may, if possible, preclude all misunderstanding, I repeat that I do not place this conclusion upon the evidence of the recognition by our government of the general belligerent rights of the Confederate States, much less upon my own private views of the effect of secession, which I have not undertaken to set forth in this opinion, nor upon those of any member of this bench, but I place it upon the deliberate and well-considered act of the President in exchanging the crew of the Jeff Davis as prisoners of war — an act which, whatever its general effect, carries conviction to my judicial understanding that that crew must in this case be regarded as privateers and not as pirates, and hence that the loss of the John Welsh was a "capture" within the excepting clause of the policy, and not a loss by "pirates, rovers, and assailing thieves."

The judgment is affirmed.

THOMPSON, J.

I had prepared an opinion in this case coming to the same conclusion with the Chief Justice; but his opinion covers the whole ground taken by me, and his presentation is so much more satisfactory, that I forbear doing more than giving my concurrence in his opinion and his conclusions.

Concurring opinion by STRONG, J.

I concur with my brethren in affirming the judgment given in this case, though I am not prepared to adopt all the reasons they assign for the affirmance. In my opinion the case does not call for a discussion of some of the questions which have been debated, and I think it better to confine myself to those matters that are necessarily involved. I shall endeavour to do so, and as briefly as possible.

The action, as it appeared at Nisi Prius, was covenant upon a policy of insurance, dated November 24th 1860, by which the defendants insured the plaintiff for one year from the 23d day of December 1860, in the sum of $3000, upon the brig John Welsh, valued at $12,000. The contract was in one of the ordinary forms of a peace policy. The clause descriptive of the perils insured against was as follows: "Touching the

adventures and perils which the said insurance company are contented to take upon them in this voyage, they are of the seas, fires, pirates, rovers, assailing thieves, jettison, barratry of the master or mariners, unless the assured be owner or part owner of the vessel (embezlement and illicit trade excepted in all cases), and all other perils, losses, or misfortunes that have or shall come to the detriment or damage of the said vessel, freight or property, or any part thereof." Then followed a proviso not necessary now to be

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noticed, and a second in these words: "And provided also that the said company shall not be liable for any claim for, or loss by seizure, capture, or detention, or the consequences of any attempt thereat." The effect of this proviso was to restrain the generality of the description of perils against which the defendants undertook to insure. It introduced an exception, and exempted the insurers from all liability for losses arising from any of the enumerated or non-enumerated causes before mentioned, if, within the understanding of the parties, they were seizure, capture, detention, or consequences of any attempt thereat.

The vessel insured left Philadelphia in May 1861, took aboard a cargo of sugar at Trinidad de Cuba, and sailed thence in June, 1861, for Falmouth, in England. On the morning of the 6th of July, in that year, she fell in with a strange brig which at first hoisted French colours, but afterwards ran up the secession flag and compelled her to come to. She was then boarded by armed men from the strange vessel, her papers were demanded, plundered of what the strangers thought proper to take, and taken posession of as a prize. A prize crew was put on board, her own crew was removed to the strange vessel, and the captured vessel sailed away and has never since been heard from. The brig which made the capture proved to be the Jeff Davis, and was then cruising under letters of marque issued in pursuance of pretended authority of the so-called Confederate States. After the capture of the John Welsh, the Jeff Davis captured another vessel called the Enchantress, and her crew were themselves subsequently captured, brought into the port of Philadelphia, indicted for piracy, tried and convicted. The offence was laid as having been committed against the Enchantress. No sentence was adjudged after the conviction, but by direction of the President of the United States the accused persons were exchanged as prisoners of war.

It is out of this state of facts that the question for our decision arises. Was the loss of the John Welsh to the assured, a loss by piracy, or a loss by capture within the meaning of the policy of insurance?

That, under the Acts of Congress, the forcible seizure of the vessel on the high seas by the officers and crew of the Jeff Davis and taking her out of the possession of her owners, was an act of piracy, is too clear for denial, and I do not understand it to be seriously controverted. Whether it was piracy at common law depends upon the answer to be given to another question, which is, whether the letters of marque under which the Jeff Davis sailed were available to change the character of the acts done by her crew, and give to them a legal significance, which, without the letters, they would not have had. But I apprehend this case is not to be determined by any answer that may be given to the question whether the capture of the John Welsh was an act of piracy, as

defined by our Acts of Congress, or piracy according to the laws of nations. If the loss was caused by seizure, or capture, it matters not whether the capture was lawful or unlawful, made by a recognised belligerent *jure belli,* or made without any legitimate authority, even by a pirate. The defendants are not liable on this policy for any loss by capture of any description, though it may be called by another name. Had they insured against capture, they would have been equally responsible whether the capture was rightful or wrongful, *jure belli,* or *contra jurem belli,* whether made by a public enemy or a neutral power, or made without any pretence of right at all. See Arnould on Insurance, vol. 2, 808; Marshall on Insurance 394. And when losses by capture are excepted from the risk assured, the excepted losses must equally extend to captures of every description. Now I admit that the word "capture," when used in a policy of marine insurance, most frequently presents the idea of a seizure by a government, a recognised member of the family of nations. Such seizures are much more numerous than all others, and they are very common when the country is at war, or when war exists between two other nations. The clause by which underwriters assume the risk of captures is peculiarly appropriate to war policies, and is not found in peace policies, unless introduced negatively to limit liability to the assured. But the authorities show that wherever used, the meaning of the word "capture," in a policy is not confined to forcible seizure of property on the high seas by the act of governments, and to lawful taking by belligerents. It is not the character of the agent, but the nature of the thing done, which determines whether the act is a capture. Such are the definitions given in the best elementary treatises, and such are the decisions of the courts. A very large number of these definitions are collected by Chief Justice Bigelow in the opinion of the Supreme Court of Massachusetts in Dole *et al. v.* The New England Mutual Insurance Company, 6 Allen 373. I shall not cite them at large, but I refer to them as cited in that case. They show incontestably that in policies of insurance the word "capture" means any forcible taking out of the possession of an owner, whether lawful or not, by whomsoever the act is committed, and that it includes a piratical taking, as well as one made by a

