

2012

A Territorial Sea Change: The Death on the High Seas Act and the Extension of the Territorial Sea

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Recommended Citation

Andrew S. Levy, *A Territorial Sea Change: The Death on the High Seas Act and the Extension of the Territorial Sea*, 80 Fordham L. Rev. 1721 (2012).

Available at: <http://ir.lawnet.fordham.edu/flr/vol80/iss4/6>

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A TERRITORIAL SEA CHANGE: THE DEATH ON THE HIGH SEAS ACT AND THE EXTENSION OF THE TERRITORIAL SEA

Andrew S. Levy*

In March 2011, the Ninth Circuit ruled that the Death on the High Seas Act provides the exclusive remedy for deaths occurring both within the United States' territorial sea and without the states' traditional three-mile territorial boundaries. This ruling created a split with the Second Circuit, which had handed down a different interpretation of the Act eleven years earlier.

Prior to President Ronald Reagan's extension of the territorial sea of the United States in 1988, there was no issue regarding the operation of the Death on the High Seas Act because the statute's three-mile scope and the nation's boundaries were coextensive. The extension, coupled with U.S. Supreme Court deliberation over maritime wrongful death actions, created a "perfect storm" around the Act's territorial purview, raising issues of statutory construction, preemption, and federal-state comity.

This Note examines the significant issues relevant to the Act's application. It reviews the chief arguments proffered by the Ninth and Second Circuits, including then-Judge Sonia Sotomayor's dissent in the latter case. The Note next considers the Second Circuit's problematic holding and parses the opinion's persistent contradictions and inconsistencies. It then explores recent congressional action that further bolsters the arguments against the Second Circuit's position. The Note concludes that, absent congressional action, the Second Circuit must reconsider its holding when it next hears the issue.

TABLE OF CONTENTS

INTRODUCTION.....	1723
I. A HISTORY OF MARITIME WRONGFUL DEATH ACTIONS IN AMERICA AND RELEVANT DEVELOPMENTS IN MARITIME LAW..	1724
A. <i>Pre-DOHSA Maritime Law and Wrongful Death Actions</i>	1724
1. Maritime Law	1724
2. <i>The Harrisburg</i>	1725

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3. After <i>The Harrisburg</i>	1726
B. <i>The Death on the High Seas Act</i>	1728
1. The Legislative History	1728
2. The Original DOHSA	1729
C. <i>The General Maritime Law Wrongful Death Action</i>	1730
1. <i>Moragne v. States Marine Lines</i>	1730
2. Post- <i>Moragne</i> Wrongful Death Actions	1733
D. <i>Recent Changes to U.S. Maritime Law</i>	1734
1. Proclamation 5928's Extension of the Territorial Sea	1734
2. DOHSA Revisited	1735
II. A CIRCUIT SPLIT OVER DOHSA'S STARTING POINT	1736
A. <i>TWA Flight 800 and the Second Circuit</i>	1736
1. The High Seas	1737
2. Avoiding Redundancy	1738
3. The Addition of "Beyond a Marine League"	1738
4. DOHSA's Non-application Provision, <i>Yamaha</i> , and State Law Preemption	1739
5. Subversion of a Preexisting Remedy	1739
6. The Extension of the Territorial Sea and Legislative Intent	1739
B. <i>Judge Sotomayor's Dissent in TWA Flight 800</i>	1740
1. Proclamation 5928's Extension Was for International Purposes Only	1741
2. DOHSA Has Been Applied to Foreign Territorial Waters	1742
3. The Drafters' Sole Concern Was Providing a Remedy Where One Had Not Previously Existed	1743
4. Justifiable Surplusage	1743
5. Generosity, Uniformity, and Certainty	1744
C. <i>Helman and the Ninth Circuit</i>	1745
1. The High Seas and a Plain Reading of the Statute	1745
2. Recent Congressional Action Supports a Three-Mile Starting Point	1746
3. Proclamation 5928 Was Not Intended to Alter DOHSA's Boundary	1748
III. THE SECOND CIRCUIT'S HOLDING IS SUNK BY CONTRADICTION, INCONSISTENCY, AND THE COMMERCIAL AVIATION EXCEPTION	1748
A. <i>Significant Problems with the Second Circuit's Arguments</i> ..	1749
1. The Troubling Conclusion that Congress Both Foresaw and Excluded Any Later-Created Federal Waters	1749
2. The Implication that "High Seas" Was Insufficient to Preserve State Remedies	1749
3. The Avoidance of Preempting an Unclear or Non-existent Remedy	1750

4. The Aversion to Ousting a Preexisting, More Generous Remedy	1751
<i>a. DOHSA Does Not Displace a Preexisting Remedy....</i>	1751
<i>b. Safety of Air Travel and DOHSA's Remedial Scheme Undercut the Rationale for Favoring Generosity.....</i>	1753
B. <i>The Commercial Aviation Exception: A Fatal Blow to the Second Circuit</i>	1754
C. <i>The Second and Ninth Circuits Question the Legality of Proclamation 5928's Extension of DOHSA's Starting Point</i>	1756
D. <i>DOHSA's Statutory Language Is Inconsistent with Its Purpose</i>	1756
CONCLUSION	1757

INTRODUCTION

Few people wondered at the close of the movie *Titanic* whether Jack Dawson's family would be able to bring a wrongful death action to recover damages for his death.¹ For those who did, this Note may provide some insight. In 1912, when the *Titanic* sank, the U.S. Supreme Court's rule was that no action would lie under the common law for a death at sea, absent a state statute providing a remedy.² In response, courts applied state death statutes to deaths occurring on both state and non-sovereign waters, with varying results.³ Such was the state of the law in 1912 when Rose finally "let go" of Jack's hand.⁴ And so, of those who brought actions in the wake of the *Titanic*, it was said in 1914 that "they are making a desperate attempt to get some recovery, but so far without success."⁵

In 1920, Congress passed the Death on the High Seas Act⁶ (DOHSA), finally establishing a statutory wrongful death action for deaths occurring on the high seas. The Act applied to deaths occurring "on the high seas beyond a marine league from the shore of any State."⁷ One half-century later, the Supreme Court reversed its earlier ruling and held that an action can lie for wrongful death at sea under the common law.⁸ In subsequent

1. TITANIC (Paramount Pictures 1997).

2. See *The Harrisburg*, 119 U.S. 199, 213 (1886).

3. See *infra* Part I.C.

4. TITANIC, *supra* note 1.

5. 51 CONG. REC. 1928 (1914) (statement of Rep. McCoy). Those seeking relief in the aftermath of the *Titanic* were also impeded by statutory caps on the liability of shipowners. See *Oceanic Steam Navigation Co. v. Mellor*, 233 U.S. 718, 731–34 (1914).

6. See Death on the High Seas Act, Pub. L. No. 66-165, 41 Stat. 537 (1920) (codified as amended at 46 U.S.C. §§ 30301–30308 (2006)).

7. *Id.* § 1. A marine league is equal to approximately three nautical miles. *Blome v. Aerospatiale Helicopter Corp.*, 924 F. Supp. 805, 808 n.6 (S.D. Tex. 1996). One nautical mile is equal to 1.15 land miles. *In re Air Crash Off Long Island, New York, on July 17, 1996 (TWA Flight 800)*, 209 F.3d 200, 201 n.1 (2d Cir. 2000). Because of their rough equivalencies, this Note will employ "one marine league," "three nautical miles," and "three miles" interchangeably, notwithstanding when one's usage is preferred for clarity.

8. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970).

decisions, the Court grappled with preemption issues involving DOHSA, state law, and common law remedies.⁹

The present issue arises from President Ronald Reagan's 1988 extension of the United States' territorial sea from three to twelve miles.¹⁰ This extension created a nine-mile zone of federal territorial waters that had not previously existed. Although DOHSA provides a right of action for deaths occurring on the "high seas beyond a marine league," territorial waters are not considered "high seas" under today's commonly accepted definition.¹¹ Did the Proclamation, therefore, have the effect of moving DOHSA's territorial starting point to twelve miles from shore? Or was it the DOHSA Congress's intent to permanently fix DOHSA's starting point at three miles? The Second and Ninth Circuits have split over this question.

This Note proceeds in three parts. Part I addresses the history of wrongful death actions in American maritime law, including DOHSA and developments in maritime law relevant to its application. Part II examines the critical arguments behind the Second and Ninth Circuits' interpretations of DOHSA since Proclamation 5928. Part III questions the Second Circuit's more problematic arguments and suggests that its holding is no longer tenable due to recent developments in the law.

I. A HISTORY OF MARITIME WRONGFUL DEATH ACTIONS IN AMERICA AND RELEVANT DEVELOPMENTS IN MARITIME LAW

This part begins with a short introduction into the pertinent law, and then proceeds chronologically through the history of wrongful death actions pertaining to deaths at sea.

A. *Pre-DOHSA Maritime Law and Wrongful Death Actions*

1. Maritime Law

Maritime law is one of the oldest legal subjects in existence today, tracing its roots to prehistoric times.¹² Specifically, maritime law refers to "the entire body of laws, rules, legal concepts and processes that relate to the use of marine resources, ocean commerce, and navigation."¹³

9. *See, e.g.*, *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 118 (1998) (holding DOHSA preempts survival actions); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986) (holding that DOHSA preempts available state law actions); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 618–19 (1978) (holding that DOHSA preempts the general maritime law action); *see also infra* notes 113–15 and accompanying text.

10. Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

11. 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 53 (5th ed. 2011) ("The doctrine of high seas holds that [the high seas] are open to all states, and no state may validly subject any part of them to its sovereignty.")

12. *Id.* at 3. The famous Code of Hammurabi even deals with "marine collisions and ship leasing." *Id.*

13. *Id.* at 2. Admiralty is often used synonymously with maritime law today, although their meanings are in fact distinct. *See id.* at 1. Admiralty is narrower in that it "refers only to the private law of navigation and shipping," but also broader in that it refers to all waters, not just those of the sea. *Id.* at 2.

Admiralty and maritime jurisdiction in the United States is established in the Constitution: “The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.”¹⁴ Federal district courts today have original jurisdiction over admiralty cases, but if the claimant is entitled to a remedy granted by the state, the “saving to suitors” clause reserves the claimant’s right to bring a cause of action sounding in admiralty in a state court.¹⁵

Deaths at sea may give rise to two distinct types of legal actions. A wrongful death action allows the victim’s dependents “to recover for the harms the *dependents* personally suffered as a result of the death.”¹⁶ In contrast, a survival action allows the victim’s estate to recover for damages the victim would have been able to seek but for his death.¹⁷ Summarily, a wrongful death action is personal to the dependent, whereas a survival action is not. Recovery in wrongful death actions may be for loss of support or consortium, while survival action recovery may be for the victim’s pain and suffering.¹⁸

2. *The Harrisburg*

Any discussion of wrongful death actions pertaining to death at sea invariably begins with the seminal 1886 Supreme Court case, *The Harrisburg*.¹⁹ In May 1877, the Philadelphian steamer *Harrisburg* and the schooner *Marietta Tilton* collided in Massachusetts state waters.²⁰ Six members of the schooner’s crew, including the first mate, perished in the collision.²¹ Five years later, the widow and child of the deceased first mate filed suit “to recover damages for his death, caused by the negligence of the steamer.”²² Under the wrongful death statutes of Pennsylvania and Massachusetts, the action was time-barred by a one-year statute of limitations.²³ The district court held, though, that a court of admiralty was not so bound by the laws of the states and that “[i]n the admiralty courts . . . the death of a human being . . . may be complained of as an injury, and the wrong redressed under the general maritime law.”²⁴

14. U.S. CONST. art. III, § 2, cl. 1.

15. 28 U.S.C. § 1333 (2006).

16. 2 ERASTUS CORNELIUS BENEDICT ET AL., BENEDICT ON ADMIRALTY § 81 (7th ed. rev. 2008).

17. *See id.* (citing *Sea-Land Servs. Inc. v. Gaudet*, 414 U.S. 573, 575 n.2 (1974); *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989)).

18. *See* BLACK’S LAW DICTIONARY 1583 (9th ed. 2009).

19. 119 U.S. 199 (1886).

20. *See id.* at 199.

21. *See The Harrisburg*, 15 F. 610, 610 (C.C.E.D. Pa. 1883).

22. *The Harrisburg*, 119 U.S. at 199.

23. *See id.* at 200.

24. *Id.* (quoting *The Harrisburg*, 15 F. at 611). General maritime law is “[t]he body of U.S. legal precedents and doctrines developed through caselaw in maritime and admiralty litigation.” BLACK’S LAW DICTIONARY, *supra* note 18, at 753. It “is a branch of federal common law” and “is distinguished from statutory law.” *Id.* As the Supreme Court has stated, it is “[d]rawn from state and federal sources . . . [and] is an amalgam of traditional

On appeal, the Supreme Court reversed, finally settling the issue of whether an action may lie under general maritime law to recover damages for wrongful death at sea by holding that, absent statute, no such action could be maintained.²⁵ The Court painstakingly reviewed myriad case law on the subject, but ultimately based its decision on its 1877 decision in *Insurance Co. v. Brame*,²⁶ which held that “by the common law no civil action lies for an injury which results in death.”²⁷ The Court determined that maritime law should not vary from the common law of the land, and found itself bound by *Brame*.²⁸

The rule promulgated by *Brame*, and used to justify *The Harrisburg*, was based on the old English common law felony-merger doctrine.²⁹ This doctrine deems that, if an action is both a felony and a tort, the felony preempts the tort.³⁰ The historical justification for this rule was simply that once the felon was put to death, as all were, his property was forfeited to the Crown.³¹ There was therefore no property upon which to base a civil action once the felon had been criminally punished for his crime.³² Killings—be they intentional or negligent—were felonious, and thereby preempted any wrongful death tort that could have arisen out of the same event.³³ Part I.F will return to and further discuss this concept in the discussion of *Moragne*.

