Governmental Claims For Salvage*

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I. INTRODUCTION

Few areas of admiralty law have more of a public policy basis than that of salvage awards. It is an area which emphasizes the fundamental public policy of encouraging seamen to render prompt service in future emergencies.[1] Entitlement to salvage awards is based on three requirements. The first is that there be a maritime peril from which rescue without the salvor's assistance is impossible. Second, the salvor's act must be voluntary: he must not be under any official or legal duty to perform such an act. Third, the effort must be successful.[2]

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* Paper originally published as part of the proceedings of the Southeastern Admiralty Law Institute, 1979. The paper won the Institute's writing competition for 1979.

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1. Kimes v. United States, 207 F.2d 60, 63 (2d Cir. 1953).
2. G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY, 534-35 (2d ed. 1975).

In the case of a private individual or ship these three requirements are often easily satisfied. Where the salvor is a government vessel or employee, however, the requirement that the act be voluntary and done without any official or legal duty becomes difficult to meet. This article examines this problem.

As a foundation, the relevant statutes will be examined. This will be followed by an historical review of nineteenth and early twentieth century cases where claims for salvage were made by ships. In discussing the uniform services, the Navy and Air Force will be segregated from the Coast Guard until all three services come together in one instance.[3] The remainder of this section will deal with claims put forth by individuals who are either military members or civilian employees of the government. This will be followed by a discussion of prize cases and wartime salvage.

II. Statutory Basis

Despite the statement that "[i]t has not been the policy . . . to maintain actions for salvage awards, especially against the owners of small vessels,"[4] statutes governing both Navy and Air Force operations permit the claim and receipt of payment for salvage efforts. The Navy's statute reads: "The Secretary of the Navy, or his designee, may consider, ascertain, adjust, determine, compromise, or settle and receive payment of any claim by the United States for salvage services rendered by the Department of the Navy. . . ."[5] Air Force conduct in this area is governed by the following provision: "The Secretary of the Air Force may settle, or compromise, and receive payment of a claim by the United States for salvage services performed by the department of the Air Force. Amounts received under this section shall be covered into the Treasury."[6] A third statutory basis for the permitting of salvage awards may be found in the Suits in Admiralty section of the United States Code, which provides:

> The United States, and the crew of any merchant vessel owned or operated by the United States, or a corporation mentioned in section 741 of this title, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of such corporation, having control of the possession or operation of such vessel.[7]

Only the latter statute permits recoveries by crew members. This probably

3. United States v. American Oil Co., 417 F.2d 164 (5th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970) [hereinafter referred to as Amoco Virginia].
4. Basic Boats, Inc. v. United States, 311 F. Supp. 596-97 (E.D. Va. 1970).
5. 10 U.S.C. § 7365 (1976).
6. 10 U.S.C. § 9804(a) (1977).
7. 46 U.S.C. § 750 (1975).

stems from the higher standard of duty owed by the military.[8]

Were the statutes governing Coast Guard operations as explicit as the aforementioned, many of the problems in the area of government claims for salvage would not exist. Two statutes pertaining to the Coast Guard must be examined. The first deals with the Coast Guard's primary duty. It reads:

> The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on and under the high seas and waters subject to the jurisdiction of the United States. . .shall develop, establish, maintain, and operate, with due regard to the requirements of national defense. . .rescue facilities for the promotion of safety on and over the high seas and waters subject to the jurisdiction of the United States.[9]

Specific tasks are allocated to the Coast Guard in the area of saving life and property. The statutory language governing this is as follows:

> (a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:
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> (1) perform any and all acts necessary to rescue and aid persons and protect and save property;
>
> (2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophies;
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> (3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and
>
> (4) destroy or tow into port sunken or floating dangers to navigation.
>
> (b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.[10]

This last section deals with the essence of what is considered a circumstance warranting salvage. The statute addresses itself to the question of voluntariness as it twice employs the word "may" as opposed to "will" in describing Coast Guard duties. This seems to imply that these activities on the part of the Coast Guard are permissive and that the requisite requirement of voluntariness is present and therefore awards should be allowed. This has not been the case, however.

One commentator has implied that the sole reason for denying awards to the Coast Guard while permitting them for the Navy and Air Force is the absence of specific statutory language permitting the Coast Guard such an

8. Thornton v. The Livingston Roe, 90 F. Supp. 342 (S.D.N.Y. 1950).
9. 14 U.S.C. § 2 (1977).
10. 14 U.S.C. § 88 (1977).

award.[11] This appears to be a manifestation of congressional intent based more on tradition than on logic, and it warrants a contemporary examination.

III. Historical Background

Salvage by government ships, particularly those of the Navy, has long been recognized by the courts. In 1801, *Talbot v. Seeman*[12] dealt with the recapture of a neutral merchant vessel from the French, the award of salvage by the district court, and the subsequent reversal by the circuit court. Chief Justice Marshall, who delivered the opinion of the Supreme Court, reasoned that the taking must have been lawful, and there must have been a meritorious service rendered to the recaptured vessel.[13]

Marshall viewed the recapture as legal, relying upon a series of statutes passed in 1798 which permitted the United States vessels to capture armed vessels of France,[14] protect United States shipping,[15] and recapture vessels taken by France.[16] With respect to recapture, salvage awards were specifically permitted, and parameters were established for them.[17]

On March 3, 1800, Congress passed "An act providing salvage in cases of recapture."[18] This extended the right to salvage where a vessel owned by a resident of a country "in amity with the United States" had been taken by a government "against which the United States have authorized, or shall authorize, defense or reprisals."[19] Marshall concluded that since this was at the time of recapture an armed vessel under French authority, the taking was lawful, and the fact that the recapture took place before the passage of the act did not bother him. He viewed the acts prior to the recapture as the basis for a general system of resistance to aggression, and therefore he felt that no additional specific statutory basis was necessary.[20]

The question of what meritorious service was rendered the recaptured

11. Zendel, *Coast Guard Entitled to Salvage Award for Expenses Incurred by Other Armed Forces During Rescue*, 2 J. Mar. L. 682-83 (1971).

12. Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801).

13. Among counsel on the argument before the circuit court were two of America's most famous antagonists, Alexander Hamilton (Talbot) and Aaron Burr (Seeman), *id.*

14. Act of May 28, 1798 "An act more effectually to protect the commerce and coasts of the United States." *Id.* at 29.

15. Act of June 25, 1798 ". . . to authorize the defence of merchant vessels of the United States against French depredations." *Id.*

16. Acts of June, 1798, and July 7, 1798 These latter two expanded the May 28, 1798 Act.

17. Talbot v. Seeman, 5 U.S. (1 Cranch) 30 (1801). The amount would be from one-eighth to one-half of the value of the vessel and cargo.

18. *Id.*

19. *Id.* at 31.

20. *Id.* at 35.

vessel was resolved in a similarly straightforward way. The logic ran as follows:

1. The vessel was being taken to a French port to be adjudged according to the rules of war.

2. The laws of France were such that condemnation of the vessel was extremely possible.

3. Therefore, the danger to the vessel was real and imminent.

4. The vessel was saved.

5. Therefore, salvage should be allowed.[21]

Forty years later, the Supreme Court had another opportunity to examine the question of when salvage would be permitted the crew of a United States warship. In *United States v. The Amistad*[22] a ship was towed into Connecticut from a point near Long Island. When found, the Amistad was crewed by kidnapped Africans who, had they not risen and taken over the ship, would have been sold into slavery. The commander of the American vessel made a claim for salvage on behalf of himself and his crew. The claim was allowed to the extent of one-third of the ship's value.[23] The Supreme Court affirmed, holding that the efforts of the officer and his crew were highly meritorious and of useful service to the ship's and cargo's proprietors.

Not every effort by a warship which resulted in the saving of property qualified for a salvage award, however. In *The Josephine*,[24] an abandoned vessel was towed into port and the crew claimed salvage (the officers having renounced their claim), but the libel was dismissed. The circuit court affirmed, not because the services were rendered under direction of the warship's commander acting under general instructions from the Secretary of the Navy, but because of the nature of the act involved. The court held that for salvage awards to be permitted a government vessel, unusual peril must be encountered and extraordinary service rendered.[25] The rescue must exceed the duty imposed by employment,[26] and that requirement was not met here. The court found the acts neither particularly meritorious nor hazardous. Also, as a matter of public policy, the court did not want to place the crew on the same footing as common salvors.[27] *The Josephine* appears to be the first instance of a court expressing concern about the

21. *Id.* at 37-45. The Court lowered the amount of award from one-half to one-sixth the value of the vessel and cargo.

22. 40 U.S. (15 Pet.) 518 (1841).

23. This amount did not include any value for the Africans, since they were considered free by the circuit court. This reversed a district court decision which ordered them turned over to the President for deportation. *Id.* at 519.

24. 13 F. Cas. 1150 (C.C.S.D.N.Y. 1851) (No. 7,546).

25. *Id.* at 1152.

26. *Id.*

27. *Id.* at 1153.

military status of the salvor; had great efforts been involved in effectuating the salvage, an award would likely have been permitted even there.

In *Rees v. United States*,[28] the fact that both the salved vessel and the salvor were owned by the same party (in this case the government), did not preclude libelant's right to salvage compensation. This concept, subsequently codified,[29] is applicable to both government and privately owned vessels.

In *The Kanawha*[30] a United States revenue cutter and a steamer owned by the Dominion of Canada both assisted in the salvage of the Kanawha. No claim was made for their services because of their status as government vessels,[31] but an award was made in their name so as to properly fix compensation for the entire salvage effort.[32]

Later, in *The Olockson*,[33] the unilateral actions of the crew and captain of a government owned tug in towing an abandoned vessel were found compensable. The crew's efforts in establishing a tow saved the abandoned vessel. In awarding salvage the court pointed out that the tug was not like a fire fighter putting out a blaze: the tug was performing a function outside the scope of its employment.[34] The dissent maintained that since the tug was for hire, the contract which sent it out included rescue and the saving of ship and cargo, and since salvage was contemplated, no separate award should have been made.[35]

Modern precedent for the claim of salvage by government vessels was clearly established by *The Impoco*.[36] There the owners of the saved vessel admitted that the master and crew of the salvor had a right to recover but denied that right to the government.[37] The government asserted its claim on the basis that the vessel involved was a steamer acting as a merchant vessel and therefore a salvage claim was proper under section 9 of the Shipping Act of September 7, 1916[38] and section 10 of the Suits in Admi-

28. 134 F. 146 (N.D. Cal. 1904).