government, or *jure belli.* I speak of capture unqualified, as it is used in the exceptions made in the policy issued by these defendants. If, as is often the case, it be described as a capture by kings, princes, and people of governments, the construction is more limited. The decisions of the courts also sustain the definitions given by the elementary writers. Assurers have been held liable on their policies assuming the risk of capture when the taking of the subject insured was made not by a government, either *de facto* or *de jure,* nor by any belligerent. And in some well-considered

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cases it has been held not essential to a capture that the taking should be by external force. In McCargo *v.* The New Orleans Insurance Co., 10 Robert (La.) 202, the loss of a slave cargo by insurrection of the slaves was held to be covered by an insurance against "capture." That was an undoubted case of piracy, but it was also capture. In Powell *v.* Hyde, 5 Ellis & Blackburne 607 (85 Eng. Com. Law Reps.), goods were warranted "free from capture and seizure, and the consequences of any attempt thereat." The risks insured against were enumerated as "of the seas, men-of-war, fire, enemies, pirates, jettisons, letters of marque and countermart, surprisals, taking at sea, arrests, restraints, and detainment of all kings, princes, or people of what nation, condition, or quality whatsoever." The British vessel insured passed within gunshot of a Russian fort, and was fired into and sunk, when there was no war between Great Britian and Russia. It appeared to the court from all the facts that the object of the Russians was to detain the ship. The arrest was without right and without any governmental authority. Yet it was held that the exception introduced by the warranty was not confined to legal capture, but that an illegal seizure was within both the enumerated perils and the exceptions. Hence the insurers were ruled not liable. Lord Campbell declared as his opinion that the word "capture," in the warranty, was not confined to lawful capture, but included any capture in consequence whereof the ship was lost to the assured. And in Kleinwort *v.* Shepard, 5 Jurist N. S. 863, where the question was, whether the taking of a vessel by mutinous coolie passengers was a capture within the meaning of a warranty "free from capture or seizure," Lord Campbell declared that such a warranty is not confined to war risks, or belligerent seizures, and added, "we clearly think it would extend to a capture or seizure by pirates."

Such being the extent of the meaning of the word capture, when used in policies of insurance, as well as in common language, it must be obvious that in this policy the parties cannot be held to have intended an insurance against any such taking as that by which the John Welsh was lost to the plaintiff. Let it be that the taking was an act of piracy, both under the Act of Congress and at common law. It was more. The underwriters undertook against such piracies only as were not captures. In the light of the cases referred to, as well as in the light of common sense, the seizure of the John

Welsh had all the essentials of a capture. The history of the times, which by agreement has been made part of the evidence, shows that after the policy was issued to the plaintiff, a number of the states belonging to the Federal Union attempted to withdraw from it, adopted pretended ordinances of secession, confederated together under the forms of a new government, and agreed to a written constitution that made

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provision for executive, legislative, and judicial departments, similar in many respects to those created by the Constitution of the United States. It is also a fact that this pretended government went into operation, that it has enforced obedience to its authority over large regions of country and over many millions of people; that it has by force excluded temporarily the operation of the laws of the United States; that its courts are the only courts which in large districts attempt to hold sessions; that it levies and collects taxes, raises armies, borrows money, and does all the acts which are done by legitimate governments. It is also a fact that this confederacy has, since the month of April 1861, been carrying on a war of large proportions against the government of the United States, and that our own government has in many ways recognised the contest as a civil war. I think it would be affectation to deny that the contest which has been raging for more than three years is a war, not an external but a civil war. What then is this thing, thus carrying on a war, subjecting millions of men to its formally-organized power, and excluding by force the operation of any other laws than its own? A government *de jure* it certainly is not. All its acts are in gross violation of right. It is nowhere a recognised government. It has never been admitted into the family of nations. But though it is not a rightful government, does it not exist as a government *de facto?* Is it not in fact performing the functions of a government? I am not now inquiring whether our government, or any other is to be affected by any of its acts, or whether it can confer any authority which we must recognise. The question now is, as to the existence of a fact, not what will be the consequence if the fact be conceded. I cannot doubt that these revolting states, confederated as they have been, claiming and enforcing authority, as they have done, are to be regarded as a government *de facto.* This is not conceding to them any rights as a government, not even the right to carry on war either on sea or land. Nor do I think they are any less a government *de facto,* because they have had no interval of peaceful existence. If they have effectually excluded the rightful government, though the exclusion be but temporary, I cannot see that their continuing to carry on a war alters the fact that they do claim, exercise, and enforce governmental authority over large bodies of people and extensive districts of country. Nor do I perceive that they are any the less a government *de facto* because the geographical boundaries of the district over which their power is exclusively felt are not well defined. It is not essential to the existence of any government, either rightful or

usurping, that it be possible to trace accurately the line of division between the territory over which it claims to exercise dominion, and the territory of an adjoining power. There is more than one government now in

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existence recognised as such, the territory of which it is impossible to define.