3. After *The Harrisburg*

Many lower courts had long felt that a wrongful death claim should lie under general maritime law.³⁴ Such courts, along with state legislatures eager to abrogate the harshness of *The Harrisburg*, employed strategies to provide remedies for relatives of those who were killed at sea.³⁵ By 1888, most states had adopted a wrongful death statute.³⁶ Courts craftily

common-law rules, modifications of those rules, and newly created rules.” E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864–65 (1986).

25. See *The Harrisburg*, 119 U.S. at 213–14.

26. 95 U.S. 754 (1877).

27. See *The Harrisburg*, 119 U.S. at 204 (quoting *Brame*, 95 U.S. at 756).

28. See *id.* at 213 (“[I]n the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law . . . has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind . . .”).

29. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 382 (1970).

30. See *id.*

31. See *id.*; see also Juanita M. Madole, *The Death on the High Seas Act*, in AIRCRAFT ACCIDENT RECONSTRUCTION AND LITIGATION 471, 471 (Barnes W. McCormick & M.P. Papadakis eds., 4th ed. 2011).

32. See *Moragne*, 398 U.S. at 382; see also Madole, *supra* note 31, at 471.

33. See *Moragne*, 398 U.S. at 382 (“[T]he punishment for the felony was the death of the felon and the forfeiture of his property to the Crown . . . and all intentional or negligent homicide was felonious . . .”).

34. See, e.g., *Cutting v. Seabury*, 6 F. Cas. 1083, 1084 (D. Mass. 1860) (No. 3,521) (“[N]atural equity and the general principles of law are in favor of [wrongful death actions.]”); accord *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578) (concurring with Judge Sprague’s analysis in *Cutting*).

35. See Madole, *supra* note 31, at 472.

36. See 1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 215 (4th ed. 1888) (noting in 1888 that “most States of the American Union”

extended these statutes to deaths occurring on both state and non-territorial waters, and were sometimes able to “sidestep[]” *The Harrisburg*.³⁷ In *The Hamilton*,³⁸ two vessels owned by Delaware corporations collided in non-sovereign waters.³⁹ The Supreme Court affirmed a recovery under Delaware’s wrongful death statute, holding that the statute need not be confined to deaths on land,⁴⁰ and that state law is applicable even in non-territorial waters so long as the plaintiff and defendant are from the same state.⁴¹

Reliance on the various state statutes necessarily led to “farfetched theories,”⁴² but, more importantly, to uncertainty⁴³ and a lack of uniformity in wrongful death recoveries as well.⁴⁴ Further, in the majority of cases, courts were unable to extend the death statutes to deaths occurring on the high seas.⁴⁵ The Supreme Court did not formally hold that a state death statute could be applied to maritime deaths until 1921, one year after Congress passed DOHSA.⁴⁶

had incorporated aspects of the British wrongful death statute—the Fatal Accidents Act, or more commonly referred to as Lord Campbell’s Act—into their own death statutes). For more on Lord Campbell’s Act, see *infra* note 93. Almost twenty years prior, “29 of the 37 states had enacted wrongful death statutes.” John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 L. & SOC. INQUIRY 717, 736 (2000) (citing THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 335–44 (1869)).

37. See Madole, *supra* note 31, at 472.

38. 207 U.S. 398 (1907).

39. *Id.* at 402.

40. See *id.* at 405 (“[W]e construe the statute as intended to govern all cases which it is competent to govern, or at least not to be confined to deaths occasioned on land.”).

41. See *id.* at 403 (“[T]he bare fact of the parties being outside the territory in a place belonging to no other sovereign would not limit the authority of the State”); see also *Moragne v. States Marine Lines*, 398 U.S. 375, 393 n.10 (1970) (noting that *The Hamilton* suggests that “the law of that State could be applied to a death on the high seas” if “the plaintiff and defendant were of the same State”); cf. Calvert Magruder & Marshall Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 409–11 (1926) (asserting that Delaware’s jurisdiction may have been warranted because the fatal injury was sustained on a Delaware vessel, rather than the fortuity of the tortfeasor and victim’s identical citizenship).

42. See John Edington Ball, *Wrongful Death at Sea—The Death on the High Seas Act*, 51 CALIF. L. REV. 389, 389 (1963). One such example occurred in *Lindstrom v. Int’l Nav. Co.*, 117 F. 170 (C.C.E.D.N.Y. 1902), where the court allowed an extension of New York’s wrongful death statute to reach a death that occurred at sea. Although New York’s death statute required the act to be consummated on New York territory, the court permitted recovery because the ship from which the decedent was thrown was registered in New York and “[t]he wrongful act or omission took effect on shipboard,—that is, territory of New York.” *Id.* at 173.

43. See Note, *Recovery for Death in Collision at Sea*, 32 HARV. L. REV. 713, 713 (1919) (“Situations not covered by these statutes, where consequently an injury goes remediless, are constantly arising.”).

44. See Robert M. Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 116–17 (1921).

45. See *Moragne*, 398 U.S. at 393 n.10 (remarking that “probably because most state death statutes were not meant to have application to the high seas, the possibility [of courts employing farfetched theories] did little to fill the vacuum”).

46. See *W. Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921).

B. *The Death on the High Seas Act*

1. The Legislative History

Only two years after *The Harrisburg*, federal legislators were already attempting to override the Supreme Court's ruling.⁴⁷ In 1888, Senator John McPherson of New Jersey introduced a bill to legislatively overrule *The Harrisburg*, but it made no significant progress in Congress.⁴⁸ In 1899, the Maritime Law Association (MLA) was founded with the goal of drafting a bill that would create a wrongful death right of action in admiralty.⁴⁹ The primary issue that arose throughout the drafting process concerned the waters over which the bill would have jurisdiction.⁵⁰ "The main issue was, whether to make such an act apply to all navigable waters, and thus supersede state statutes within their respective boundaries, or to make it supplementary to state statutes and apply only on waters not covered by any statute."⁵¹ Whereas the former had the benefit of uniformity,⁵² the justification for the latter was clarity and an aversion to the confusion that would be created by uniformity.⁵³ After all, much confusion would arise from both a federal and a state statute governing the same area, especially where maritime boundaries are not easily identifiable.⁵⁴

Uniformity initially prevailed, and so an early draft of the bill allowed for recovery for death occurring "on the high seas, the Great Lakes, or any navigable waters of the United States."⁵⁵ That bill ultimately made no progress in Congress.⁵⁶ The same bill was revived in 1908, and

47. See Kenneth G. Engerrand, *DOHSA's Reach: What are the High Seas Beyond a Marine League from Shore?*, 1 LOY. MAR. L.J. 1, 2 (2002).

48. *Id.*

49. See Hughes, *supra* note 44, at 117. Robert Hughes was a member of the MLA and much of the "final form [of DOHSA] . . . was drawn by him." *Id.* at 116.

50. See *id.* at 117.

51. *Id.*

52. See *id.* Uniformity has long been a central tenet of American maritime law. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 217 (1917) (describing the "uniformity in respect to maritime matters which the Constitution was designed to establish"). Without such uniformity, "domestic and foreign participants in maritime shipping and commerce would be subject to varying state laws, and the differences resulting therefrom could have an adverse effect on the nation's maritime shipping and commerce." FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *ADMIRALTY IN A NUTSHELL* 5 (2005).

53. See Hughes, *supra* note 44, at 117.

54. See *id.* On this issue, Robert Hughes stated at a hearing before the Committee on the Judiciary in 1916, "If you try to make it cover the same territory that the States statutes cover, then you have rules of action applying in the admiralty court for damages arising on navigable waters different from the one applying in the State court." *Right of Action for Death on the High Seas: Hearing Before the H. Comm. on the Judiciary*, 64th Cong. 4 (1916) (statement of Robert M. Hughes, Member, Maritime Law Association, American Bar Association) [hereinafter *1916 Hearing*]. On a similar issue, Mr. Hughes humorously added, "You can not ride two horses at the same time unless you are a circus rider." *Id.* at 6.

55. AN ACT TO AUTHORIZE THE MAINTENANCE OF ACTIONS FOR NEGLIGENCE CAUSING DEATH IN MARITIME CASES § 1 (Maritime Law Ass'n, Proposed Draft 1903), reprinted in George Whitelock, *A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts*, 22 HARV. L. REV. 403, 416 n.3 (1909).

56. See Hughes, *supra* note 44, at 117.

reintroduced to Congress in 1910.⁵⁷ After hearings in the Senate and House, Congress once again took no action.⁵⁸

The sinking of the *Titanic* in 1912,⁵⁹ and a subsequent Senate Committee on Commerce report finding that “the number of deaths at sea was increasing sharply,”⁶⁰ ultimately spurred substantial interest in the bill. In 1915, the MLA’s bill passed the House but was severely weakened by amendments made on the floor and was subsequently stifled.⁶¹

The MLA soon concluded that the “simplest bill and the one that would cause the least opposition” would be one that did not overlap state statutes.⁶² The bill was drafted “simply [to] apply where no bill applies at all now—that is, a marine league from shore” and would not “affect any remedy that exists now.”⁶³ The bill dropped the statutory language permitting recovery for deaths occurring on “any navigable waters of the United States”⁶⁴ and added the requirement that the accident must occur “beyond a marine league from the shore of any State.”⁶⁵ After many debates and amendments,⁶⁶ the bill, which would become known as the Death on the High Seas Act, was passed in 1920.

2. The Original DOHSA

The original DOHSA had three provisions relevant to this Note: the first, second, and seventh sections of the Act.⁶⁷ The first granted a right of action for wrongful death:

[W]henever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories

57. *See id.*

58. *See id.* The Second Circuit noted that “[t]he rest of DOHSA’s legislative history concerns the narrowing of this provision.” *In re Air Crash Off Long Island, New York*, on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 204 (2d Cir. 2000). This was an exaggeration by the court, though, as many other provisions of DOHSA were changed throughout its drafting. *See generally 1916 Hearing, supra* note 54.

59. *See* Ball, *supra* note 42, at 390; Hughes, *supra* note 44, at 117; *see also* Letter from Harrington Putnam to E.Y. Webb, Chairman of the Comm. on the Judiciary, House of Representatives (Aug. 22, 1913), *reprinted in* ACTION FOR DEATH ON THE HIGH SEAS, H.R. REP. NO. 66-674, at 4 (1920) [hereinafter Harrington Putnam Letter] (“The *Titanic* disaster is still fresh in mind.”).

60. *See* Engerrand, *supra* note 47, at 3–4 (citing HENRY W. FARNAM, THE SEAMAN’S ACT OF 1915, S. DOC. NO. 64-333, at 3 (1916)).

61. *See* Hughes, *supra* note 44, at 118.

62. *1916 Hearing, supra* note 54, at 11.

63. *Id.* at 12.

64. *TWA Flight 800*, 209 F.3d 200, 204 (2d Cir. 2000); *see also supra* note 55.

65. *1916 Hearing, supra* note 54, at 12 (quoting H.R. 9910, 64th Cong. (1st Sess. 1916)).

66. *See TWA Flight 800*, 209 F.3d at 204–05. All in all, twenty-three bills were introduced over thirty-two years. *See* Engerrand, *supra* note 47, at 21.

67. In 2000, DOHSA was amended to include a provision for commercial aviation accidents, which is also relevant to this Note. *See infra* Part I.D.2.

or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages⁶⁸

The second section states that the damages recoverable may only be for pecuniary loss,⁶⁹ and the seventh—the non-application provision—states “[t]hat the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act.”⁷⁰

The first and seventh sections of the Act, taken together, show just how cautious Congress was to not interfere with existing state death statutes.⁷¹ The vast majority of state territorial boundaries extended approximately three miles into the sea.⁷² By creating a cause of action that arises only out of waters beyond three miles from shore, DOHSA would not interfere with existing statutes. Noting that both the first and seventh sections preserve state remedies, Representative Andrew Montague of Virginia asserted that both are retained in the Act “‘out of abundant caution, to calm the minds’ of those who feared that DOHSA would oust state remedies.”⁷³

C. *The General Maritime Law Wrongful Death Action*

1. *Moragne v. States Marine Lines*

In 1970, the Supreme Court heard a case arising from the death of a longshoreman⁷⁴ in Florida’s navigable waters.⁷⁵ The plaintiff, the decedent’s widow, based her claim upon negligence and unseaworthiness,⁷⁶ and sought damages for wrongful death and the decedent’s pain and suffering.⁷⁷ After the plaintiff failed to prove the shipowner’s negligence,⁷⁸ the defendant moved to dismiss the plaintiff’s claims, asserting that Florida’s death statute did not include seaworthiness as a basis for liability,

68. Death on the High Seas Act, Pub. L. No. 66-165, § 1, 41 Stat. 537 (1920) (codified as amended at 46 U.S.C. §§ 30301–30308 (2006)).