29. 46 U.S.C. § 727 (1976) which provides: "The right to remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services."

30. 254 F. 762 (2d Cir. 1918).

31. *Id.* at 764.

32. *Id.* The two vessels were awarded a total of $12,000 of a total award of $34,000. Where such an award is made but not paid, it is not put into the pot to be pro-rated among other salvors. It returns to the salved vessel's owner.

33. The Olockson, 281 F. 690 (5th Cir. 1922).

34. *Id.* at 694.

35. *Id.* at 695. The majority in considering the tug's contract felt that this did not stop the crew from claiming salvage and that the existence of such a contract was a factor to be considered in determining the size of the award.

36. 287 F. 400 (S.D.N.Y. 1922).

37. *Id.* at 401.

38. 46 U.S.C. § 808 (1976) which provides:

ralty Act of March 9, 1920.[39]

The court rejected this argument, yet it found that the government had a right to make a claim. The mere fact that the United States had a long practice of not asserting such claims did not affect its right to do so. Congress, the court held, "may restrict the inherent right of the United States to claim salvage, that right remains. . .until it is restricted."[40] As to the crew the court said "such services are voluntary, and they are just as voluntary in the case of "men at war and public vessels generally as they are in the case of" private vessels; i.e., it is no part of their duty to render such services."[41] The court added: "I can see that a sovereign would and perhaps should consider it beneath his dignity to ask for compensation for services in saving property at sea, I can imagine no legal reason to prevent him from doing so."[42]

The court quoted English statutes which expressly precluded a salvage claim absent specific consent of the Secretary of the Admiralty,[43] but it maintained that either an Act of Congress or an expression of executive

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Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold mortgage, lien, or other interest therein.

39. 46 U.S.C. § 750 (1976) which provides:

That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation having control of the possession or operation of such vessel.

40. The Impoco, 287 F. 400, 402 (S.D.N.Y. 1922).

41. *Id.*

42. *Id.*

43. The Merchant Shipping Act of 1854, §§ 484, 485, which provides:

484. In cases where salvage services are rendered by any ship belonging to her majesty or by the commander or crew thereof, no claim shall be made or allowed for any loss, damage, or risk thereby caused to such ship, or the the stores, tackle, or furniture thereof or for the use of any stores or other articles belonging to her Majesty supplied in order to effect such services, or for any other expense or loss sustained by her majesty by reason of such services.

485. No claim whatever on account of any salvage services rendered to any ship or cargo or to any appurtenances of any ship by the commander or crew or part of the crew of any of her Majesty's ships shall be finally adjudicated upon unless the consent of the Admiralty has first been obtained, such consent to be signified by writing under the hand of the Secretary to the Admiralty, and if any person who has originated proceedings in respect of any such claim fails to prove such consent to the satisfaction of the court, his suit shall stand dismissed and he shall pay all the costs of such proceedings: Provided that any document purporting to give such consent and to be signed by the Secretary to Admiralty shall be prima facie evidence of such consent having been given.

Id.

authority would be required to so limit the United States.[44]

IV. Post World War II: The Move To Quantum Meruit

The post World War II era has not seen any radical developments in this area. In 1947 a salvage award in excess of $66,000 was given to the owner (the United States), officers and crew of the S.S. Puente Hills.[45] The award was divided into four components: expenses, a general award to the owner, an award to the crew, and special awards to certain crew members. Neither the court's opinion nor the Commissioner's report it adopted addressed itself to the fact that the salvor was owned by the government and operated by the War Shipping Administration;[46] the right to an award was not questioned.

The problem of what constitutes a salvage award versus a quantum meruit award for services rendered was addressed in *Tampa Tugs and Towing v. M/V Sandanger*.[47] There the government initiated a claim for salvage based on negotiations between the Navy, a marine surveyor, and the owner of a tug then involved in the salvage of the Sandanger. The result of these negotiations was that the Navy agreed to fight the fire raging aboard the Sandanger upon being guaranteed its expenses. After three vain attempts by YTBs to put out the fire, Navy personnel boarded the vessel and succeeded in extinguishing it. The court characterized this undertaking as "extremely difficult and hazardous."[48]

The Navy stipulated expenses in excess of $9,800 and waived the salvage claims for the crews of the YTBs. The court determined that the Navy's claim was for services rendered as opposed to salvage. This conclusion was based on the Sandanger's seizure by a U.S. Marshall prior to the Navy's major and most successful efforts.[49]

Ultimately, the Navy was awarded $25,000 as reasonable value of its services. In making this award the court was concerned with two factors. The first was the amount of benefit conferred. Had not the Navy intervened, the vessel would probably have broken up and valuable cargo would have been lost. The second factor was that the Navy bore the risk of death and

44. *Id.* The concept of a claim for an award absent expressed statutory prohibition is now followed on both sides of the Atlantic. England retains a standard which forces the line not to be drawn between duty and voluntariness, but between duty and "exceeding the scope of their ordinary function." M. Norris, Law of Salvage 133 (1958).

45. The Donbass, 74 F. Supp. 15 (W.D. Wash. 1947).

46. *Id.* at 15-24.

47. 242 F. Supp 576 (S.D. Cal. 1965).

48. *Id.* at 579. YTB's are a type of harborcraft.