I repeat that though the Confederate States are a government *de facto,* it does not follow that they have any rights as such, or can confer any authority which we or any other nation are bound to recognise. The admission of existence in fact is no concession of right. But the fact is important in determining whether the taking of the John Welsh was a capture. The vessel was taken under an authority derived from this power, pretending to be a government. It matters not that the taking was justified by no law, not even by those of war. As has already been said, it is not essential to a capture that it be made by any right. Many seizures have been held captures that had no pretence or justification, and some that were afterwards disavowed. What other difference can there be between a seizure made by such a power as the Confederate States, and a seizure by a recognised government, except this, that the one may be lawful, and the other cannot be? I cannot bring my mind to doubt that the taking of the John Welsh in the manner in which she was taken, and under the direction or authority of this *de facto* government, though it was an usurpation, was a capture within the meaning of the defendant's policy, and hence it was a risk which they did not assume. And such was manifestly the understanding of the parties. The one exacted and the other paid no premium for anything more than such hazards as exist in time of peace. The risks common in time of war the defendants were not asked to assume, but they did undertake to indemnify against acts of pirates, not amounting to captures. It is one thing to insure against the acts of rovers, plunderers and freebooters on the seas, assailants who act in small bodies, who are unsupported by any considerable force, and whose assaults are less probable because the world is at enmity with them, and quite another thing to insure against the acts of a government in form, fitting out privateers and carrying on war. The hazard of loss in the one case is far less than in the other. And the latter risk is not diminished by the fact that the war is an unjust one, and that those in arms against the government have no right to make the capture. Now it was the extent of the hazard that the parties sought to fix by the language of the policy. They could not have used more fit words to negative responsibility for such an act as was the seizure of the John Welsh, than those they have employed in the excepting proviso.

For these reasons I am of opinion the judgment should be affirmed.

Concurring opinion by READ, J.

The question in this case is whether piracy in the

sense in which it is used in this policy was committed by rebels, sailing in a rebel vessel, with a rebel commission, and under a rebel flag. In discussing this question, it is to be recollected that the authorities cited relate almost exclusively to what foreign nations may consider as the law of nations by which they may regulate their conduct, in relation to the legitimate government and its rebellious subjects or citizens. They do not govern the present case, which arises between the parent government and its rebellious children.

My opinion is, that as regards the United States, all these ordinances of secession are null and void, and that the so-called Southern Confederacy is an entire and complete nullity. The country and the people embraced by this unholy rebellion are simply in a state of rebellion and are rebellious citizens, but at the same time they are enemies, and may be treated as such. They may be tried as traitors and pirates, and may under the laws of the United States be convicted and punished as such, and no man or nation could complain of it as an unjust or illegal act. This is the strict law, and therefore when the citizens of the United States who committed this depredation and robbery on the high seas, were tried and convicted as pirates by the Circuit Court of the United States, no one could dispute the justice and validity of the proceedings. But when a rebellion assumes such gigantic proportions as the present one, the lawful government cannot from motives of policy and humanity act upon strictly legal principles, but must *ex necessitate rei* adopt so much of the practice of civilized warfare, as would prevent indiscriminate slaughter, and the infliction of unnecessary pain and hardship. This leads necessarily to exchange of prisoners, whether on land or sea, the government waiving its legal rights, without in any manner recognising the rebel leaders, or their organization, but constantly denying them to be a government *de facto* or *de jure,* or as possessing the powers to issue letters of marque and reprisal, or to fit out privateers, or armed vessels, or to make captures, or to establish prize courts which could condemn as legal prizes the vessels captured by their cruisers. Lord Coke's description of war is very apposite: "so when by invasion, insurrection, rebellion, or such like, the peaceful course of justice is disturbed and stopped, so as the courts of justice be as it were shut up, *et silent leges inter arma,* then it is said to be time of war." All rebellion or insurrection is in reality war, and it becomes more evidently such, when it brings hundreds of thousands of men into the field. Still it is only a rebellion, and the citizens of the rebellious portion are only rebellious citizens, over whom the government possesses not only all its legal rights, but all those powers which a state of war confers upon it. This I think was the view taken in the discussion

of the constitutionality of the draft law. It was still a rebellion.

In the policy of insurance in this case, the word pirates is used in the sense known to the commercial world, and we know that in any foreign country, it would not be considered as applicable to such captors as those who took this vessel. Can we therefore put a different construction upon it, in a commercial instrument, governed by general commercial law? Here was a rebel cruiser, not committing a single act of robbery, but capturing vessels under rebel authority, and we cannot say that this is piracy in the sense in which it is understood by the world at large.

If this be so, then the exception of capture applies, and relieves the insurance company from liability.

I have written a separate opinion because I did not wish to be misunderstood, as to the reasons which have induced me, contrary to my first impressions, to concur in the judgment of the court. I am answerable only for my own grounds of decision, as my brethren are for theirs.

Concurring opinion of AGNEW, J.

This case comes before us upon a marine policy, taken upon a vessel called the John Welsh. The crew of the Confederate privateer Jeff Davis boarded the John Welsh on the high sea, putting the crew of the latter in fear, and taking them off. They plundered the vessel of property on board, and carried her away. The witness, speaking of the affair, said: "They were pirates, they robbed me on the high seas." These acts are piracy, either under the laws of nations, or of Congress. Two questions arise — 1. Whether the letters of marque of the Jeff Davis, and the nature of the war in which she was engaged, divest these acts of their piratical character. 2. Whether it was a *capture* within the true meaning of this term, as used in the policy.