69. *Id.* § 2.

70. *Id.* Today, this provision reads: “This chapter does not affect the law of a State regulating the right to recover for death.” 46 U.S.C. § 30308.

71. See Hughes, *supra* note 44, at 118–19.

72. See *TWA Flight 800*, 209 F.3d 200, 205 (2d Cir. 2000) (“[S]tate territorial waters . . . traditionally lay within three nautical miles from shore.”); see also 43 U.S.C. § 1312 (2006) (setting original coastal states’ boundaries to three miles from shore). *But see* *United States v. California*, 332 U.S. 19, 38 (1947) (holding that a state “is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt”).

73. *TWA Flight 800*, 209 F.3d at 224 (Sotomayor, J., dissenting) (quoting 59 CONG. REC. 4482–83 (1920) (statement of Rep. Montague)).

74. A longshoreman is “[a] maritime laborer who works on the wharves in a port,” or is someone who “loads and unloads ships.” BLACK’S LAW DICTIONARY, *supra* note 18, at 1027–28.

75. See *Moragne v. States Marine Lines*, 398 U.S. 375, 376 (1970).

76. Unseaworthiness is “a failure to supply and keep in order the proper appliances appurtenant to the ship.” Madole, *supra* note 31, at 473 (quoting *The Osceola*, 189 U.S. 158, 175 (1903)). A vessel is unseaworthy if it is “unable to withstand the perils of an ordinary voyage.” BLACK’S LAW DICTIONARY, *supra* note 18, at 1679.

77. See *Moragne*, 398 U.S. at 376.

78. See Madole, *supra* note 31, at 473.

and that under *The Harrisburg*, maritime law did not permit a recovery for wrongful death.⁷⁹ The district court granted the defendant's motion.⁸⁰ On appeal, the Fifth Circuit certified to the Florida Supreme Court the question whether Florida's death statute allowed seaworthiness as a basis for recovery.⁸¹ The Florida Supreme Court answered in the negative and the Fifth Circuit affirmed.⁸² The Supreme Court granted certiorari "to reconsider the important question of remedies under federal maritime law for tortious deaths on state territorial waters."⁸³ The Court's discussion was centered around *The Harrisburg*, as its premise—that no wrongful death action may lie under general maritime law⁸⁴—was still controlling law.⁸⁵ In reversing the Fifth Circuit, the Court finally overruled the "unjustifiable anomaly" that was *The Harrisburg*.⁸⁶

The *Moragne* Court first reviewed the reasoning of *The Harrisburg*.⁸⁷ It sought to find a persuasive justification for the harsh rule adopted by the Court in *Brame* and later extended to *The Harrisburg*.⁸⁸ Relying on legal historians, the Court found that the only basis for the rule was the felony-merger doctrine.⁸⁹ The Court, recognizing that it did not need to assess whether *The Harrisburg* had been decided correctly,⁹⁰ did so nonetheless.⁹¹ The felony-merger doctrine, adopted from English jurisprudence,⁹² had "long since been thrown into discard" in England when *The Harrisburg* was decided.⁹³ Even worse, the historical justifications for the doctrine in England never existed in the United States.⁹⁴ Because forfeiture of one's entire property was not part of a felon's sentence, preclusion of a civil action on that basis made little sense.⁹⁵

The Court also questioned why the harsh common law rule enunciated in *Brame* was extended to admiralty, an arm of the law that had "developed general principles unknown to the common law . . . [which often] included

79. *See Moragne*, 398 U.S. at 376.

80. *See id.*

81. *See id.* at 377.

82. *See Moragne v. States Marine Lines*, 409 F.2d 32, 32 (5th Cir. 1969).

83. *Moragne*, 398 U.S. at 377.

84. *See supra* Part I.A.2.

85. *See Moragne*, 398 U.S. at 378.

86. *See id.*

87. *See id.* at 379–80.

88. *See id.* at 381 ("One would expect, upon an inquiry into the sources of the common-law rule [that no civil action may lie for the death of another], to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies.").

89. *See id.* at 382.

90. *See id.* at 388; Madole, *supra* note 31, at 473.

91. *See Moragne*, 398 U.S. at 381–88.

92. *See id.* at 383–84.

93. *See id.* at 381. Indeed, Lord Campbell's Act abrogated the harsh common law rule by providing "a civil remedy for death caused by negligence." 2 BENEDICT ET AL., *supra* note 16, § 81(a) (citing Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93 (Eng.)).

94. *See Moragne*, 398 U.S. at 384. The felony-merger doctrine was premised on the forfeiture of the felon's possessions to the Crown. After such forfeiture, there would be no property upon which to base a civil action. *See supra* notes 30–33 and accompanying text.

95. *Moragne*, 398 U.S. at 384.

a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages.”⁹⁶ After all, maritime law had a “long history” of being applied more generously than the common law.⁹⁷

The Court then veered its discussion toward public policy.⁹⁸ Finding that every state at the time had enacted a wrongful death statute,⁹⁹ and that Congress had created actions for wrongful death in a multitude of situations,¹⁰⁰ the *Moragne* Court thought it clear that wrongful death actions were not contrary to public policy.¹⁰¹

Nevertheless, the Court was not yet ready to create a general maritime law action. The Court recognized that Congress’s failure to provide a remedy for this type of death—one occurring within state territorial waters—could be justified by two discrete congressional intents.¹⁰² On one hand, “the scope of a statute may reflect nothing more than the dimensions of the particular problem.”¹⁰³ On the other hand, Congress could have legislated in such a way to “erect[] a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation.”¹⁰⁴ Put another way, either (1) Congress declined to provide a remedy for deaths occurring in state waters because at the time of legislation, these deaths were already covered by state statutes; or (2) by excluding these deaths from the statutory recovery scheme, Congress purposely denied a remedy for these deaths.¹⁰⁵

The Court concluded that Congress’s intent in enacting DOHSA was to ensure a remedy for deaths occurring outside of state territorial waters.¹⁰⁶ Therefore, the Act’s exclusion of state territorial waters from coverage did not reflect a congressional desire to insulate those waters from remedies, but rather spoke to the superfluity of legislating those waters for which a

96. *See id.* at 386–87. In this vein, Chief Justice Salmon Chase, sitting on circuit, remarked that “it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.” *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578). Interestingly, Justice Chase commented that the common law rule barring wrongful death actions was derived from the “peculiar” felony-merger doctrine—a doctrine “traceable to the feudal system and its forfeitures.” *Id.* This “peculiar” rule, though, was affirmed twelve years later in *Brame*, and twenty-one years later in *The Harrisburg*. *See supra* Part I.A.2.

97. *See Madole, supra* note 31, at 471–72.

98. *See Moragne*, 398 U.S. at 390.

99. *See id.*

100. *See id.* (citing the creation of statutory wrongful death actions for railroad employees, merchant seamen, and persons on the high seas). Statutory wrongful death actions also existed for longshore and harbor workers. *See Longshoremen’s and Harbor Workers’ Compensation Act*, Pub. L. No. 69-803, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901–950 (2006)).

101. *See Moragne*, 398 U.S. at 390.

102. *See id.* at 392.

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.* at 397–98.

remedy was already provided.¹⁰⁷ Based on a thorough analysis, the Court concluded that “Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy.”¹⁰⁸ After finding no “substantial countervailing factors” to justify keeping the rule of *The Harrisburg* afloat, it was cast to the sea once and for all.¹⁰⁹

2. Post-*Moragne* Wrongful Death Actions

The *Moragne* decision left many questions unanswered about the general maritime law action, most of which pertained to recoverable damages and preemption. After *Moragne*, the Supreme Court further defined what an action lying in general maritime law entailed. *Sea-Land Services, Inc. v. Gaudet*¹¹⁰ established that recoverable damages in a *Moragne*-type cause of action were loss of support and services, funeral expenses, and loss of society, while grief was not.¹¹¹ Thus, a *Moragne* action could provide for a greater recovery than DOHSA. Other cases established that DOHSA was the exclusive remedy for deaths on the high seas. *Mobil Oil Corp. v. Higginbotham*¹¹² held that where DOHSA applies, the general maritime law cannot provide a remedy or nonpecuniary damages.¹¹³ Similarly, *Offshore Logistics, Inc. v. Tallentire*¹¹⁴ held that where DOHSA applies, state law cannot provide a remedy or nonpecuniary damages.¹¹⁵ Furthermore, as a wrongful death statute, the DOHSA cause of action provides relief only for the dependents’ personal loss from the decedent’s death.¹¹⁶ The plaintiffs in *Dooley v. Korean Air Lines Co.*¹¹⁷ therefore contended that DOHSA, as a wrongful death statute, does not preclude a survival action under general maritime law.¹¹⁸ The Court denied the plaintiffs’ claim, holding that DOHSA’s design as a wrongful death statute indicated Congress’s intent to preclude all other causes of action arising from death on the high seas.¹¹⁹ Congress decided to limit both which relatives were allowed to recover and the damages that they could seek, and

107. *See id.*; Madole, *supra* note 31, at 473.

108. *See Moragne*, 398 U.S. at 393.

109. *See id.* at 403–09.

110. 414 U.S. 573 (1974).

111. *See id.* at 585–91; *see also* MARAIST & GALLIGAN, *supra* note 52, at 310.

112. 436 U.S. 618 (1978).

113. *See id.* at 625.

114. 477 U.S. 207 (1986).

115. *See id.* at 232–33.

116. 46 U.S.C. § 30302 (2006) (limiting the cause of action to the “benefit of the decedent’s spouse, parent, child, or dependent relative”). The personal representative of a plaintiff who dies during an action brought for personal injury may also proceed under DOHSA, but may only seek the wrongful death damages permitted under § 30303. *See* 46 U.S.C. § 30305. Although this has the façade of a survival action, it is really a “type of non-abatement statute, since it converts a pre-existing suit for personal injury by the victim into a wrongful death action by his beneficiaries.” MARAIST & GALLIGAN, *supra* note 52, at 314.

117. 524 U.S. 116 (1998).

118. *See id.* at 123.

119. *See id.*

in doing so “provided the exclusive recovery for deaths that occur on the high seas.”¹²⁰

D. Recent Changes to U.S. Maritime Law

1. Proclamation 5928’s Extension of the Territorial Sea

The Third United Nations Conference¹²¹ on the Law of the Sea convened in 1973.¹²² The impetus for the Conference was that “[t]he oceans were generating a multitude of claims, counterclaims and sovereignty disputes.”¹²³ Nations asserted sovereignty over dissimilar lengths into the seas, and tensions and disputes arose over ownership and treatment of resources.¹²⁴ At the time, only twenty-five nations claimed the traditional three-mile boundary for their territorial sea.¹²⁵ Sixty-six nations had claimed a boundary of twelve miles, fifteen claimed a boundary between four and ten miles, and eight claimed a vast boundary of two hundred miles.¹²⁶ The Conference’s resulting treaty, finalized in 1982,¹²⁷ established the right of a nation to claim an outermost boundary of twelve nautical miles for its territorial sea.¹²⁸

Acting under such authority,¹²⁹ President Ronald Reagan issued Proclamation 5928, which extended the territorial sea of the United States

120. *See id.*

121. The “conference” would produce the resultant “convention” nine years later with the completion of the treaty. *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, U.N. DIVISION FOR OCEAN AFF. & L. SEA (1998), http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm [hereinafter *UNCLOS Historical Perspective*].

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* A territorial sea is “the belt of water immediately adjacent to the coast of a nation” and within which “[a] nation is sovereign.” Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 TERRITORIAL SEA J. 1, 3 (1990).

126. *See UNCLOS Historical Perspective, supra* note 121.

127. While the treaty was completed in 1982 (save for a 1994 addendum), the United States did not accede to it at that time. President Reagan believed that the Convention “contain[ed] many positive and very significant accomplishments,” yet he announced that the United States “would not adhere to the Convention primarily because of objections to the form and content of the proposed régime on future sea-bed mining.” KENNETH R. SIMMONDS, U.N. CONVENTION OF THE LAW OF THE SEA 1982, at xvi–xvii (1983) (quoting Bernard Gwertzman, *U.S. Will Not Sign Sea Law Treaty*, N.Y. TIMES, July 10, 1982, at L5). Currently, the United States has signed the treaty, regards most of it as “customary international law,” but has not yet formally acceded to it. Scott G. Borgerson, *The National Interest and the Law of the Sea*, COUNCIL ON FOREIGN REL. 3 (Council Special Report No. 46, May 2009), available at i.cfr.org/content/publications/attachments/LawoftheSea_CSR46.pdf.

128. United Nations Convention on the Law of the Sea, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397.

129. In 1983, President Reagan proclaimed that the United States would “voluntarily abide by all non-seabed parts of the convention.” *See* Borgerson, *supra* note 127, at 11 (citing Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983)).

from three¹³⁰ to twelve miles.¹³¹ In so doing, President Reagan created a nine-mile zone of federal waters, as state maritime boundaries were not affected by this Proclamation.¹³² Also of importance in the Proclamation was the disavowal clause: “Nothing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom”¹³³ The Proclamation unwittingly precipitated the issue this Note addresses.