49. *Id.* at 581. The seizure was initiated by Tampa Tugs and Towing and was effectuated by service upon masters of the tugs then with tow lines connected to the Sandanger. Such service is valid given the control of the tugs over the Sandanger and its inability to be boarded (it was still on fire).

injury to the men involved in the action.[50]

The court rejected claims that the Navy had a public duty to fight the fire and that it was extinguished solely to protect naval facilities nearby.[51] The concept of "public duty" seems to lose import when it is realized that the Navy, in this case, was given a maritime lien for expenses incurred in de-oiling and towing the Sandanger into harbor.[52] The author feels that any "public duty" here would have been more in de-oiling and towing than in extinguishing a blaze.

The question of "public duty," salvage and reasonable value for services rendered, as indicated by *Tampa Tugs*, appears to turn on the existence of an agreement between the Navy and other parties involved in the action. The actions of the Navy clearly warranted a salvage award. The court's language indicates that the requirements for a salvage award were met: a maritime peril, success and no pre-existing duty. Absent the Navy's waiver of a salvage claim, such a claim would have been appropriate.

Amoco Virginia[53] is the most recent case of a salvage award to the uniformed services. Not only does it follow the lead of *Tampa Tugs* in awarding only expenses for services rendered, but it also bridges the gap between the Navy and Air Force being authorized awards and the Coast Guard not being so authorized.

In *Amoco Virginia*, a tanker carrying six million gallons of gasoline and heating fuel caught fire in the Houston Ship Channel. The fire and resulting explosions created a major disaster. After the supply of foam available to agencies fighting the fire (the Houston Fire Department, the fire departments of eighteen other municipalities, the Houston Navigation District and the Coast Guard) has been exhausted, a military airlift was instituted to effectuate a resupply of foam. Before the airlift ended, the Navy and Air Force had flown 47 missions, involving 400 military personnel and 42 vehicles. Over one-half million pounds of foam were flown into Houston.[54]

The lower court rejected government claims totalling $89,676 for salvage.[55] In doing so, the court looked at the claim in two parts. Concerning

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50. *Id.*
51. *Id.*
52. *Id.* at 580.
53. *See* note 3 *supra*. The award was modified to include interest from date of judgment. United States v. American Oil Co., 419 F.2d 1321 (5th Cir. 1969).
54. 417 F.2d 164, 165-66, (5th Cir. 1969).
55. *Id.* at 166. The claim was broken down as follows:

Cost of foam	$35,641.20
Transportation costs—aircraft	51,129.36
Personnel costs—military	2,168.23
Personnel costs—civilian	357.19
Transportation costs—vehicles	296.62
Lost equipment	90.00
TOTAL	$89,682.60

the cost of the foam, the court said that the government "as sovereign has no inherent right to recover for salvage services under the general maritime law."[56] As to the remaining parts of the claim, the court maintained that the government failed to carry its burden of proving to what extent its efforts contributed to preserving the S.S. Amoco Virginia.[57] The rejection of the salvage claim flies in the face of the court's own finding that "[i]t would have been impossible to put out the fire at the time it was extinguished without the cooperation of the United States Air Force and Navy. . . .[T]he efforts of the Air Force and Navy were a contributing factor in preserving more than $900,000 worth of property. . . ."[58]

The Fifth Circuit reversed. In so doing, the court adopted American Oil's position that the salvage services performed were rendered by the Coast Guard. The court then separated the Coast Guard's efforts from those of the Navy and Air Force.[59] (It must be remembered that all references to Coast Guard salvage in this opinion can be viewed only as dicta, since the Coast Guard did not submit a claim.) As to the Navy and Air Force, the court established that the decision to claim salvage is one made by the government, and here it chose to do so only on behalf of the Navy and Air Force.[60] This claim was entirely permissible pursuant to statute.[61]

American Oil maintained that the Navy and Air Force were obligated to come to the assistance of the Coast Guard, that they could not legally refuse to do so, and therefore that they were precluded from an award. This argument was rejected by the court. If such an obligation did exist, it ran to the Coast Guard and not to American Oil. There was no pre-existing duty here which would preclude the award.[62]

A final defense to the claims of the Navy and Air Force was that the National Search and Rescue Plan [SAR] established duties which encompassed the efforts involved in this incident. The court rejected this by illustrating that the SAR included the utilization of facilities of the signatories (Army, Navy, Air Force, Joint Chiefs of Staff unified commands and Coast Guard) "*consistent with the statutory responsibilities and authorities and assigned functions of such agencies*",[63] and that SAR did not encompass salvage operations.[64]

Thus the claims of the Navy and Air Force were successful. The Fifth Circuit's approach to the Coast Guard warrants analysis. The court ap-

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 167.
60. *Id.* To this end the court relied on The Impoco, 287 F. 400 (S.D.N.Y. 1922).
61. *Id.* *See* 10 U.S.C. § 7365, 9804(a) (1976).
62. *Id.*
63. *Id.* at 170.
64. *Id.*

pears to say that had the Coast Guard made a salvage claim, there was no pre-existing duty which would bar the claim. More specifically, the Court stated that the government's claim for salvage for the Navy and Air Force'' does not mean that the Coast Guard has no right to salvage for its own services and supplies.''[65]

The court's analysis turns on statutory interpretation of 14 U.S.C. § 88.[66] It concludes that acts such as these are performed in a permissive context.[67] Analogyzing to the permissiveness of Coast Guard rescue operations[68] the court concluded that ''there was no pre-existing legal duty which compelled the Coast Guard to render fire fighting and salvage services in this case.''[69] The court further emphasized the permissive nature of the Coast Guard's duty given SAR.[70]