The public history of the country is admitted — the secession of the Southern States, their confederacy, organization of a government, rebellion, and issuing letters of marque — that the Jeff Davis, sailing under letters of marque as an armed privateer, captured the Enchantress, after boarding the John Welsh, and some of her crew were tried and convicted of piracy for this act, in the Circuit Court of the United States at Philadelphia, but not sentenced; the President taking them out of civil custody and exchanging them as prisoners of war.

To avoid qualification and circuity, I shall use the terms Confederate Government, and President, without any admission of their rightful character.

Was the act of capture of the John Welsh divested of its piratical character by the commission under which the Jeff Davis

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sailed? This question is solved by an answer to another — would the letters of marque protect from a conviction for piracy? A response to it has been judicially rendered by Justices Grier and Cadwalader, in the conviction of the crew of the Jeff Davis for piracy. But I reply, they would not protect, unless the Confederate Government is one *de jure* or *de facto.* To say that it is one *de jure,* is to admit the right of secession, which no one concedes. To say it is one *de facto,* is to admit that the Union is dissolved, and that the seceding states have in fact accomplished independence, and can thereby protect their adherents, under the law of nations, from punishment for treason and piracy, and can pass title to property by capture *jure belli.* In view of the nature of our government, and of the facts in the case, the latter cannot be admitted, and should have no countenance from the court.

The United States are a nation, as to all the powers vested in them by the Constitution. It is immaterial as to the terms used to designate the government, National or Federal; it is the nature of the powers bestowed which must determine their national character. These powers, whether exercised by Congress, the President, or the Supreme Judiciary, are performed *in solido* throughout the whole territory of the United States, without regard to state boundaries. All acts of the government, whether relating to foreign or domestic affairs, falling within the domain of the conferred powers, are characterized by unity; and therefore belong to a single nationality. Without a destruction of this national unity, there can be no government set up within the United States either *de jure* or *de facto,* with power to make war, grant letters of marque, &c.

The Constitution takes away the slightest pretext for secession, confederation, and the exercise of any of the war powers. A state cannot by itself, or by confederation with others, establish any government with these forbidden powers.

"No state shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money," &c.

"No state shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war unless when actually invaded, or in such imminent danger as will not admit of delay." Sect. 10, Art. 1.

I hold, therefore, that secession and confederation are nullities, and heartily agree with the Chief Justice *in this view* of our affairs that it is as fatal to the *de facto*

pretensions of the Confederate States as to the rightfulness of their dominion; and that the United States is the supreme government, both *de jure* and *de facto,* over the seceded territory, its functions indeed temporarily suspended in certain districts, but its actual existence continued

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everywhere within its rightful jurisdiction, and therefore necessarily excluding within the same limits, all other sovereignties.

And in view of the facts of public history, I must emphatically deny that secession has accomplished "revolution;" that confederation has acquired "the position of an independent power *de facto,"* or that "the Constitution and Union are abrogated so far as they (the seceding states) are concerned," leaving them "under the laws of war and of nations alone."

State conventions, ordinances of secession, confederation of states, organization of a form of government, and the taking up of arms against the United States, do not abrogate the Constitution, or work actual dissolution of the Union. Such acts are revolutionary in their *tendency,* but do not constitute successful revolution, or accomplish *de facto* independence. They have produced insurrection and civil war, and called out the constitutional means of suppression and redress, but have not displaced the Federal jurisdiction. Resistance of authority suspends for a period the exercise of governmental functions, but the constant and progressive use of the means of suppression forbids the idea of the destruction of governmental authority. The restoration has been progressing successfully, until now, the Federal jurisdiction is reasserted within large tracts in every state within the territory of the attempted Confederacy.

Abstractly from other facts, it would be true, that a government in the actual exercise of sovereignty over a people and a territory as large as the original thirteen states, and under a written constitution, exercising the war power as well as civil functions, would have a *status,* not less than a government *de facto.* But the application of this test to the Confederate Government, omits these essential features — that the territory, though so large, is but a part of the entire territory of one nation; and that the population, though so numerous, is but a portion of one people; that their constitution is but a compact of states, disqualified from confederating, and overridden by a higher constitution; that the bastard progeny of this void compact is not in the exercise of exclusive sovereignty over this fraction of the territory and people of the nation; and that the true government is still supreme, *de jure* and *de facto,* exercising its sovereignty

within the entire circle of the Confederacy, occupying important portions, and commanding positions, in the territory of every state.

The true idea of a *de facto* government is, that it in *fact* represents a *people* or nation as such. It may be a usurpation, but *it,* and not another, actually exercises the authority of the nation. A rebellion or attempt at revolution by a portion of a people, taking the form of a government, but leaving the true government still *in esse,* active and successful in asserting

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its authority, does not constitute a *de facto* government; for the reason that it in no sense represents a nation or exercises its sovereignty. It lacks distinctness and completeness of separation. The body of men who set up the Confederate Government are not a people or nation in the proper sense of distinctness or complete separation. They are a combination of persons, but possess no authority as a *de facto* government, whose commissions will protect. The point is not what the Confederate Government affects to be, but what it is. Granting it a form of government, the fact remains; it is not in the exercise of exclusive sovereignty; it does not represent a distinct, separate, independent nationality. The question is — What is the value of this combination? This is the very pivot of the discussion; the inquiry being, what authority exists in the letters of marque to protect.