2. DOHSA Revisited

With one major exception, DOHSA today looks much like its original version. Its main provisions are unchanged, save that where DOHSA once began “beyond a marine league from the shore,”¹³⁴ it was amended in 2006 to begin “beyond 3 nautical miles from the shore.”¹³⁵ In 2000, however, Congress made an amendment on a larger scale, essentially excepting commercial aviation accidents¹³⁶ from DOHSA’s remedial scheme.¹³⁷ This amendment provides that if death results from a commercial aviation accident occurring within the twelve-mile territorial sea, DOHSA does not apply.¹³⁸ It also provides the only exception to pecuniary relief, permitting nonpecuniary, but not punitive, damages for deaths arising from a commercial aviation accident occurring beyond the territorial sea.¹³⁹

Today, litigation of maritime wrongful death actions is particularly contentious because of the drastic difference in recovery that results from whether or not DOHSA applies.¹⁴⁰

130. See *TWA Flight 800*, 209 F.3d 200, 213 (2d Cir. 2000) (“The Proclamation thus alters the three-mile boundary that had historically defined the territorial sea.”).

131. Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (“The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States . . .”).

132. See, e.g., 43 U.S.C. § 1312 (2006) (fixing the states’ coastal borders at three miles).

133. Proclamation No. 5928, 54 Fed. Reg. 777.

134. Death on the High Seas Act, Pub. L. No. 66-165, § 1, 41 Stat. 537 (1920).

135. 46 U.S.C. § 30302 (2006). This substantively inconsequential change was made in the interest of clarity. See *Helman v. Alcoa Global Fasteners, Inc.*, No. 09-Civ. 1353, 2009 WL 2058541, at *3 n.2 (C.D. Cal. June 16, 2009). The relevance of this change is discussed more thoroughly in Part II.C.2, *infra*.

136. In *Eberli v. Cirrus Design Corp.*, 615 F. Supp. 2d 1369 (S.D. Fla. 2009), the U.S. District Court for the Southern District of Florida found the words “commercial aviation accident” to be ambiguous. *Id.* at 1372–73. Such an accident could be one that “occurs during the course of aviation involving commerce, . . . or an accident that occurs during the transportation of passengers or cargo for commercial purposes.” *Id.* at 1373. The court held the latter to be the intended meaning. *Id.*

137. 46 U.S.C. § 30307. The impetus for this amendment was the TWA Flight 800 crash in 1996 and its subsequent litigation. See *Helman*, 2009 WL 2058541, at *2–3.

138. 46 U.S.C. § 30307(c).

139. *Id.* § 30307(b). The recoverable nonpecuniary damages are limited to “loss of care, comfort, and companionship.” *Id.* § 30307(a).

140. See *Blome v. Aerospatiale Helicopter Corp.*, 924 F. Supp. 805, 807–08 (S.D. Tex. 1996) (noting, after defendants moved to dismiss plaintiffs’ state wrongful death and survival claims as preempted by DOHSA, that “if federal law governs the Plaintiffs’ claims, the recovery available to them is substantially less than the recovery available under state law”); see also JACK B. HOOD & BENJAMIN A. HARDY, JR., SEAMEN’S DAMAGES FOR DEATH AND INJURY 54 (1983). Damages recoverable under DOHSA are limited to loss of support,

II. A CIRCUIT SPLIT OVER DOHSA'S STARTING POINT

A conflict has arisen in DOHSA's applicability since President Reagan issued Proclamation 5928. The cause lies at the heart of DOHSA: the qualifying language of "on the high seas beyond 3 nautical miles."¹⁴¹ The issue is that, with the extension of the territorial sea, the zone between three and twelve miles cannot properly be termed the "high seas," as it is not international waters.¹⁴² Can DOHSA be applied in this zone, as "beyond 3 nautical miles" suggests? Or must it only apply beyond twelve miles from shore, as the "high seas" suggests? The Second and Ninth Circuits have both adjudicated this issue and have reached different conclusions.

A. TWA Flight 800 and the Second Circuit

On July 17, 1996, Trans World Airlines (TWA) Flight 800 crashed into the Atlantic Ocean some eight miles off the coast of Long Island, New York.¹⁴³ All 230 people on board were killed.¹⁴⁴ The relatives and estate representatives of 213 of those passengers, seeking both pecuniary and nonpecuniary damages, filed suit against TWA, Boeing, and Hydro-Aire, a manufacturer of aircraft components.¹⁴⁵ One hundred forty-five wrongful death cases were consolidated in the U.S. District Court for the Southern District of New York.¹⁴⁶ The defendants moved to dismiss claims for nonpecuniary damages, asserting that DOHSA limits recovery strictly to pecuniary relief.¹⁴⁷ The motion was denied¹⁴⁸ and an appeal followed.¹⁴⁹

The Second Circuit affirmed the lower court's decision, holding "that DOHSA does not apply to the United States territorial waters where the crash in this case occurred."¹⁵⁰ The arguments made by the Second Circuit were largely based on the meaning and importance of the term "high seas," particularly at the time of DOHSA's drafting.¹⁵¹ The court also sought to

service, care, nurture, guidance, and training. *See id.* Recovery for grief, mental anguish, love, affection, consortium, society, or companionship is not permitted. *See id.*; *supra* Part I.A.2.

141. 46 U.S.C. § 30302.

142. *See* Convention on the High Seas, art. 1, Apr. 29, 1958, 450 U.N.T.S. 82 ("The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State."); *see also supra* note 11 and accompanying text. A more thorough discussion of the "high seas" follows in Part II.A.1.

143. *See TWA Flight 800*, 209 F.3d 200, 201 (2d Cir. 2000).

144. *Id.*

145. *See id.*; *In re Air Crash Off Long Island, New York, on July 17, 1996 (TWA Flight 800)*, No. 96-Civ. 7986, 1998 WL 292333, at *1 (S.D.N.Y. June 2, 1998).

146. *See TWA Flight 800*, 209 F.3d at 201.

147. *Id.* This case was tried and decided before the commercial aviation exception was added to DOHSA in 2000. *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 404, 114 Stat. 131 (2000) (codified as amended at 46 U.S.C. § 30307 (2006)).

148. *See TWA Flight 800*, 1998 WL 292333, at *11.

149. *See TWA Flight 800*, 209 F.3d at 202.

150. *See id.* at 215.

151. *See id.* at 205-07.

accord with what it believed was DOHSA's legislative history and purpose.¹⁵²

1. The High Seas

The court found the term "high seas" to be ambiguous in the statute.¹⁵³ The plaintiffs submitted that "high seas" meant all waters beyond the territorial sea,¹⁵⁴ while the defendants argued that the term meant all waters beyond the low-water mark.¹⁵⁵

The court first looked at what the Supreme Court's understanding of "high seas" was at the time of DOHSA's enactment.¹⁵⁶ It concluded that the term was "generally interpreted" by the Court in 1920 to mean non-sovereign waters.¹⁵⁷ More important, however, was that the Supreme Court's understanding of the term was relied upon in, and thus shaped, the congressional debates over DOHSA.¹⁵⁸ The Second Circuit reasoned that this reliance indicated Congress's understanding that the term meant international waters.¹⁵⁹

The court then looked to how Congress and courts used the term after DOHSA's enactment.¹⁶⁰ In 1969, the Supreme Court, addressing the Submerged Land Act, noted that "[o]utside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation."¹⁶¹ The court cited some of its own cases in harmony with the Supreme Court's usage of the term since 1920.¹⁶²

152. *See id.* at 207–09.

153. *See id.* at 202 ("Where the statutory language is ambiguous, as the phrase 'high seas' is in this case, our inquiry must range further [than simply looking to the language of the statute].").

154. *See id.* at 205.

155. *See id.* The low-water mark is "[t]he shoreline of a sea marking the edge of the water at the lowest point of the ordinary ebb tide." BLACK'S LAW DICTIONARY, *supra* note 18, at 1730. The court also noted that Judge Sonia Sotomayor, in her dissent, had even advocated a third definition of "high seas": those waters that are beyond three nautical miles from shore. *TWA Flight 800*, 209 F.3d at 202 (mentioning the dissent).

156. *See TWA Flight 800*, 209 F.3d at 205–07.

157. *See id.* at 205. *Contra* *Helman v. Alcoa Global Fasteners, Inc.*, No. 09-Civ. 1353, 2009 WL 2058541, at *4 (C.D. Cal. June 16, 2009) ("There was some uncertainty at the time [of the drafting of DOHSA] surrounding the meaning of 'high seas' . . .").

158. *See TWA Flight 800*, 209 F.3d at 206. *But see* Engerrand, *supra* note 47, at 10–11 (discussing a 1914 letter sent from an Assistant Attorney General of the United States to a Representative which claimed that, in the American view, "the high seas begins . . . at [the] low-water mark").

159. *See TWA Flight 800*, 209 F.3d at 205.

160. *See id.* at 209–11.

161. *See id.* at 210 (emphasis omitted) (quoting *United States v. Louisiana*, 394 U.S. 11, 23 (1969)).

162. *See id.* at 211 (citing *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38, 40 n.1 (2d Cir. 1982); *D'Aleman v. Pan Am. World Airways*, 259 F.2d 493, 495 (2d Cir. 1958); *The Buenos Aires*, 5 F.2d 425, 436 (2d Cir. 1924)).

2. Avoiding Redundancy

Following the basic canon of statutory construction that a court should “avoid a reading which renders some words altogether redundant,”¹⁶³ the Second Circuit sought an interpretation giving “high seas” and “beyond a marine league” two distinct meanings.¹⁶⁴ The court found that the defendants’ reading of “high seas” as any waters beyond the low-water mark¹⁶⁵ would render “high seas” superfluous because the low-water mark is *always* within three miles from shore.¹⁶⁶ In other words, “high seas” would not be useful to the statute because the only way it differs from “beyond 3 nautical miles” is that it includes waters between the low-water mark and three nautical miles from shore—waters expressly excluded by the “beyond 3 nautical miles” language.¹⁶⁷ The court was unwilling to believe that Congress put two geographical boundaries into the statute where one subsumed the other.¹⁶⁸ The plaintiffs’ position, which put forth a definition of “high seas” as a political boundary subject to change, avoided the redundancy.¹⁶⁹

3. The Addition of “Beyond a Marine League”

Looking to the legislative history of DOHSA, the court found that “high seas” was always a part of the statutory language, while “beyond a marine league” was only added later “to preserve state remedies.”¹⁷⁰ The new phrase was added at the same time the MLA abandoned its position of uniformity and removed those deaths occurring on “any navigable waters of the United States” from the bill’s reach.¹⁷¹ The court reasoned that if “high seas” really meant waters beyond the low-water mark, then the term was subsumed by the “beyond a marine league” addition, and Congress would have had no reason to retain it.¹⁷² Therefore, Congress’s retention of “high seas” indicated that Congress believed it to have a meaning independent from “beyond a marine league.”¹⁷³

163. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995).

164. *See id.*

165. *See supra* note 155 and accompanying text.

166. *See TWA Flight 800*, 209 F.3d at 207 (“Defendants provide no examples in which the low-water mark is not well within . . . three nautical miles[] of the coast.”).

167. *See id.* Simple substitution reveals the superfluity: DOHSA would apply to deaths occurring both on waters beyond zero miles from shore (functionally the low-water mark) and beyond three miles from shore. Clearly, if both conjunctions must be satisfied, then only the second conjunction carries meaning because it is more restrictive.

168. *See id.*

169. *See id.* (noting that the plaintiffs defined “beyond a marine league” as a geographical boundary and “high seas” as a political boundary).

170. *See id.* at 208.

171. *See id.*; *see also supra* notes 62–65 and accompanying text.

172. *See TWA Flight 800*, 209 F.3d at 208; *see also supra* notes 166–67.

173. *See TWA Flight 800*, 209 F.3d at 208.

4. DOHSA's Non-application Provision, *Yamaha*, and State Law Preemption

The majority reviewed the case law that dealt with issues of preemption that arose after *Moragne*.¹⁷⁴ Only *Yamaha Motor Corp., U.S.A. v. Calhoun*,¹⁷⁵ a 1999 Supreme Court case, addressed “the application of DOHSA to federal territorial waters.”¹⁷⁶ The *Yamaha* Court found that the non-application provision of DOHSA¹⁷⁷ proscribed “DOHSA from displacing state law in territorial waters.”¹⁷⁸ Because the death occurred in the waters of Puerto Rico,¹⁷⁹ the territorial waters at issue were federal rather than state. *Yamaha*'s holding that DOHSA did not preempt state death statutes within territorial waters suggested to the Second Circuit that DOHSA would not apply in the federal waters presently at issue, or at least would not preempt a state statute that could also apply to such federal waters.

5. Subversion of a Preexisting Remedy

The court, looking to legislative history once again, found that the purpose of DOHSA was to create a remedy where one had not previously existed.¹⁸⁰ With alternative remedies available to the plaintiffs, namely a *Moragne*-type action or a state statutory action, the court thought it was “particularly inappropriate” to apply DOHSA, especially when the preexisting remedy would likely be more generous.¹⁸¹ The court cited and echoed Justice Salmon Chase's support of generosity in admiralty proceedings to justify its position.¹⁸² Indeed, the court believed that “[t]he remedies available to plaintiffs for wrongful death in the federal territorial waters in which the crash occurred may prove better suited to this case than DOHSA's statutory requirements.”¹⁸³

6. The Extension of the Territorial Sea and Legislative Intent

The defendants pointed to the disavowal clause in Proclamation 5928,¹⁸⁴ which expressly states that it does not “extend[] or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom.”¹⁸⁵ They contended that if the Proclamation had the effect of extending the geographical starting point of DOHSA, it would have altered a federal law—something that the Proclamation rejects by its

174. *See id.* at 210–11; *see also supra* Part I.C.2.