Comment after *Amoco Virginia* indicates disagreement with the court's holding as to the Coast Guard. Much of it seems to stem from those timeless concepts of tradition. One author, rejecting the permissiveness of the Coast Guard's function, could find ''no good reason to award salvage as an incentive to an agency whose very function is to aid persons and ships in distress at sea.''[71]

In coming to its conclusion, the Fifth Circuit was not taking a blind shot in the dark. In a footnote in *United States v. Gavagan*[72] the court, although it chose not to decide the issue, expressed no doubt that the Coast Guard could claim salvage.[73] In arriving at this conclusion, they saw little valid distinction between the Coast Guard and other government personnel jointly engaged in a rescue operation.[74]

Additional support for this proposition can be found in *Beach Salvage Corp. of Florida v. The Cap't Tom.*[75] There the Coast Guard was party to a salvage award of $2,000, one-half of which was apportioned to it. As the government did not, however, put forth a claim, the award was not paid. What is important is that the Coast Guard was a party to the award, even if it appears that the amount was specified solely for the purpose of determin-

65. *Id.* at 168.
66. 14 U.S.C. § 88 (1977). *See* text accompanying note 10 *supra.*
67. 417 F.2d at 168.
68. See discussion of the standard of care to be exercised in regard to this and salvage operations, Frank v. United States, 250 F.2d 178 (3d Cir. 1957).
69. 417 F.2d at 168-169. To buttress this the court relied on a Coast Guard publication which permitted Coast Guard fire fighting equipment to be utilized to assist local fire officials.
70. *Id.* at 170.
71. Zendel, *Coast Guard Entitled to Salvage Award for Expenses Incurred by Other Armed Forces During Rescue*, 2 J. MAR. L. 682, 688 (1971).
72. 280 F.2d 319 (5th Cir. 1960).
73. *Id.* at 326, n. 15.
74. *Id.*
75. 207 F. Supp. 479 (S.D. Fla. 1961).

ing the extent of the complete award.[76]

After *Amoco Virginia* it appears that the following conclusions may be drawn concerning governmental claims for salvage:

1. The government will decide on a case-by-case basis if a claim for salvage is to be put forth.
2. There is a statutory basis for such claims on behalf of the Air Force and Navy.
3. Policy and tradition preclude the Coast Guard from making salvage claims.
4. Claims are limited to the amount of expenses incurred.[77]
5. There is not, per se, a pre-existing duty on the part of any government military agency, including the Coast Guard, to render salvage services.

The standard of care to be applied in situations where the government acts either as a rescuer or salvor is that which would be applied by a private party in a like situation. In *Frank v. United States*,[78] the government was held not liable when a passenger on a ship being towed by the Coast Guard fell overboard and drowned. The court refused to hold the Coast Guard to a higher standard solely because it was a public agency.[79] Further, the court looking at 14 U.S.C.§ 88(b) found that "[T]his legislation falls short of creating a governmental duty of affirmative action owned to a person or vessel in distress."[80]

V. Individual Claims

As illustrated above, the government may, and does, exercise its prerogative to make salvage claims. These claims do not currently permit awards to individuals, but this has not always been the case.

Le Tigre[81] gives an example of an official going beyond his duty and therefore being held entitled to a salvage claim. The court emphasized that where the service performed is required by law no additional compensation may be paid,[82] but that going beyond this entitles one to a salvage award. The court said:

> [T]he general principle of law then may be, we have no doubt, that, if a collector, or other revenue officer, intending to act in the line of his official duty, but mistaking the law, and transcending his authority, is the meritorious cause of saving property to the owner, he is not precluded, on account of the motive

76. *See* The Kanawha, 254 F. 762 (2d Cir. 1918).

77. United States Air Force, AFM 112-1 (C4) para. 11-8 (14 Oct. 1977) specifically limits claims to operational costs where the Air Force is concerned. 32 C.F.R. §§ 752.1-754.3 (1979) deals with the Navy and accomplishes the same result. It goes into detail as to rates and costs to be used when necessary.

78. 250 F.2d 178 (3d Cir. 1957).

79. *Id.* at 179.

80. *Id.* at 180.

81. 15 F. Cas. 404 (C.C.D.N.J. 1820) (No. 8,281).

82. *Id.* at 405.

> which actuated him, from claiming salvage . . . . The owner, whose property has been preserved from destruction by the acts of a stranger, has no right to inquire into the motives which influenced his conduct, provided he acted legally. It is sufficient to entitle the salvor to a just compensation, that a beneficial service has been rendered, by which the property has been rescued from imminent danger.[83]

This case seems to set out general guidelines for the claims of salvage by individuals in the government employ; the act must be beneficial and not within the scope of the employee's official duties.