Secession bears no resemblance to the American Revolution. Then the colonies were actually and territorily separated from the mother country; had declared independence, and set up a government which in fact represented the entire people, and exercised their national authority. Then there was distinctness, separateness, exercise of executive sovereignty, and actual ouster of the legitimate government. Secession has none of these. In the former case there was a *de facto* government; in the latter there is not.

But have the political departments of our government conceded a *de facto* status to the Confederate Government? Here I must pause to notice the fallacy of any argument which, presenting a single alternative between the continued Federal sovereignty, and a substitution of Confederate sovereignty, by means of revolution and dissolution, and alleging as a fact, the admission of the latter by the political departments of the Federal Government, brings as the proof of it, the alleged concession of *belligerent rights.* The yielding of certain temporary benefits to rebels in arms, to moderate the rigours of war — a condition produced by the violence of force — differs essentially from the concession of a *de facto* governmental status to the rebels themselves — a concession demanding, according to the presented alternative, an

admission of sovereignty. The substitution of the expression "belligerent rights," in order to draw the inference from their concession, that the Federal Government, therefore, regards "secession as a revolution which dissolved the Union," leads to error. Belligerent rights arise from a state of war, and not necessarily from any governmental *status.* Civil war may exist without separation, or distinct sovereignty. It begins between members of the state, and the government, opposed in its own domain, does not concede successful revolution or separate sovereignty, by awarding belligerent rights to the rebels. A state

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of civil war undoubtedly exists, and a corresponding necessity to treat the rebels according to the usages of civilized warfare; but it does not follow that this is a concession of a *de facto* status to the government under which the rebels prosecute their rebellion. The Federal Government, on the contrary, has uniformly and persistently denied it. Excepting the exchange of prisoners, and the application of the law of prize to Federal captures of vessels violating the blockade, not a solitary governmental act has been pointed to, as a recognition of the Confederate status; and these, it will be shown, fail of the purpose aimed at.

I have examined all of the proclamations of the President, beginning with that of the 15th of April 1861, and all the principal laws of Congress, and have not found a single executive or legislative act which concedes a governmental status to the Confederacy. The whole ground of legislation has been aimed to "suppress insurrection" — "punish treason and rebellion" — "seize and confiscate the property of rebels," and "prevent correspondence with rebels." The only Act of Congress in which I have noticed any mention of the Confederate Government is that "to prevent correspondence with rebels;" which terms it "the present pretended rebel government."

What is it to tell us that the crew of the Jeff Davis were exchanged as prisoners of war, when all the proclamations of the President, all his orders, and the very war he is waging to subdue the rebels, teaches us that he has not for an instant acknowledged their power; when all the enactments of Congress have aimed at continued authority over their persons, property, and territory. When and in what way has any department of our government conceded to the Confederacy a position outside of the Constitution and Union, and the possession of the actual governing power within any point of the territory of the Union? If we have exchanged prisoners, it was but the exercise of humanity to loyal citizens, and not a concession to a separate government. If we have blockaded their ports and applied the law of prize to Federal captures, one was but as a means of warfare, and the other a concession to the rights of neutrals.

Is it the fact that the rebels levy war, which confers this status? War neither abrogates the Constitution, nor dissolves the Union. But war levied must be met by war. This war must be governed by civilized usages, and where neutrals may be affected must be conducted so as to preserve their rights, and maintain our peace with other nations. An exchange of prisoners simply grows out of a state of war, and its effect as an act, can rise no higher than its producing cause. If war, the cause, does not *ipso facto* confer the assumed status, clearly exchange, the mere consequence, cannot.

War brings with it the necessity for using the means of making

it effective. A blockade of the ports in the insurgent territory, as an act of war, is no more than the siege of a city. Each is intended to destroy the power of the insurgents to carry on their war. As to the rebels, therefore, it is but a means of making war effective to subdue them. It is no concession on our part, of an outside status, or of an abrogated constitution. If therefore, we choose to apply the law of prize to our own captures, and thus escape collisions with other nations, it is but an act collateral to the blockade, as a means of warfare. We restrict ourselves so far as to consent to be governed by the law of nations as to neutrals, but as to the rebels, we do not elevate this means of warfare into a concession of their separate status.

The Supreme Court of the United States, in the prize cases, decided no more than this, that being engaged in a war with rebels, "the President had a right *jure belli* to institute the blockade of ports in possession of states in rebellion, which *neutrals* are bound to regard." There is no intimation in the opinion of an "abrogated constitution," or an outside status. Had this question been before the court, I doubt not Justice Grier, who delivered the opinion, would have adhered to his own judgment in the case of these pirates. His language is worthy of reproduction, for its clear and terse statement of the whole question. "Every government is bound by the law of self-preservation to suppress insurrections, and the fact that the number and power of the insurgents may be so great as to carry on a civil war against their legitimate sovereign, will not entitle them to be considered a state. The fact that a civil war exists for the purpose of suppressing a rebellion, is conclusive evidence that the Government of the United States refuses to acknowledge their right to be considered such. Consequently, this court, sitting here to execute the laws of the United States, can view those in rebellion in no other light than traitors to their country; and those who assume, by their authority, a right to plunder the property of our citizens on the high seas, as pirates and robbers."