175. 516 U.S. 199 (1996).

176. *See TWA Flight 800*, 209 F.3d at 211.

177. *See supra* note 70.

178. *Yamaha*, 516 U.S. at 216.

179. *See id.* at 201.

180. *See TWA Flight 800*, 209 F.3d at 209.

181. *See id.*

182. *Id.*; *see supra* note 96 and accompanying text.

183. *TWA Flight 800*, 209 F.3d at 215.

184. *See id.* at 213.

185. *See supra* note 133 and accompanying text.

own terms.¹⁸⁶ In assessing the effect of the Proclamation on the extension of DOHSA, the Second Circuit heeded the advice of the Office of Legal Counsel (OLC), which recommended that “in determining the effect of the proclamation on domestic law,” the consideration is “whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea.”¹⁸⁷ Therefore, the question was: did DOHSA’s territorial starting point (1) simply coincide with, or did it (2) purposely attach to “the existing territorial sea”?¹⁸⁸ If DOHSA’s and the territorial sea’s coterminous boundary appeared coincidental, Congress likely had not intended for the Proclamation to affect the statute.¹⁸⁹ The opposite was true, too, in that if their coterminous boundary appeared intentional, then Congress had intended such an effect.¹⁹⁰

The Second Circuit concluded that the latter (a purposely coterminous boundary) most fittingly correlated to legislative history and congressional intent, and therefore the Proclamation did affect DOHSA.¹⁹¹ The court believed that Congress originally placed DOHSA’s starting point at three miles because it had sought to exclude all state and federal waters from the Act’s scope,¹⁹² and because the three mile limit “was the extent of the problem” at the time.¹⁹³ This justified the three-mile starting point from a 1920 perspective, but the court reasoned that there was no “persuasive reason to fix immutably the scope of the statute to the boundary between United States territorial waters and nonterritorial waters as it existed in 1920.”¹⁹⁴ Accordingly, the Second Circuit held that DOHSA can only be applied beyond twelve miles.¹⁹⁵

B. Judge Sotomayor’s Dissent in TWA Flight 800

Then-Judge Sonia Sotomayor wrote an impassioned dissent, focusing on the international bent of Proclamation 5928, legislative intent, and policy considerations that the majority seemingly disregarded.

186. *TWA Flight 800*, 209 F.3d at 213.

187. *See* Kmiec, *supra* note 125, at 22. Judge Robert W. Sweet of the Southern District of New York took a different approach. *See TWA Flight 800*, No. 96-Civ. 7986, 1998 WL 292333, at *10 (S.D.N.Y. June 2, 1998); *see also infra* note 287. He reasoned that, if it was Congress’s intent to attach DOHSA’s starting point to the beginning of the high seas (defined as non-sovereign waters), then the President would not be able to expand the territorial sea and also exclude an effect on a federal law. *Id.* In so doing, the President would be amending the statute by affixing DOHSA’s starting point to three miles when Congress would have intended it to move to twelve. *Id.* Such an amendment, Judge Sweet noted, “can only be accomplished by Congress.” *Id.*

188. *See* Kmiec, *supra* note 125, at 22–23.

189. *See id.* If the similar boundaries were due to mere coincidence, there would be no reason for one boundary to change with the other.

190. *See id.*

191. *See TWA Flight 800*, 209 F.3d at 213.

192. *See id.*

193. *See id.* at 208 (quoting *Moragne v. States Marine Lines*, 398 U.S. 375, 398 (1970)).

194. *See id.* at 213.

195. *See id.* at 215.

1. Proclamation 5928's Extension Was for International Purposes Only

Judge Sotomayor's dissent focused on Proclamation 5298's international nature.¹⁹⁶ Finding that the Proclamation was inextricably linked to international law and foreign policy, and that DOHSA was not, she concluded that the Proclamation should not affect DOHSA.¹⁹⁷ Judge Sotomayor's authority supporting her international law conclusion included a Supreme Court opinion, which found that the expansion of the territorial sea was "for international law purposes,"¹⁹⁸ and an admiralty treatise, which noted that the Proclamation "is effective . . . only for foreign policy purposes."¹⁹⁹ Judge Sotomayor reasoned that, because the disavowal clause repudiated any alterations of federal law, an expansion of the territorial sea for international purposes should not apply for domestic law purposes.²⁰⁰

Judge Sotomayor provided a few illuminating examples. Only a year prior, the Second Circuit had dealt with a statute²⁰¹ forbidding gambling on boats within the territorial waters of the United States in *United States v. One Big Six Wheel*.²⁰² As a result of the statute, gambling ships would travel beyond the three-mile boundary to avoid criminal prosecution.²⁰³ The government had contended that, because of the extension of the territorial sea to twelve miles,²⁰⁴ a gambling boat that travelled beyond three miles, but within twelve, was still within the territorial sea, and therefore violating the Gambling Ship Act.²⁰⁵ The Second Circuit had held, though, that the Gambling Ship Act's usage of "territorial waters" only referred to waters within three miles from shore "because Congress had not stated otherwise."²⁰⁶ Important to the court's holding was that the Gambling Ship Act dealt with domestic, rather than international law.²⁰⁷

Judge Sotomayor similarly relied on decisions of the Federal Aviation Administration, Environmental Protection Agency, and United States Coast Guard, all of which "recognized the distinction between the meaning of the

196. *See id.* at 216–20 (Sotomayor, J., dissenting).

197. *See id.*

198. *See id.* at 217 (quoting *United States v. Alaska*, 503 U.S. 569, 589 n.11 (1992)).

199. *See id.* (quoting 1 SCHOENBAUM, *supra* note 11, §§ 2–14 & n.7 (2d ed. 1994)).

200. *See id.*

201. Gambling Ship Act, 18 U.S.C. §§ 1081–1084 (2006).

202. 166 F.3d 498, 500 (2d Cir. 1999).

203. *See id.*

204. In reality, it was not simply Proclamation 5928 at issue, but rather Section 901(a) of the Antiterrorism and Effective Death Penalty Act (AEDPA) that the government claimed the gambling ship had violated. *See id.* at 501. AEDPA § 901(a) declared that the entire extent of the twelve-mile territorial sea was subject to U.S. sovereignty for federal criminal jurisdiction purposes. *See* AEDPA, Pub. L. No. 104-132, § 901(a), 110 Stat. 1317 (1996) (codified at 18 U.S.C. § 7 (2006)); *see also One Big Six Wheel*, 166 F.3d at 501.

205. *See One Big Six Wheel*, 166 F.3d at 501. The government would have had a gambling ship travel to beyond twelve miles from shore in order to avoid prosecution. *See id.* at 499.

206. *TWA Flight 800*, 209 F.3d 200, 218 (2d Cir. 2000) (Sotomayor, J., dissenting) (citing *One Big Six Wheel*, 166 F.3d at 501–02).

207. *See id.* (citing *One Big Six Wheel*, 166 F.3d at 499 & n.1, 501).

U.S. territorial sea for the purposes of domestic law, on the one hand, and international law, on the other.”²⁰⁸ The Coast Guard, for example, dealt with a requirement for uninspected vessels to carry certain emergency equipment on the “high seas.”²⁰⁹ The Coast Guard had previously defined “high seas” as “waters which are neither territorial seas nor internal waters of the U.S. or of another country.”²¹⁰ Yet the ruling held that uninspected vessels still must carry the emergency equipment anywhere beyond three miles from shore simply because the “proclamation did not affect domestic law.”²¹¹

Judge Sotomayor was convinced that interpretations of domestic statutes such as DOHSA should not incorporate international concepts of “high seas” and “territorial waters” unless Congress specifically intended for them to be part of the statute.²¹² *One Big Six Wheel* demonstrated just that, ruling that Proclamation 5928 had no effect on a federal domestic statute if the statute had no relation to international law.²¹³

2. DOHSA Has Been Applied to Foreign Territorial Waters

To determine whether the “high seas” was intended to mean non-sovereign waters, Judge Sotomayor looked at prior decisional law on the application of DOHSA in foreign territorial waters.²¹⁴ After all, if DOHSA were applied in foreign territorial waters, this would be inconsistent with the “high seas” definition the majority accepted of non-territorial waters.²¹⁵ Judge Sotomayor cited multiple cases from sister circuits holding that DOHSA can be applied to foreign territorial waters²¹⁶; the Ninth Circuit permitted a DOHSA action for a death occurring within the territorial waters of Mexico,²¹⁷ and the Fifth Circuit allowed a DOHSA claim for a death occurring in the English Channel.²¹⁸ These cases, and others from the Third and Fourth Circuits,²¹⁹ have been cited as definitive authority by

208. *See id.*

209. *See id.* (quoting 46 U.S.C. § 4102 (1988)).

210. Emergency Position Indicating Radio Beacons for Uninspected Vessels, 58 Fed. Reg. 13,364, 13,666 (Mar. 10, 1993).

211. *See id.*

212. *TWA Flight 800*, 209 F.3d at 219 (Sotomayor, J., dissenting).

213. *United States v. One Big Six Wheel*, 166 F.3d 498, 501–02 (2d Cir. 1999).

214. *See TWA Flight 800*, 209 F.3d at 221 (Sotomayor, J., dissenting).

215. *See supra* Part II.A.1.

216. *See TWA Flight 800*, 209 F.3d at 221 (Sotomayor, J., dissenting).

217. *See Howard v. Crystal Cruises, Inc.*, 41 F.3d 527, 528–29 (9th Cir. 1994).

218. *See Accord Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 892, 894 (5th Cir. 1984) (holding that a survival action under general maritime law is not preempted by DOHSA). *But see Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 123 (1998) (holding that DOHSA preempts any survival action under general maritime law).

219. *See Jennings v. Boeing Co.*, 660 F. Supp. 796, 803 (E.D. Pa. 1987), *aff'd*, 838 F.2d 1206 (3d Cir. 1988); *Kuntz v. Windjammer “Barefoot” Cruises, Ltd.*, 573 F. Supp. 1277, 1280–81 (W.D. Pa. 1983), *aff'd*, 738 F.2d 423 (3d Cir. 1984); *First & Merchants Nat’l Bank v. Adams*, 1979 A.M.C. 2860 (E.D. Va. 1979), *aff’d in part, rev’d in part on other grounds*, 644 F.2d 878 (4th Cir. 1981).

admiralty treaties.²²⁰ Judge Sotomayor thought this strongly indicated that Congress did not intend “high seas” to necessarily comport to the international law concept of non-sovereign waters.²²¹

3. The Drafters’ Sole Concern Was Providing a Remedy Where One Had Not Previously Existed

The dissent surmised that the concept of the states’ territorial seas was of sole import to the DOHSA drafters.²²² Judge Sotomayor believed that there was no justification for creating a three-mile starting point for DOHSA other than to preserve state remedies.²²³ She posited “that if the U.S. territorial sea had exceeded three nautical miles in 1920, Congress would still have set DOHSA’s boundary line beyond a marine league . . . because the decision in *The Harrisburg* left no remedy for death in any area outside state territorial waters.”²²⁴ Because Congress would have placed the DOHSA starting point at three miles irrespective of the edge of the territorial sea, Congress intended “high seas beyond a marine league” to be solely geographical and not connected to an international legal concept of sovereignty.²²⁵

4. Justifiable Surplusage

Judge Sotomayor did not simply reject the majority’s redundancy argument;²²⁶ she turned it on its head.²²⁷ Acknowledging that including both “beyond [a] marine league” and “high seas” in the statutory language created surplusage, she argued that such surplusage was inserted in the interest of unmistakable clarity.²²⁸ Speaking on this very subject at a DOHSA congressional debate eighty years earlier, Representative Wells Goodykoontz of West Virginia had eloquently noted that treating one of the terms as surplusage “can do no harm, for the reason that that which is useless does not vitiate the useful.”²²⁹

220. *TWA Flight 800*, 209 F.3d at 221 (Sotomayor, J., dissenting) (“It appears to be settled that the term ‘high seas’ *within the meaning of DOHSA* . . . includes the territorial waters of a foreign nation as long as they are more than a marine league away from any United States shore.” (quoting 2 BENEDICT ET AL., *supra* note 16, § 81(b) n.21 (1999))).

221. *See id.*

222. *See id.* at 222–23.

223. *Id.*

224. *Id.* at 223 (internal quotations omitted). Judge Sotomayor went on to find that, because of this, the *Moragne* holding does not affect the present analysis. *See id.* After all, the DOHSA Congress could not have anticipated the rejection of *The Harrisburg* half a century before it occurred, so the legislative intent in the drafting process reflects a time when no federal common law remedies for death at sea existed. *See id.*

225. *See id.*

226. *See supra* Part II.A.2.

227. *See TWA Flight 800*, 209 F.3d at 223–24 (Sotomayor, J., dissenting).

228. *See id.* at 224. It is perhaps ironic, then, that the present dispute concerns language inserted for the sake of clarity.

229. 59 CONG. REC. 4486 (1920) (statement of Rep. Goodykoontz).