A specific statute may provide the basis for the denial of a salvage award to individuals. Such was the case in *The Lyman M. Law*.[84] The court although recognizing the valuable and effective services performed by the crew of a life saving station, denied them an award because existing statutes required them to function as life savers.[85]

An award was permitted to employees, however, where a government-owned life saving station was operated by a private contractor. In *Kittelsaa v. United States*,[86] a disabled and abandoned government vessel was salved by a government-owned tug operated under a contract from the government by a private towing company, and a salvage award was approved for the meritorious services of the crew of the tug. The court considered it significant that the tug had not been ordered out by the contractor, and that he had not advanced a claim.[87]

The court was able to sweep away any pretense of an agency argument to preclude an award. Otherwise the claim would probably have been rejected, particularly since the contract the parties were operating under contemplated salvage.[88]

The Lyman M. Law lost favor during the post World War I era. In *Jacobson v. Panama Railroad Co.*,[89] after reaffirming *Rees*, which held that common ownership was no bar to recovery by master and crew, the court said that "members of the crew had an independent right accorded them by law for compensation for salvage."[90] This idea was reaffirmed in *The Olockson* where the court said:

> Whether the tug be strictly a merchant vessel or a quasi public vessel, her crew are not, by reason of any agreement as to compensation or her character, debarred a reward by way of salvage for the responsibility which the master assumed and efforts of himself and crew, which resulted in the saving of the cargo and of the vessel, in its damaged condition . . . . It has never been held

83. *Id.* at 407.
84. 122 F. 816 (D. Me. 1903).
85. *Id.* at 827. The court neglects to specify what statutes.
86. 75 F. Supp. 845 (E.D.N.Y. 1948).
87. *Id.* at 846.
88. *Id.*
89. 266 F. 344 (2d Cir. 1920).
90. *Id.* at 347.

that the crews of public vessels are not be be compensated in any case by way of salvage.[91]

Cases arising during and after World War II began to scrutinize the issue of duty, particularly where the individual claimant was not attached to a ship. Two cases, *Thorton v. The Livingston Roe*[92] and *Spivak v. United States*,[93] examined the question of a non-crew member's claim for salvage.

In *The Livingston Roe*, the libelant Thornton was a Commander in the Navy stationed at Recife, Brazil, during World War II. At this time Thornton was on the staff of the Commander, Fourth Fleet, at Recife. He was charged with the preservation of shore based care facilities in addition to his normal duties. Although not the salvage officer, he had on nine previous occasions conducted salvage operations successfully. In May, 1943, a fire broke out on the S.S. Livingston Roe, and Thornton was in charge throughout the entire firefighting operations. The situation was so grave that the entire port was endangered. For his efforts Thornton was decorated and promoted.[94] He also sued to recover an award in salvage.

The question of Thornton's entitlement to salvage went to issue of duty. The court saw two co-existing rules of law: one permitting recovery, and the other precluding it. The performance of salvage service precludes recovery if the salvor is under a duty to the salved ship. However, naval personnel, not assigned to the endangered vessel, performing salvage under direction and control of their superiors, would not be so denied.[95] Thornton would seem to fit into this criterion.

The second rule, which ultimately precluded Thornton from recovery, dealt with the nebulous quality of "public duty." The court termed it the "public duty disqualification."[96] It is applicable even when there is no duty to a specific ship. The crux of the disqualification is the question "whether the operation for which salvage is claimed is one which the individual or group was expected to perform as a result of his or its public status."[97]

The answer turns on the facts of any given case. In its analysis of the facts in *The Livingston Roe*, the court was particularly impressed by Thornton's status as a member and high ranking officer of the military. This thrust upon him a duty and obligation to do whatever would be beneficial in the emergency; actions such as his were to be expected.[98]

91. Falk v. United States Shipping Board Emergency Fleet Corp., 281 F. 694 (5th Cir. 1922).
92. 90 F. Supp. 342 (S.D.N.Y. 1950).
93. 203 F.2d 881 (3d Cir. 1953).
94. 90 F. Supp at 344.
95. *Id.* at 345.
96. *Id.*
97. *Id.*
98. *Id.* at 346.

A similar case was decided a few years later where the employee was a civilian.[99] In *Spivak v. United States* the libelant was a civilian employee of the War Department stationed in Korea. His duty was that of Advisor (Korean Merchant Marine). A ship went aground and Spivak was sent to look into the matter.

Before the ship was refloated Spivak had left to return to his station. He filed a libel for salvage based on his actions at the wreck. The district court dismissed the libel, finding that Spivak had acted within the scope of his duties, and that his services were not voluntary.[100] This was affirmed by the court of appeals. They examined Spivak's job, his employer and the fact that he was acting under proper orders, and concluded that he had a duty throughout this incident. The fact that he continued to draw a government salary was also a factor in the court's determination.[101]

Spivak and *The Livingston Roe* demonstrated that an employee, whether military or civilian, has a difficult burden to overcome: the concept of a pre-existing duty based upon his status. In *The Livingston Roe*, the actions of the libelant were insufficient to sustain an award, despite the magnitude of his efforts. There the efforts were expected from a person of his rank and position. *Spivak* saw the establishment of a test whereby the operative question was whether the conduct was within the range of the claimant's duty.

A third case denying an award to a government employee was *W.E. Rippon & Son v. United States*.[102] There an Air Force employee whose duty it was to advise the Air Force on marine matters supervised the attempted salvage of a government vessel by libelant Rippon. An award was made to Rippon. In determining the value of such an award, the efforts of the civilian employee were considered for calculation purposes only.

Where the government may have a salvage claim but waives it, the crews may still sue in their own right, with permission. In *Nolan v. A.H. Basse Rederi Aktieselskat*,[103] an Army tug and Navy LST went to the aid of an abandoned ship fifty miles off shore.