This is sound and patriotic language, and while I comprehend the necessity growing out of the exigency of a civil war, compelling the government to suspend for a time the exercise of its powers to punish rebels and pirates, I cannot conceive by what process under the Constitution, either the President or Congress can, before accomplished revolution, change the status of rebels as a portion of the people. Even the treaty-making power confers no such authority. It regards foreign relations only, not the states of the Union, which lie under the express prohibitions of the Constitution.

The clemency of the President which relieved these pirates from punishment, did not reach back to their crime, and convert piracy into privateering *jure belli.* Yet this is the very point of

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the reasoning which puts the case upon a capture *jure belli.* If they are privateersmen, and their capture *jure belli,* they are protected from the punishment of pirates by the letters of marque; and the capture of the John Welsh needs only a decree in admiralty to transfer the property as a lawful prize of war. The prize cases adjudicating the lawfulness of *Federal* captures, do not for an instant sanction *rebel* captures, or concede the authority of rebel prize courts.

The same argument which redeems rebel privateering from piracy, will protect its military on land from the imputation of robbery, murder, and treason. If secession be disunion and revolution, and if they confer upon the Confederate States the rights of a *de facto* government, leaving them under the laws of war and of nations alone, their authority under these laws will protect those in arms as to all acts done *jure belli.* In short, the argument which rescues pirates, by converting their piratical acts into a capture *jure belli,* asserts nothing less, than that treason on land protects piracy at sea.

The second question is, whether the loss of the John Welsh was by *capture* within the meaning of the proviso in the policy. The exception reads thus: "Provided also, that the company shall not be liable for any claim for or loss by seizure, capture, or detention, or the consequences of any attempt thereat."

Capture is a term specially applicable to a taking by men of war or by privateers: and it matters not whether the vessel be carried into port and condemned as a prize: 2 Burrows 294; 2 Campbell 620; 3 Taunton 508; 4 East 396, 402; 7 Id. 449; 9 Id. 233; 11 Id. 205.

The insurers become liable if they warrant against it as a peril of the sea, and the same force should be given to the term when used as an exception. It is not to

be supposed that a word of definite signification, when used in a commercial instrument to create liability, would be used in a different sense as an exception in the same species of contract.

Although the commission of the Jeff Davis under which she sailed, cannot be used to characterize the capture as an act *jure belli,* yet it certainly may be used to give character to the act as a capture within the true intent of the policy. The vessel was not a freebooter, in quest of gain by indiscriminate pillage, but acted under a commission to capture vessels of the United States only, as enemies; and the declarations of those on board at the time of the capture accorded therewith.

A pirate, according to the most approved definitions, is a sea robber; one who robs on the high seas, irrespective of country or conditions — an indiscriminate plunderer for the sake of gain. Hence he is called *hostis humani generis.* In this case the object was not plunder, but capture and destruction of the property of persons regarded as enemies. Plunder accompanied the act, but

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was not its prime intent. We look upon these captors as rebels and pirates under our laws, but they regard themselves as enemies only. They considered themselves a part of an authorized force of a government at war with us; and therefore bore its commission, carried its flag, and made war upon us alone. The war in which they took a part, was one of terrible earnestness and gigantic proportions. The power of the rebels had compelled our Government to regard it as a civil war, and to concede to them certain belligerent rights. In every sense, therefore, affecting individual interests, in the power to seize and destroy private property, and the intent to exert this power to carry on their war and increase their own success, these captors were to be viewed as a part of a naval force, and their act as a capture of war.

This is a peace policy issued before secession and the war. It is not supposed it was the intention of the insurers, for the ordinary premium of a peace policy, to warrant against a capture of this kind, indistinguishable from a capture *jure belli,* in any feature, except the want of protection in the letters of marque. They might be willing to insure against freebooters in quest of individual gain, unsupported by any kind of government, and yet be unwilling to risk the number, force, and armament of privateers, supported by a powerfully-organized combination prosecuting a formidable civil war. Indeed, in the absence of the proviso against capture, it can scarcely be supposed that this intent even lurked under the expressions "pirates, rovers, and assailing thieves." But in view of the exception, it seems to me clear that the policy never was designed to insure against this then unknown, great, and imminent peril.

This view is strengthened by the nature of the policy as a commercial instrument. It is not a writing peculiar to ourselves, and therefore not more likely to conform in its intention, to the piratical character of the captors as viewed under our laws; but it is a world-wide instrument, the growth of the commerce of all civilized countries, in its terms and intention conforming rather to general than particular opinions.

What would an English court think of it? Unquestionably, following the action of their own government in its recognition of the rebels as belligerents, it would be pronounced a capture. An English court would not undertake to pass upon the effect of the Southern secession under the Federal Constitution and laws, and to pronounce the act piracy under them; but would look simply to the flag and commission of the alleged privateer, and the attitude of the Confederates as recognised by Great Britain. As a neutral, judgment would be rendered according to the apparent fact of a capture made by an armed privateer, under a commission and flag, prosecuting a general public purpose, and

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not the calling of a freebooter. Such an interpretation accords with the meaning I suppose the framers of the policy attached to the term *capture,* which looks to a seizure by parties prosecuting war by an armed public force, whether it be lawful or unlawful; and whether it be justified or not as an act of rightful war under the law of nations.

The Massachusetts case of Dale *et al. v.* New England Insurance Co., which I have seen in the proof-sheets, is an authority in point, and decided the question entirely on this interpretation of the word capture.