Further, DOHSA is no stranger to redundant language retained for the sake of clarity.²³⁰ DOHSA's non-application provision affirms that state laws governing wrongful deaths remain unaffected by the Act.²³¹ But the preservation of state remedies is elementary to DOHSA's operative provision, which disallows a claim under DOHSA within state waters by excluding deaths within three miles from shore.²³² This redundancy—and therefore superfluity—was “retained ‘out of abundant caution, to calm the minds’ of those who feared that DOHSA would oust state remedies.”²³³ Judge Sotomayor concluded that “beyond [a] marine league” and “high seas” were both included in the statutory language to ensure that no confusion would arise over DOHSA's starting point.²³⁴

5. Generosity, Uniformity, and Certainty

Judge Sotomayor's dissent began by criticizing the majority for favoring generosity over an accurate interpretation of the statute.²³⁵ Judge Sotomayor remarked that Congress purposely acted to limit the relief in these actions to pecuniary damages.²³⁶ Furthermore, the dissent argued, “[i]f Congress had wished to make that remedy more generous, it certainly had the opportunity to reflect that in the statute.”²³⁷

Sotomayor also addressed the policy concern of uniformity that was left unaccounted for by the majority's holding,²³⁸ which had the effect of creating four zones of applicable law.²³⁹ State law and general maritime law would apply between zero and three miles.²⁴⁰ Between three and twelve miles, general maritime law would apply.²⁴¹ Beyond twelve miles, DOHSA would apply.²⁴² The majority did not address what law would apply in foreign territorial waters.²⁴³

In Judge Sotomayor's view, uniformity is better achieved through its position: between zero and three miles, state law and general maritime law

230. *TWA Flight 800*, 209 F.3d at 224 (Sotomayor, J., dissenting).

231. *See supra* note 70 and accompanying text.

232. *See supra* note 70 and accompanying text.

233. *TWA Flight 800*, 209 F.3d at 224 (Sotomayor, J., dissenting) (quoting 59 CONG. REC. at 4483 (statement of Rep. Montague)).

234. *Id.*

235. *See id.* at 215–16 (“In an understandable desire to provide the relatives and estate representatives of the [victims] . . . with a ‘more generous’ recovery, the majority fails to give proper effect to [various aspects of legislative history and intent, and case law].” (citation omitted) (quoting majority opinion)).

236. *See id.* at 224–25.

237. *See id.*

238. *See id.* at 225. The Supreme Court has addressed the importance of uniformity of admiralty law when confronted with interpreting DOHSA. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) (noting that an interpretation of DOHSA must consider, among other things, “the importance of uniformity of admiralty law”); *see also supra* note 52.

239. *TWA Flight 800*, 209 F.3d at 225 (Sotomayor, J., dissenting).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

would apply; beyond three miles, DOHSA would apply.²⁴⁴ This position also promotes certainty because DOHSA's starting point is not affixed to the ever-changing boundary of the high seas.²⁴⁵

C. Helman and the Ninth Circuit

On January 26, 2007, a Navy helicopter crashed into the Pacific Ocean off the coast of California's Catalina Island.²⁴⁶ While completing a training exercise, the helicopter crew lost control and crashed approximately 9.5 miles from shore.²⁴⁷ The crash killed all four crew members on board.²⁴⁸ The personal representatives and successors-in-interest to three of the Navy crewmen brought suit, asserting six causes of action for "strict products liability, negligence, failure to warn, breach of warranty, and wrongful death and survival."²⁴⁹ These actions were brought under California and general maritime law.²⁵⁰ All but one defendant moved to dismiss for a failure to state a claim based on DOHSA preemption.²⁵¹ The district court granted the defendants' motion and certified the case for immediate appeal.²⁵² The Ninth Circuit affirmed, creating a split with the Second Circuit. In a concise opinion, the court reviewed legislative history and intent, and important developments in maritime law.²⁵³

1. The High Seas and a Plain Reading of the Statute

The plaintiffs and defendants in *Helman* took identical positions as to the definition of "high seas" as had their counterparts in the *TWA Flight 800* case.²⁵⁴ The *Helman* court was more reluctant to accept the plaintiffs'

244. *Id.*

245. *See id.* ("Under international law, the boundary of the high seas is subject to constant change . . ."). For example, President Bill Clinton extended the contiguous zone of the United States from twelve to twenty-four miles in 1999. Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999). The contiguous zone is a zone extending beyond the territorial sea where a nation may prevent and punish "infringement of its customs, fiscal, immigration or sanitary laws and regulations." United Nations Convention on the Law of the Sea, art. 33, Dec. 10, 1982, 1833 U.N.T.S. 397. It has been suggested that Proclamation 7219's extension "may have extended the seaward boundary of DOHSA." *See MARAIST & GALLIGAN, supra* note 52, at 306. While the Second Circuit's decision came after Proclamation 7219, the crash of TWA Flight 800 did not, leaving the Court with "no occasion to consider its effect." *TWA Flight 800*, 209 F.3d at 202 n.3.

246. AW1 CORY JAMES HELMAN, <http://www.tourohio.com/fleetaw/Memorial/Helman.html> (last visited Feb. 23, 2012); *see also Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986, 988 (9th Cir. 2011).

247. *Helman*, 637 F.3d at 988.

248. *See AW1 CORY JAMES HELMAN, supra* note 246.

249. *Helman*, 637 F.3d at 988.

250. *Id.*

251. *Id.* The other defendant filed a Rule 12(c) motion based on DOHSA preemption. *Id.*

252. *See Helman v. Alcoa Global Fasteners, Inc.*, No. 09-Civ. 1353, 2009 WL 2058541, at *1 (C.D. Cal. June 16, 2009).

253. *See Helman*, 637 F.3d at 989-93.

254. *See id.* at 990. Recall that the plaintiffs' definition of "high seas" was that of non-sovereign waters, while the defendants' was all waters beyond the low-water mark. *See supra* Part II.A.1.

definition than was the Second Circuit.²⁵⁵ The court concluded, though, that it was not necessary to assign a meaning to “high seas” to determine DOHSA’s applicability, as a plain reading of the statute was sufficient.²⁵⁶

The Ninth Circuit held that DOHSA has a clearly stated starting point: “beyond 3 nautical miles.”²⁵⁷ Under a plain reading, the injection of the term “high seas” simply describes the scope of the remedial scheme, with “no indication that this term was meant to incorporate . . . the independent and fluid political concept of U.S. territorial waters.”²⁵⁸ The plain language of the statute defines “high seas” as “beyond 3 nautical miles.”²⁵⁹

Like their *TWA Flight 800* counterparts, the plaintiffs also contended that the statute must be read in a way to render no words superfluous.²⁶⁰ The Ninth Circuit was not persuaded.²⁶¹ First, the court reasoned that the DOHSA Congress understood both “high seas” and “beyond a marine league” to be “functionally equivalent.”²⁶² It would therefore be unsound to impute two different meanings to the terms.²⁶³ Second, adopting the definition of “high seas” that the plaintiffs advocated, namely non-sovereign waters, would render the term “beyond 3 nautical miles” meaningless because it would have no “independent meaning.”²⁶⁴

2. Recent Congressional Action Supports a Three-Mile Starting Point

Congress aided the Ninth Circuit in its decision by acting in three significant ways.²⁶⁵ The first two actions were recent amendments to DOHSA.²⁶⁶ In 2006, Congress changed the phrase “beyond a marine

255. See *Helman*, 637 F.3d at 990 (“[B]oth sides find support for their proffered definition in the relevant, pre-enactment case law.”).

256. See *id.*

257. See *id.* (quoting 46 U.S.C. § 30302 (2006)). Note that the Ninth Circuit did not consider the statute’s original language of “beyond a marine league.” Death on the High Seas Act, Pub. L. No. 66-165, 41 Stat. 537 (1920).

258. See *Helman*, 637 F.3d at 990.

259. See *id.* at 990–91.

260. See *id.* at 991 (“[N]o clause, sentence, or word shall be superfluous, void, or insignificant.” (internal quotation marks omitted) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001))); see also *supra* note 164 and accompanying text.

261. See *id.* at 991–92.

262. See *id.* This is because the two terms’ starting points coincided at the time. See *TWA Flight 800*, 209 F.3d 200, 207 (2d Cir. 2000).

263. See *Helman*, 637 F.3d at 991–92.

264. See *id.* at 992. Although the court did not expound on this point, the reasoning most likely intended was that if “high seas” meant non-sovereign waters, then “high seas” always subsumes the term “beyond 3 nautical miles” because no waters within three nautical miles are ever non-sovereign. Perhaps, then, the court should have said that the plaintiffs’ definition of “high seas” leaves “3 nautical miles” with no useful meaning, rather than no independent meaning.

265. See *id.* at 991, 993.

266. *Id.* at 991. The court noted that “the clarity that these amendments brought to our interpretation of the statute” could not inform the Second Circuit because the 2000 and 2006 amendments were enacted after the Second Circuit handed down its decision. *Id.* at 992. The Ninth Circuit essentially explained away the circuit split it created by reasoning that the Second Circuit did not have the “benefit” of the enactments in reaching its decision. *Id.* The Second Circuit was aware of possible legislation at the time of its ruling, though. *TWA Flight*

league” to “beyond 3 nautical miles.”²⁶⁷ In so doing, Congress “reaffirmed” the three mile starting point of DOHSA, because if Congress believed that Proclamation 5928 extended DOHSA’s starting point, they could have, and likely would have, amended the statute to reflect such a change.²⁶⁸

The second amendment was the addition of the commercial aviation exception.²⁶⁹ This amendment provided that deaths occurring from commercial aviation accidents “on the high seas 12 nautical miles or less from the shore” were exempted from DOHSA.²⁷⁰ For two distinct reasons, the Ninth Circuit found DOHSA’s commercial aviation exception to be particularly compelling support for its holding.²⁷¹ First, the use of “high seas” in the exception necessarily indicated that some portion of the high seas lies within the twelve-mile boundary.²⁷² Otherwise, a reading of the statute is “non-sensical.”²⁷³ Second, if Congress really believed DOHSA began at twelve miles, as the Second Circuit held it did, then there would have been no purpose in amending the statute.²⁷⁴ Commercial aviation accidents, and all other accidents, would already be exempted from DOHSA’s reach within the twelve mile territorial sea, rendering an exception “wholly unnecessary.”²⁷⁵ Congressional action of this sort is “highly persuasive” evidence that DOHSA should regularly apply between three and twelve miles from shore.²⁷⁶

Third, the Ninth Circuit was influenced by Congress’s decision to leave DOHSA intact following Proclamation 5928. In response to that proclamation, Congress “specifically chose to amend certain maritime statutes to incorporate the extension of U.S. territorial waters DOHSA, however, is notably absent from mention as one of the congressionally amended statutes.”²⁷⁷ The court reasoned that if Congress had thought DOHSA ought to be amended to reflect the extension of the territorial sea, it would have done so.²⁷⁸

800, 209 F.3d at 215 n.24. The court knew of the bill’s content, as it stated the bill “would alter DOHSA by excluding from its scope commercial aviation crashes.” *Id.* The court, though, decided to “take no position on the effect of the bill.” *Id.* The dissent recognized the bill and concluded that “[t]he appropriate remedial scheme . . . is clearly a legislative policy choice, which should not be made by the courts.” *Id.* at 226 (Sotomayor, J., dissenting).

267. *See supra* notes 134–35 and accompanying text.

268. *See Helman*, 637 F.3d at 991.

269. *See id.*; *see also supra* notes 136–40 and accompanying text.

270. 46 U.S.C. § 30307(c); *see also supra* Part I.D.2.

271. *See Helman*, 637 F.3d at 991.

272. *Id.*

273. *See id.* Adopting the plaintiffs’ definition of “high seas” as non-sovereign waters makes this clear. The amendment would only exclude deaths that occur both on the high seas and within twelve miles from shore. Because the high seas would never be within twelve miles from shore, the amendment would have the effect of excepting no deaths.

274. *See id.*

275. *See id.*

276. *See id.*

277. *See id.* at 993 (citing Coast Guard Authorization Act of 1998, Pub. L. No. 105-383, § 301, 112 Stat. 3411 (1998)).

278. *See id.*

3. Proclamation 5928 Was Not Intended to Alter DOHSA's Boundary

The Ninth Circuit was not persuaded that Proclamation 5928 was intended to alter DOHSA's three-mile starting point.²⁷⁹ The first reason was based on the disavowal clause and the OLC's subsequent advice on interpreting whether it affected a statute.²⁸⁰ The OLC report noted that if "a statute . . . uses the term 'territorial sea' but then defines it as 'three miles seaward from the coast of the United States,'" the Proclamation would not affect the statute.²⁸¹ The Ninth Circuit then asserted that, because DOHSA's "high seas" boundary is defined as "three nautical miles," there is "a presumption that Proclamation 5928 did nothing to alter it."²⁸²

The court also gave cursory consideration to its doubts that the President has the ability to alter DOHSA's remedial scheme through a proclamation.²⁸³ The Ninth Circuit, affirming Judge Robert Sweet's reasoning concerning the Proclamation and presidential power,²⁸⁴ found that "[t]he power to create and alter the scope of federally-created remedies for victims of wrongful acts . . . remains squarely within Congress."²⁸⁵ If the Proclamation extended DOHSA's starting point to twelve miles, the President would effectively be altering a federal remedial scheme.²⁸⁶ Therefore, the Proclamation could not extend DOHSA's starting point.²⁸⁷

III. THE SECOND CIRCUIT'S HOLDING IS SUNK BY CONTRADICTION, INCONSISTENCY, AND THE COMMERCIAL AVIATION EXCEPTION

This part offers objections to, and arguments against, the Second Circuit's reasoning, which is, at times, highly problematic. The Second Circuit looked into the background and drafting process of DOHSA, and then plunged into an extensive analysis of the usage of "high seas."