The court rejected a public duty disqualification by using analysis from both *The Livingston Roe* and *Spivak*.[104] In looking at the LST, the court concluded:

> [T]here is no serious question but that her services, and consequently those of her personnel, were above and beyond those which they were expected to

99. 203 F.2d at 881.
100. *Id.* at 882.
101. *Id.* at 883.
102. 348 F.2d 627 (2d Cir. 1965).
103. 164 F. Supp. 774 (E.D. Pa. 1958). Ultimately the award to the tug was trebled as a result of their participation in putting out the fire on board the abandoned vessel.
104. *Id.* at 776.

> perform as a result of her and their public employment. There was no legal obligation . . . upon her as a naval vessel to go out of her course or to incur any risk in bringing an abandoned and burning derelict into port.[105]

The Army tug was equipped with special fire fighting equipment, and this placed her in a different situation. Still, an award was upheld. The court looked to the situs of the activity and said: "If the Else Basse had caught fire while in the harbor or while berthed where Army installations might have been in danger, the tug claimants might well be disqualified, but I do not think that the tug's duties extended to a foreign ship 50 miles at sea . . . ."[106]

The make-up of the respective crews, military on the Army tug and civilian on the Navy LST, was not a factor.[107] The bottom line is that because of the situs and absence of threat to governmental operations (consider *The Livingston Roe* in this regard) both crews were found to be outside the scope of their public duty in effectuating salvage, and thus entitled to an award.

Although enlistment in the Coast Guard is a bar to recovery, membership in the Coast Guard Auxiliary is not such a bar.[108] In *Dominguez v. Schooner Brindicate*, the voluntary actions of salvors who happened to be members of the Coast Guard Auxiliary qualified for a salvage award. Differentiating a member of the Auxiliary from a member of the Coast Guard, the court recognized strong public policy grounds for allowing such an award, saying:

> It certainly would be contrary to good public policy, and to the wording of the Act of Congress, if members of the Coast Guard Auxiliary, by the mere fact of such membership, would be disentitled to claim a salvage award for services they voluntarily undertook and rendered when they were not acting as members of the Coast Guard by designation from competent Coast Guard authority.[109]

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105. *Id.*

106. *Id.* at 777.

107. *Id.* at 776, n. 1.

108. 204 F. Supp. 817 (D.P.R. 1962).

109. *Id.* at 818. The act of Congress referenced by the court is 14 U.S.C. § 831 (1956), which provides:

> No member of the Auxiliary, solely by reason of such membership, shall be vested with, or exercise, any right, privilege, power, or duty vested in or imposed upon the personnel of the Coast Guard or the Reserve, except that any such member may, under applicable regulations, be assigned specific duties, which, after appropriate training and examination, he has been found competent to perform, to effectuate the purposes of the Auxiliary. No member of the Auxiliary shall be placed in charge of a motorboat, yacht, aircraft, or radio station assigned to Coast Guard duty unless he has been specifically designated by authority of the Commandant to perform such duty. Members of the Auxiliary, when assigned to specific duties as herein authorized shall, unless otherwise limited by the Commandant, be vested with the same power and authority, in the execution of such duties, as members of the regular Coast Guard assigned to similar duty. When any member of the Auxiliary is assigned to such duty he may, pursuant to regulations issued by the Secretary, be paid actual necessary traveling expenses, including a per diem al-

This decision can be easily reconciled with other cases involving employees of the government. As the statute shows, there is no connection with the Coast Guard absent a specific designation of such status. Once that status is conferred, but not before, the member becomes subject to the same standards as any other Coast Guard personnel. The applicable test then becomes *Spivak*. Until such time, the Auxiliary member acts as a private individual.

VI. MILITARY SALVAGE

Talbot[110] was, in today's vernacular, a "prize" case. Military salvage is defined as having the same general rules as a civil salvage except that it involves an award for recapture of property taken by an enemy.[111] The district court would be the prize court.[112]

Given her long naval tradition, England led the way in formulating guidelines of military salvage. Early on, they recognized that civil salvage may be superadded to military salvage. In sustaining an award for civil salvage in the case of a prize vessel an English court said: "The captain of a man-o'-war is not bound to put himself or his men in danger to preserve a merchant vessel from sinking, and I do not know that he is bound to take her in tow."[113] In that instance the question of whether the act was within the scope of duty was raised and answered in favor of the warship and her crew.

Times and the nature of war change. Prize cases were threatened with extinction during World War I because of the increase in submarine warfare. In some circles this was viewed as a loss of chivalry.[114]

World War II initiated the view that bringing a disabled enemy vessel into port was an opportunity for salvage in the traditional sense. Prize courts were perceived as courts of equity with broad jurisdiction that paralleled traditional salvage courts.[115] For example, when a Dutch ship was salved and, before an award could be paid, the country was occupied, the ship became a prize and the claim for salvage remained. In this case the

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lowance in conformity with standardized Government travel regulations in lieu of subsistence, while traveling and while on duty away from his home. No per diem shall be paid for any period during which quarters and subsistence in kind are furnished by the Government, and no per diem shall be paid for any period while such member is performing duty on a vessel.

110. *See* text accompanying notes 12-21 *supra*.

111. Oliver, *Admiralty: Prize courts: Military salvage: International law: Salvage by the officers and crew of the disabled and abandoned vessel*, 28 CORNELL L.Q. 69-70 (1942).