I concur therefore in affirming the judgment in this case, on the ground that the exception in the policy was intended to cover a case of capture in the nature of an act of warfare, but not on the ground that the capture itself was an act *jure belli.*

APPENDIX D. SHIPWRECK DATABASE

Ship	Origin	Sink Date	Latitude	Longitude	Casualty	Decom	Depth	Location Verified	Notes	Dive Site
USS *Aeolus*	US	1 August 1988	34.27808	-76.644317	0	Y	90	Y	Sunk as an artificial reef.	
USS *Aster*	US	7 October 1864	33.96	-77.91	0	N	10	Y	Ran aground at Kure Beach/Carolina Shoals	
USS *Atik*	US	26 March 1942	36.0002	-69.999372	141	N	14725		Q-ship; torpedoed by U-123.	4
HMT *Bedfordshire*	FOR	11 May 1942	34.31415	-76.45254	37	N	105	Y	Anti-submarine trawler torpedoed by German submarine *U-588* off the coast of Ocracoke Island.	10
USCGC *Bedloe*	US	September 1944	35.48351	-75.249589	26	N	95		Formerly USCGC Antietam; sank off Oregon Inlet in the 1944 Great Atlantic Hurricane.	11
CSS *Bendigo*	CONF	January 1864	33.91	-78.235	0	N	10	Y	Iron-hulled sidewheel blockade runner; ran aground in Lockwood's Folly Inlet.	
Bluefields	FOR	15 July 1942	34.76684	-75.366253	4	N	690	Y	Nicaraguan freighter; torpedoed off Cape Hatteras by *U-576*.	4
USS *Chopper*	US	21 July 1976	35.95	-71.5667	0	Y	14000		Sunk off Cape Hatteras, while being rigged as a tethered underwater target.	
USS *Comte de Grasse*	US	7 June 2006	35.85111	-70.335833	0	Y	14010		SINKEX target	
Condor	CONF	1 October 1864	33.965	-77.915	0	N	25	Y	Iron sidewheel blockade runner that ran aground at the mouth of New Inlet near Fort Fisher. First site listed as a NC Heritage Dive Site.	11
USS *Cythera*	US	2 May 1942	33.25	-75.43	69	N	11400	N	A patrol boat that was torpedoed by *U-402*.	

Ship	Origin	Sink Date	Latitude	Longitude	Casualty	Decom	Depth	Location Verified	Notes	Dive Site
Diamond Shoals Lightship	US	6 August 1918	35.08651	-75.32724	0	N	200	Y	Lightship sunk by *U-140*. AWOIS location different.	3
Dixie Arrow	US	26 March 1942	34.89962	-75.749606	11	N	70	Y	American tanker sunk by *U-71*.	1
E.M. Clark	US	18 March 1942	34.8428	-75.53773	1	N	260	Y	Steel-hulled American tanker sunk by *U-124* off Cape Hatteras.	
El Salvador	FOR	29 August 1750	34.665	-76.665	UNK	N	30	N	Spanish merchantman ran aground during a hurricane near Beaufort Inlet, North Carolina	
USS Ellis	US	24 November 1862	34.7179	-77.4254	0	N	6	Y	Originally a Confederate gunboat that was captured by Union Navy. A gunboat that ran aground in New River and was destroyed to prevent capture.	2
Empire Gem	FOR	24 January 1942	35.03034	-75.47717	49	N	160	Y	British tanker; torpedoed off Diamond Shoals by *U-66*. Was in service to the British Ministry of War Transport.	4
Empire Thrush	FOR	14 April 1942	35.19685	-75.254583	0	N	42	Y	British freighter torpedoed by *U-203*.	1
USS *Huron*	US	24 November 1877	36.4952	-75.8496	98	N	10	Y	Ran aground off Nags Head.	
USS *Indra*	US	4 August 1992	34.56204	-76.851783	0	Y	60	Y	Sunk as artificial reef.	
USS *Iron Age*	US	11 January 1864	33.91	-78.235	0	N	10	Y	Ran aground at Lockwood's Folly Inlet while attempting to refloat CSS *Bendigo*.	4
USCGC *Jackson*	US	September 1944	35.48351	-75.249589	21	N	95	Y	Sank off Oregon Inlet in the 1944 Great Atlantic Hurricane.	

Ship	Origin	Sink Date	Latitude	Longitude	Casualty	Decom	Depth	Location Verified	Notes	Dive Site
John D Gill	US	12 March 1942	33.84184	-77.458019	23	N	90	Y	Tanker sunk by *U-158*. Carrying Naval Armed Guard.	6
Kassandra Louloudis	FOR	17 March 1942	35.17157	-75.358475	0	N	70	Y	Greek cargo ship; torpedoed off Diamond Shoals by U-124.	
USS *Keshena*	US	19 July 1942	34.99375	-75.76195	2	N	85	Y	Navy tug; struck a naval mine off Cape Hatteras while attempting to rescue SS *Chilore*.	8
Kyzikes	FOR	1 December 1927	36.06464	-75.66833	4	N	20	Y	Greek tanker that ran aground near Kill Devil Hills.	
Lancing	FOR	7 April 1942	35.13351	-75.366253	1	N	160	Y	Norwegian tanker; torpedoed by *U-552* off Cape Hatteras.	
Liberator	US	19 March 1942	35.15018	-75.531261	5	N	120	Y	US freighter (former US Navy ship) sunk by *U-332*. Liberator was armed with 4-inch deck gun.	7
Ljubica Matkovic	FOR	24 June 1942	34.50018	-75.666267	0	N	2100		Yugoslavian freighter; torpedoed by *U-404*.	4
USS *Louisiana*	US	24 December 1864	33.965	-77.915	0	N	10	Y	Set afire and exploded at Fort Fisher.	
Manuela	US	24 June 1942	34.67653	-75.78553	2	N	160	Y	US freighter sunk by *U-404*. Carrying Naval Armed Guard.	
Margaret	US	14 April 1942	35.2	-75.23	1	N	65		A cargo ship that was sunk by *U-571* off Cape Hatteras. Formerly USS *Margaret*.	
USS *Merak*	US	6 August 1918	35.22879	-75.201247	0	N	90	Y	Seized and turned over to US Navy and assigned to NOTS. Sunk by gunfire from *U-140* with no casualties.	4