279. *See id.* at 992.

280. *See id.*; *see also supra* notes 187–90 and accompanying text.

281. *See* Kmiec, *supra* note 125, at 23.

282. *See Helman*, 637 F.3d at 992. Although DOHSA uses "high seas" and the OLC report uses "territorial sea," defining the former term as having a three-mile starting point has the same practical effect on the OLC's reasoning. Of primary import is whether a geographical boundary of a fixed distance (such as three miles) is attached to the political boundary, be it "high seas" or "territorial sea."

283. *See id.* at 993; *see also supra* note 187.

284. *See supra* note 187.

285. *See Helman*, 637 F.3d at 993; *supra* note 187.

286. *See Helman*, 637 F.3d at 993.

287. *See id.* Interestingly, Judge Sweet came to a different conclusion using the same analysis. *TWA Flight 800*, No. 96-Civ. 7986, 1998 WL 292333, at *10 (S.D.N.Y. June 2, 1998). He reasoned that "if it was Congress' intent that DOHSA's sweep be dependent on where United States territory ended and international waters . . . began then the President cannot both expand the territory yet exclude that effect on DOHSA." *Id.* Thus, beginning with the same proposition that "the President cannot alter a federal remedial scheme," rather than conclude that the Proclamation cannot alter DOHSA's starting point, as the Ninth Circuit did, Judge Sweet concluded that the disavowal clause could not impede Congress's intent to move DOHSA's starting point to twelve miles. *Id.* The different conclusions relate back to the courts' different findings of legislative intent: Judge Sweet found that DOHSA was meant to be affixed to the territorial boundary, whereas the Ninth Circuit found that DOHSA was meant to be affixed to a three-mile boundary. *See infra* Part III.C.

However, the court succumbed to contradiction and inconsistency on multiple occasions, severely undermining its own arguments.

A. *Significant Problems with the Second Circuit's Arguments*

1. The Troubling Conclusion that Congress Both Foresaw and Excluded Any Later-Created Federal Waters

The Second Circuit sought to avoid redundancy in interpreting DOHSA's statutory language of "high seas beyond a marine league."²⁸⁸ The court found the defendants' meaning of "high seas" (all waters beyond the low-water mark) to be superfluous because it was subsumed by the requirement of "beyond a marine league."²⁸⁹ The court found the plaintiffs' construction of "high seas" (non-sovereign waters) to be neither superfluous nor redundant because "high seas" is a political boundary while "beyond a marine league" is a geographical boundary.²⁹⁰ While the two terms may have appeared redundant in 1920 because both boundaries were "coterminous . . . , there was no reason to think that would always be the case."²⁹¹ Therefore, it made sense for the two terms to define the boundary.

If "there was no reason to think"²⁹² that the boundary of the territorial sea would remain the same, why would Congress have enacted a statute that would expressly exclude the extended territorial sea? Indeed, an extended territorial sea consisting of federal waters would be devoid of a wrongful death remedy.²⁹³ If the DOHSA Congress foresaw the extension of the territorial sea, surely it would not have drafted a statute for the purpose of providing a wrongful death remedy where none existed before, and then excluded waters where no wrongful death remedies existed. The Second Circuit often unwittingly returns to this theme of purposeful exclusion of federal territorial waters, even though the court acknowledges both that DOHSA "provided a remedy for wrongful death at sea where none had clearly existed before"²⁹⁴ and that up until 1920, there was an "absence of any remedy for wrongful death on the high seas."²⁹⁵ This intentional exclusion, frequently reiterated by the court, clashes squarely with the latter two premises.

2. The Implication that "High Seas" Was Insufficient to Preserve State Remedies

The majority observed that "high seas" was always part of the statutory language during DOHSA's drafting, whereas "beyond a marine league" was

288. *See supra* Part II.A.2.

289. *See supra* notes 165–66 and accompanying text.

290. *See supra* note 169 and accompanying text.

291. *TWA Flight 800*, 209 F.3d 200, 207 (2d Cir. 2000).

292. *Id.*

293. *See supra* notes 44–45 and accompanying text.

294. *TWA Flight 800*, 209 F.3d at 203.

295. *Id.* at 208 (quoting *Moragne v. States Marine Lines*, 398 U.S. 375, 398 (1970)).

only added later “to preserve state remedies.”²⁹⁶ Recall that the new phrase was added at the same time the MLA abandoned its position of uniformity and excluded those deaths occurring on “any navigable waters of the United States” from the bill’s reach.²⁹⁷ The court argued that “‘beyond a marine league’ . . . by itself exclude[s] state territorial waters,” so even accepting the defendants’ definition of “high seas” as those waters beyond the low-water mark, “high seas” is subsumed and rendered redundant—or better yet, unnecessary—by “beyond a marine league.”²⁹⁸ The court then concluded that “high seas” must have had a meaning distinct from “beyond a marine league,” or else Congress would not have retained it.²⁹⁹

But under this analysis, the court calls its interpretation of “high seas” into question. By acknowledging that “beyond a marine league” was added to preserve state remedies, the court implicitly acknowledged that the use of “high seas” on its own did not preserve state remedies. If the accepted definition of “high seas” at the time was non-sovereign waters, as the court asserted it was, then limiting recovery to deaths occurring on the high seas would have by itself preserved state remedies, and “beyond a marine league” need not have been added. In other words, the court actually gave credibility to the defendants’ position that “high seas” refers to all water beyond the low-water mark, because only under this meaning would the phrase “beyond a marine league” need to be added to preserve state remedies.

3. The Avoidance of Preempting an Unclear or Non-existent Remedy

The court held that applying DOHSA in federal territorial waters would violate the Act’s intent, which was to “creat[e] a remedy where none existed before.”³⁰⁰ Puzzlingly, the court also asserted that “Congress intended to exclude federal territorial waters from the scope of DOHSA because federal and state common-law remedies already existed for deaths in those waters.”³⁰¹ Judge Sotomayor objected, contending that such federal remedies did not clearly exist.³⁰² The majority responded that this contention ignored the many instances of courts sidestepping the ruling of *The Harrisburg*.³⁰³ But such sidestepping did not produce a clear, reliable, or uniform remedy for wrongful deaths occurring outside state territorial

296. See *supra* notes 170–71 and accompanying text.

297. See *supra* note 171 and accompanying text.

298. See *TWA Flight 800*, 209 F.3d at 208. This is true because “beyond a marine league” certainly excluded all waters within three miles from shore, the only additional waters to which “beyond the low-water mark” refers. See *supra* notes 166–67 and accompanying text.

299. See *TWA Flight 800*, 209 F.3d at 208.

300. *Id.* at 209.

301. *Id.*

302. *Id.* at 224 (Sotomayor, J., dissenting) (“No clear remedies existed for wrongful death beyond state territorial waters after *The Harrisburg*, a gap in the law that DOHSA was designed expressly to fill.”).

303. *Id.* at 209 n.6 (majority opinion).

waters.³⁰⁴ Holding that Congress wished to exclude federal territorial waters from DOHSA's reach in order to preserve such malformed remedies is inconsistent with the very intent that the Second Circuit attributed to the DOHSA Congress.³⁰⁵

It takes little abstraction to find contradiction in the majority's opinion. If the panel believed that courts "provided remedies in an effort to ameliorate the harsh rule of *The Harrisburg*," and that those remedies were enough to justify Congress's purposeful exclusion of federal waters from DOHSA's reach,³⁰⁶ then how could the court justify DOHSA's application to any waters at all? After all, the Supreme Court had permitted a judicial remedy for a death on the high seas in *The Hamilton*.³⁰⁷ Would not DOHSA also unlawfully preempt these preexisting remedies for deaths on the high seas? Troublingly, the Second Circuit acknowledged that "[t]he tension between the logic of *The Harrisburg* and *The Hamilton* 'created jurisdictional fictions and serious problems in choice of law that sometimes denied recovery altogether.'"³⁰⁸ It would then be peculiar to hold, as the court did, that remedies existed for these waters and that these were sufficient to justify exclusion from DOHSA, after acknowledging that these remedies would often be denied. Perhaps the most interesting note on this point is related to these remedies: the majority, although eager to provide a generous remedy,³⁰⁹ actually suggests that the DOHSA Congress specifically excluded certain waters from coverage, preferring recovery to be had through the precarious gaming of state death statutes.

4. The Aversion to Ousting a Preexisting, More Generous Remedy

The Second Circuit was loath to apply DOHSA where it would oust a preexisting—and more generous—remedy.³¹⁰ Holding that "Congress prioritized the preservation of preexisting remedies over securing uniformity," the court noted that it would be "particularly inappropriate" to oust a preexisting state or federal remedy in favor of DOHSA's scant remedial scheme of pecuniary damages.³¹¹ The court's argument overlooked and oversimplified the reality of DOHSA's application and wrongful death recovery schemes.

a. DOHSA Does Not Displace a Preexisting Remedy

First, the court's assertion that the DOHSA Congress intended to preserve all preexisting remedies is overly broad. At the time of DOHSA's

304. See *supra* notes 44–45 and accompanying text.

305. See *supra* note 192 and accompanying text.

306. See *TWA Flight 800*, 209 F.3d at 209 n.14.

307. See *supra* notes 40–41 and accompanying text.

308. *TWA Flight 800*, 209 F.3d at 204 (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 235 (1986) (Powell, J., concurring in part and dissenting in part)).

309. See *supra* Part II.A.5.

310. See *id.*

311. See *TWA Flight 800*, 209 F.3d at 209; see also *supra* note 181 and accompanying text.

drafting, only state remedies existed.³¹² The DOHSA Congress therefore only considered the question of state law preemption.³¹³ This is made clear in the legislative history.³¹⁴

Further, the preexisting remedy at issue here is a judge-made, federal common law remedy. Members of Congress, seeking to preserve their own state remedies, vehemently opposed DOHSA's initial drafts, which provided for uniformity by superseding state wrongful death statutes.³¹⁵ But displacing a legislative remedy is intuitively more drastic than a judge-made, interstitial one. Because *Moragne* provided a wrongful death cause of action under general maritime law only where neither DOHSA nor state law could, this Note contends that a *Moragne*-type recovery was created only to fill in the existing interstices of maritime wrongful death actions.³¹⁶ The fact that a DOHSA cause of action has been held by the Supreme Court to supersede the general maritime law cause of action, best evinced by *Higginbotham* and *Dooley*, further supports this point.³¹⁷ As a result, ousting the *Moragne*-type remedy should not be seen as ousting a preexisting remedy at all.

The Second Circuit's aversion to DOHSA preemption can be objected to on logical grounds: for one remedy to displace another, both must, as a practical matter, be able to apply to the same area. But *Moragne* only applies if DOHSA does not.³¹⁸ Therefore, DOHSA cannot oust a *Moragne*-type remedy because the two cannot apply to the same area. This argument challenges the characterization of a *Moragne*-type remedy as "preexisting." Under this framework, *Moragne* only applies when DOHSA does not, and is therefore never preexisting. It only arises after a DOHSA cause of action is ruled out.

But what of state law, rather than federal common law, preemption? State law preemption is based on the non-application provision of DOHSA, which states that DOHSA "does not affect the law of a State regulating the right to recover for death."³¹⁹ The Second Circuit reviewed *Yamaha* and concluded that DOHSA does not oust state remedies if the death occurs in territorial waters.³²⁰ The death in *Yamaha* occurred in Puerto Rican waters,³²¹ which are federal, rather than state, territorial waters. Therefore,

312. See *supra* Part I.A.3.

313. See Engerrand, *supra* note 47, at 42 ("Congress' intent was always expressed in terms of state territorial waters, not federal waters.").

314. See *supra* notes 62–63 and accompanying text.

315. See *supra* Part I.B; see also, e.g., 51 CONG. REC. 1929 (1914) (statement of Rep. Bryan) (objecting to an early draft of the bill if it were to transfer jurisdiction from state to federal courts).

316. The Supreme Court acknowledged the interstitial nature of *Moragne* in 1996. See *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 214 (1996) ("The *Moragne* cause of action was in many respects a gap-filling measure . . ." (quoting *Yamaha Motor Corp., U.S.A. v. Calhoun*, 40 F.3d 622, 642 (3d Cir. 1994))).

317. See *supra* Part I.C.2.

318. See *supra* Part I.C.2.

319. See *supra* note 70 and accompanying text.

320. See *supra* Part II.A.4.

321. See *supra* note 179 and accompanying text.

if DOHSA could not preempt a state statute from applying in federal territorial waters, then applying DOHSA here would be contrary to *Yamaha's* holding of state statute preemption in federal territorial waters.³²²

In discussing DOHSA's drafting, though, the Second Circuit was noticeably more restrictive, observing that the non-application provision was added so that "the act would not affect state wrongful death remedies for deaths in state territorial waters."³²³ It is therefore curious that the court later extended, without hesitation, the provision to preserve state remedies in federal territorial waters.