112. *Id.*

113. Anderson, *Military Salvage*, 17 J. COMP. LEGIS. 236 (1917). Author quotes from Louisa, 1 Dods. 317.

114. *Id.*

115. France Fenwick Tyne, 59 LAW Q. REV. 8 (1943).

English court held that the right to salvage should be disallowed only where there is the clearest of reasons.[116]

There are two major cases involving United States ships and wartime claims for salvage. One approximated a prize case,[117] but the other was along more traditional salvage lines.[118]

In *The Odenwald*[119] two American warships came upon a merchantman flying American colors but taking evasive action, prior to our entry into World War II. A boarding party was sent out in response to her request for assistance. Upon boarding the Odenwald, it was discovered that the crew had abandoned ship and were attempting to scuttle her. She was, in fact, a German motorship. Ultimately, the damage was repaired, and the ship was made seaworthy and convoyed into Puerto Rico. These efforts showed "great skill, resourcefulness and courage."[120] The government then filed a libel for salvage. The district court awarded more than $397,000[121] and this amount was affirmed by the court of appeals.

As to the question of the propriety of an award to the government, the court, using concepts from *The Impoco*, was concerned with the mission of the vessels involved and the risks taken. As salvage was not the mission of the vessels, considerable time had been lost from their primary mission, and great risks had been incurred, the court held that salvage was wholly appropriate.[122] Because of the United States' neutrality with Germany at the time of the incident, it is unlikely that the government could have claimed the Oldenwald as a prize. The penalty for flying a false flag was exclusion from American ports, not capture. Therefore, one author concluded, there was no alternative but to bring her into port as a salved vessel.[123]

The second case, *Kimes v. United States*,[124] involved the claim for salvage by the crew of a liberty ship for services rendered to a sister ship in the same convoy. The district court said that the libelants were entitled to an award of $10,000 but that there were set off costs such as wages,

116. France Fenwick Tyne Wear Co., Ltd. v. H.M. Procurator-General, 58 T.L.R. 388 (1940), 54 JURID. REV. 163 (1942).

117. Hamburg-American v. United States, 168 F.2d 47 (1st Cir. 1948) [hereinafter referred to as *The Odenwal*].

118. Kimes v. United States, 207 F.2d 60 (2d Cir. 1953).

119. 168 F.2d at 47.

120. 168 F.2d at 49.

121. *Id.* at 52. This was broken down as follows:

To United States as owner of vessels involved	$30,000.00
United States expenses	42,212.40
Two months pay and allowance to crew members not on boarding party	
Each member of the boarding party	3,000.00

122. *Id.* at 55.

123. Woolsey, *Capture of the German Steamship Odenwald*, 36 Am. J. Int'l. L. 96 (1942).

124. Kimes v. United States, 207 F.2d 60 (2d Cir. 1953).

overtime, and bonuses which were paid during the operation. Since the crew had already received remuneration in excess of the award, the libel was dismissed.

On appeal, the court of appeals was concerned with the policy question of the right of one warship to claim salvage for services rendered another ship. They termed this wrong, but not so wrong as to preclude an award, given traditional salvage concepts and the absence of prohibitory legislation.[125] Further, they found that the libelants did not fall under the *Spivak* doctrine, since their efforts had been entirely voluntary. To this end the court concluded: "We cannot therefore hold that, whatever their moral obligation to render these services for the effective prosecution of an all-out war effort libelants were under a legal duty to perform salvage work."[126]

The court relied on *Spivak*, possibly because of the civilian nature of the libelants' employ. *The Livingston Roe*, however, decided prior to *Spivak*, appears to preclude such an award if the claimants are military. Thus, military or civilian status seems to be the differentiating factor in cases of wartime salvage.

VII. Conclusion

The question of when the government may claim salvage appears to be well settled. By virtue of judicial and legislative decision, the right of the Navy and the Air Force to salvage awards is well established. The appropriateness of such claims is to be determined on a case-by-case basis by the Secretary of the department involved. It appears that claims will not be made absent extraordinary circumstances, and then only for the amount of the costs incurred. This seems to ignore the traditional concepts of the purpose of salvage, which was to reward past efforts in order to encourage future efforts, and in its place substitute a services rendered quasi-contract.

The Coast Guard has no such statutory base. This lack of authority, coupled with tradition, has precluded claims or awards on behalf of the Coast Guard under either traditional salvage concepts or the quasi-contract cost concept currently applicable to the Navy and Air Force. Such thinking is clearly antiquated, as *Amoco Virginia* recognizes. Were the Coast Guard to make a claim for costs in the event of a salvage operation the size of that in *Amoco Virginia*, there appears no bar to its being awarded. If nothing else, the rising costs of such operations dictate that the person who receives the benefit should bear the costs.

Individuals in government employ may receive an award for their efforts where appropriate, and the test to be applied is that of *Spivak*. This is an inquiry into whether the act came within the claimant's scope of duty. A

125. 207 F.2d at 62.
126. *Id.* at 63.

higher standard of duty is apt to be required of a military man than a civilian, because of the special circumstances of the military.

The question of wartime salvage claims is virtually moot, primarily because of the changing nature of war in the past sixty years. No longer do raiders cruise the seas looking for prizes by which to win glory and awards. The cold realities of both submarine warfare and airpower preclude the type of action which would once have given rise to such claims.