Ship	Origin	Sink Date	Latitude	Longitude	Casualty	Decom	Depth	Location Verified	Notes	Dive Site
Modern Greece	CONF	27 June 1862	33.965	-77.915	0	N	25	Y	Blockade runner run ashore at Fort Fisher after being spotted by Union blockaders.	4
USS *Monitor*	US	31 December 1862	35.00195	-75.40633	16	N	240	Y	Lost off Cape Hatteras while under tow by Rhode Island.	8
USS *New Jersey*	US	5 September 1923	35.03218	-75.290439	0	Y	320		Bombed as a target off Cape Hatteras during Billy Mitchell exercises.	
Nordal	FOR	25 June 1942	34.69184	-75.58459	0	N	650	Y	Panamanian cargo ship chartered to US Maritime Commission at time of sinking. Vssel was armed. Torpedoed by *U-404*.	3
Panam	US	4 May 1943	34.14424	-76.13006	2	N	480	N	American tanker owned by the US War Shiping Administration and chartered to Marine Transport Lines, Inc. *Panam* carried 37 merchant seamen and 14 Naval Armed Guard.	5
USS *Peterhoff*	US	6 March 1864	33.91602	-77.857367	0	N	60	Y	Mistaken for a blockade runner and rammed by USS *Monticello* off Kure Beach.	
USS *Pilgrim*	US	1935	34.71226	-76.58878	0	Y	5	Y	A patrol vessel that was eventually decommissioned and scuttled off Harkers Island as a breakwater.	
CSS *Raleigh*	CONF	7 May 1864	33.965	-77.915	0	N	10	Y	Richmond class steam ironclad run aground inside New Inlet.	4

Ship	Origin	Sink Date	Latitude	Longitude	Casualty	Decom	Depth	Location Verified	Notes	Dive Site
San Delfino	FOR	9 April 1942	35.62851	-74.889856	28	N	110	Y	British tanker; torpedoed by *U-203*. Ship was armed with deck gun and several machine guns.	4
USS *Schurz*	US	21 June 1918	34.15018	-75.782939	1	N	110	Y	Sank in a collision with SS *Florida*.	4
HMS *Senateur Duhamel*	FOR	5 June 1942	34.55092	-76.6012	0	N	65	Y	Rammed by USS *Semmes* which mistook it for a U-boat. Converted French fishing trawler used for anti-submarine patrol.	
USS *Spruance*	US	6 December 2006	36.41139	-70.768056	0	Y	14000		SINKEX target	
USS *Stump*	US	7 June 2006	36.0675	-70.233889	0	Y	14100		SINKEX target	4
USS *Tarpon*	US	28 June 1957	34.68351	-75.816275	0	Y	130	N	Probably sunk as target or while under tow to scrap yard.	
Theodore Parker	US	June 1974	34.67225	-76.74489	0	Y	24.5	Y	Liberty ship sunk as fish haven.	
U-352	FOR	9 May 1942	34.22805	-76.5649	15	N	115	Y	Sunk by depth charges from USCGC *Icarus*.	4
U-576	FOR	15 July 1942	34.76246	-75.50756	45	N	690	Y	Sunk off Hatteras by depth charges from aircraft and gunfire from SS *Unicoi*.	9
U-701	FOR	7 July 1942	35.23917	-75.1119	39	N	120	Y	Sunk off Cape Hatteras by depth charges from aircraft.	4
U-85	FOR	14 April 1942	35.91341	-75.28694	46	N	100	Y	Sunk off Bodie Island by gunfire from USS *Roper*.	4

Ship	Origin	Sink Date	Latitude	Longitude	Casualty	Decom	Depth	Location Verified	Notes	Dive Site
U-879	FOR	30 April 1945	36.34	-74	52	N	8550		Sunk by depth charges from the USS *Natchez*, USS Coffmann, USS *Bostwick*, and USS *Thomas*. Originally thought to have wrecked off Cape Cod, MA.	
USS *Virginia*	US	5 September 1923	35.01929	-75.285944	0	Y	440		Bombed as target off Cape Hatteras as part of Billy Mitchell tests.	
William Rockefeller	US	8 June 1942	35.11685	-75.116244	0	N	900	Y	American tanker sunk by *U-701*. Ship was carrying 44 crew members and 6 Naval Armed Guard.	
USS *Yancey*	US	1990	34.17017	-76.242961	0	Y	160	Y	Sunk as an artificial reef off Morehead City.	
USS *YCF-42*	US	6 December 1944	34.78352	-75.082906	0	N	8700		Yacht/car float that broke apart off Cape Lookout.	
YP-389	US	19 June 1942	34.94077	-75.39835	6	N	300	Y	Minesweeper. Sunk by *U-701*.	

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