It is also unlikely that states possess the power to legislate remedies for deaths occurring beyond their waters in the first place. In the final DOHSA House Report, Judge Harrington Putnam noted that "the States can not properly legislate for the high seas."³²⁴

In a case decided only months after the Second Circuit's ruling, the U.S. District Court for the District of Hawaii found that "[s]tates had jurisdiction over acts committed within their territorial waters of three miles."³²⁵ Therefore, the remedial scheme "permitted state law to apply to wrongful deaths that occurred within their jurisdiction; deaths beyond their jurisdiction were covered by DOHSA."³²⁶ This supports the proposition that, under DOHSA, a state wrongful death statute only applies within state waters. Moreover, the court eloquently stated that "[a] finding that Congress did not intend DOHSA to apply to the waters surrounding territories with no substantive law³²⁷ would ignore the fact that Congress only intended to except DOHSA's application from state territorial waters out of respect for federal-state comity."³²⁸ The same reasoning can be ably extended to federal territorial waters with no substantive law, as was the case when DOHSA was passed. Federal-state comity justifies DOHSA's exclusion of state territorial waters, but not federal territorial waters.

b. Safety of Air Travel and DOHSA's Remedial Scheme Undercut the Rationale for Favoring Generosity

The Second Circuit's goal of favoring generosity also raises problems. The court noted the Supreme Court's history of favoring generosity in

322. See *supra* Part II.A.4.

323. *TWA Flight 800*, 209 F.3d 200, 204 (2d Cir. 2000). The Court even reiterated this point later in the opinion: "Section 7 [the non-application provision] was inserted to clarify that state waters were not subject to DOHSA." *Id.* at 208 (citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 231–32 (1986)).

324. Harrington Putnam Letter, *supra* note 59. Judge Putnam's letter, written some years prior, was also cited in DOHSA's final Senate report. See S. REP. NO. 66-216, at 2–4 (1919). During a congressional debate, Representative Walter I. McCoy said of Judge Putnam that "there is no higher authority in admiralty law in this country." 51 CONG. REC. 1929 (1914) (statement of Rep. McCoy).

325. See *Jacobson v. Kalama Servs.*, 128 F. Supp. 2d 644, 649 (D. Haw. 2000).

326. *Id.*

327. *Jacobson* involved a death occurring in the waters surrounding Johnston Atoll, a U.S. territory. See *id.* at 645.

328. See *Jacobson*, 128 F. Supp. 2d at 650.

recovery³²⁹ and found justification for disallowing DOHSA preemption on these grounds.³³⁰ The *Moragne* Court attributed admiralty generosity to “a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages.”³³¹ This “[s]pecial solicitude embodies the equitable and humanitarian side of the general maritime law and has long served as the policy vehicle for extending rights and remedies to maritime plaintiffs.”³³²

Yet the question of whether this special solicitude should be extended to victims of commercial aviation accidents must be raised. After all, “[a]irline travel is remarkably safe.”³³³ In 2010, the worldwide accident rate was “equal to one accident for every 1.6 million flights.”³³⁴ Thus, it is nonsensical to adhere to a policy of generosity, if that policy is based on solicitude for those who take to the unpredictable hazards of the sea, when commercial aviation is overwhelmingly safe.³³⁵

*B. The Commercial Aviation Exception:
A Fatal Blow to the Second Circuit*

The commercial aviation exception, added to DOHSA in 2000, provided that deaths occurring from commercial aviation accidents “on the high seas 12 nautical miles or less from the shore” are exempt from DOHSA.³³⁶ The Ninth Circuit identified two elements of this amendment that conflicted with the Second Circuit’s holding. The first is that the amendment retains the use of the “high seas,” but qualifies it with “12 nautical miles or less.”³³⁷ Because “high seas” is conjoined to a limitation within the

329. See *TWA Flight 800*, 209 F.3d 200, 209 (2d Cir. 2000) (noting that the Supreme Court has often reiterated Justice Chase’s sentiment that admiralty proceedings “favor . . . [a] more generous recovery” (quoting *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578))).

330. See *supra* Part II.A.5.

331. See *supra* note 96 and accompanying text.

332. Ugo Colella, Comment, *The Proper Role of Special Solicitude in the General Maritime Law*, 70 TUL. L. REV. 227, 230 (1995).

333. TO CLARIFY THE APPLICATION OF THE ACT POPULARLY KNOWN AS THE “DEATH ON THE HIGH SEAS ACT” TO AVIATION INCIDENTS, H.R. REP. NO. 106-32, at 1 (1999) (noting that there were no passenger deaths on U.S. commercial airlines in 1998).

334. Press Release, Int’l Air Transp. Ass’n, Aircraft Accident Rate Is Lowest in History—Still Room for Improvement, Regional Concerns Remain (Feb. 23, 2011), available at <http://www.iata.org/pressroom/pr/pages/2011-02-23-01.aspx>.

335. Judge Sotomayor’s argument against generosity is also relevant to this issue. Puzzled by the court’s reasoning, she noted that DOHSA provides “a remedy, not the most generous remedy If Congress had wished to make that remedy more generous, it certainly had the opportunity” to do so. *TWA Flight 800*, 209 F.3d 200, 224–25 (2d Cir. 2000) (Sotomayor, J., dissenting). Judge Sotomayor’s argument was later weakened by the commercial aviation exception, though, which incorporated a more generous recovery into the statute for deaths arising from commercial aviation accidents. Judge Sotomayor’s reasoning is now functionally outdated, but only with respect to commercial aviation accidents. The amendment did little to mitigate the harsh remedial scheme applicable in most situations, such as *Helman*. Thus, DOHSA can hardly be considered a statute that favors generosity.

336. 46 U.S.C. § 30307(c) (2006); see *supra* notes 137–39 and accompanying text.

337. 46 U.S.C. § 30307(c).

territorial sea, the clear result is that the “high seas” must include waters within twelve miles from shore. The amendment’s use of “high seas” is irreconcilable with the Second Circuit’s interpretation of the term as non-sovereign waters.

A further argument arising out of the amendment need not flow from the technicalities and implications of statutory language. It is based simply on congressional action to specifically exempt a class of deaths from DOHSA’s reach within twelve miles. This strongly suggests that DOHSA applies to all other deaths within twelve miles. After all, why would Congress amend DOHSA to exempt commercial aviation accidents within twelve miles from shore if DOHSA did not apply to those waters in the first place? This intuitive reasoning finds support in a well-known canon of construction: “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”³³⁸ Here, Congress has provided an exception to the general application of DOHSA in these waters, which strongly suggests that (1) Congress did not believe any other death should be similarly exempted, and thus, (2) DOHSA applies to all other deaths in the federal territorial sea.³³⁹

The Second Circuit obviously did not have the benefit of such legislation, as it was passed after the decision came down.³⁴⁰ The Ninth Circuit, so confident in the repercussions of the amendment, acknowledged that their decision created a circuit split, but asserted that the split would not have occurred had the Second Circuit possessed the clarity provided by the amendments.³⁴¹ So clear were the amendments that wading through “legislative history and Congressional purpose” was rendered “unnecessary.”³⁴² The Ninth Circuit believed the amendments now made DOHSA unambiguous.³⁴³ Indeed, it was an ambiguity in the statute that incited the Second Circuit to retreat into the depths of legislative history and intent.³⁴⁴

338. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980).

339. Note that this conclusion is distinct from the earlier conclusion that, by excepting commercial aviation accidents from DOHSA within twelve miles, Congress must have believed DOHSA to ordinarily apply within twelve miles. One conclusion indicates that DOHSA applies within the territorial sea because Congress made no other exceptions to its application, while the other indicates that DOHSA ordinarily applies within the territorial sea because otherwise Congress would not have passed the exception in the first place. The two are distinct conclusions, each independently suggesting that DOHSA should apply within twelve miles from shore.

340. *But see supra* note 266 (noting that the Second Circuit was aware of the content of proposed legislation at the time of its decision).

341. *See supra* note 266 and accompanying text. The Ninth Circuit also relied on the replacement of “beyond a marine league” with “3 nautical miles,” and held that Congress reaffirmed DOHSA’s starting point by doing so. *See supra* notes 267–68 and accompanying text.

342. *Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986, 992 (9th Cir. 2011).

343. *Id.*

344. *See supra* note 153 and accompanying text.

*C. The Second and Ninth Circuits Question the Legality
of Proclamation 5928's Extension of DOHSA's Starting Point*

The Second Circuit reasoned, as it had many times before, that because Congress sought to exclude both state and federal territorial waters from DOHSA, the extension of the territorial sea must have the effect of extending the starting point of DOHSA.³⁴⁵ If DOHSA's starting point were to remain constant because of the disavowal clause, then the Proclamation would have the effect of amending DOHSA by adding new federal waters to its reach.³⁴⁶ The President cannot so amend a federal statute.³⁴⁷

In contrast, the Ninth Circuit reasoned that because DOHSA's starting point was intended to be immutably fixed to the three mile boundary, the extension of the territorial sea could not affect DOHSA's starting point.³⁴⁸ Otherwise, certain federal waters that Congress intended to be covered would be excluded from DOHSA, and the Proclamation would have the effect of amending DOHSA's remedial scheme.³⁴⁹ Again, this exceeds the President's authority.³⁵⁰

Therefore, the Second Circuit concluded that the disavowal clause is *ultra vires*; the Ninth Circuit concluded that the Proclamation would be *ultra vires* if DOHSA's starting point were moved. These opposing arguments of legality are only successful if the courts' findings of legislative intent are correct. As the Second Circuit's legislative intent is clearly more problematic (because it seems likely that Congress would have wanted to cover federal waters), the Second Circuit's position is far harder to maintain. The preferable conclusion on the legality of the Proclamation, therefore, is that it would be *ultra vires* only if it had the result of moving DOHSA's starting point, and that the disavowal clause is not *ultra vires*.

D. DOHSA's Statutory Language Is Inconsistent with Its Purpose

Although the Second Circuit got it wrong, its interpretation of "high seas" was actually right.³⁵¹ But because the DOHSA Congress used the term in a way that was contrary to the Act's purpose, the Second Circuit ran into trouble defending the term's use in the Act. In other words, the fault rests primarily with Congress's use of "high seas," rather than any court's subsequent interpretation of it.

Congress intended to provide a remedy where none previously existed. It likely would have intended DOHSA to apply to later-created federal territorial waters where remedies did not otherwise exist. Congress therefore simply did not realize the implications of fixing the boundary of DOHSA to the "high seas" because at DOHSA's enactment, and for

345. *TWA Flight 800*, 209 F.3d 200, 213–14 (2d Cir. 2000).

346. *Id.*

347. *TWA Flight 800*, No. 96-Civ. 7986, 1998 WL 292333, at *10 (S.D.N.Y. June 2, 1998); *see also supra* note 187.

348. *See supra* note 286 and accompanying text.

349. *See supra* note 286 and accompanying text.

350. *See supra* note 285 and accompanying text.

351. *See supra* notes 11, 142.

approximately 150 years prior, “high seas” and “beyond a marine league” were coterminous. The two terms would remain coterminous for another sixty-eight years.

Congress’s use of “high seas” in the commercial aviation exception demonstrates and reaffirms the misuse. The amendment provides that deaths occurring “on the high seas 12 nautical miles or less from shore” are exempt from DOHSA,³⁵² and, as seen, this necessarily indicates that some portion of the high seas lies within the territorial sea. Plainly stated, Congress’s usage of “high seas” is irreconcilable with the presently accepted meaning of the term.

This premise has already been explicitly and implicitly noted in multiple treatises. Professor Thomas J. Schoenbaum notes that “both original and amended DOHSA use the term ‘high seas’ in a way that contradicts the accepted technical meaning of this term under international law.”³⁵³ After finding three other incoherencies in DOHSA, he concludes that “Congress should revisit the scope and application of DOHSA.”³⁵⁴ Another treatise, addressing cases where DOHSA was applied to foreign territorial waters, notes that “the term ‘high seas’ within the meaning of DOHSA is not limited to international waters.”³⁵⁵ The limiting and qualifying language of “within the meaning of DOHSA” suggests that DOHSA’s use of “high seas” is not consistent with its ordinary use.

CONCLUSION

The history of wrongful death actions at sea has been chaotic. DOHSA reflects Congress’s wish to provide a wrongful death cause of action where one had previously gone wanting. The Second Circuit’s decision imputes to the DOHSA Congress an intent to preclude all federal waters from coverage, even though this frustrates DOHSA’s accepted purpose. States cannot properly legislate for deaths occurring beyond their borders, and so relying on state law preemption for a remedy is baseless, while relying on the interstitial *Moragne* remedy violates years of case law. These arguments indicate that the Second Circuit’s holding is specious. Subsequent congressional action further supports the necessity of reconsideration and reversal.

352. See *supra* notes 138, 270 and accompanying text.

353. 1 SCHOENBAUM, *supra* note 11, at 668–69.

354. *Id.* at 669. Although this Note agrees with Professor Schoenbaum’s conclusion, perhaps a more modest solution would be reconsideration when the Second Circuit next hears the issue.

355. 2 BENEDICT ET AL., *supra* note 16, § 81b n.18; see also *supra* note 220.