

AN ARGUMENT FOR RETURNING TO THE COMMERCE CLAUSE DEFINITION OF  
NAVIGABILITY: THE SEAMAN’S MANSLAUGHTER STATUTE AND ITS  
APPLICABILITY IN STATE WATERS

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## I. Introduction

18 U.S.C. § 1115, commonly known as the Seaman’s Manslaughter Statute, states that “every captain, engineer, pilot, or other person employed on any steamboat or vessel” is criminally responsible for negligent conduct that results in death on a vessel.<sup>1</sup> If the owner of the vessel is a corporation, this statute holds the executive officer criminally liable for any death caused by negligence.<sup>2</sup> This statute applies to deaths that occur on waters that fall within the substantive maritime law of the United States<sup>3</sup> and within the general admiralty jurisdiction of the federal courts.<sup>4</sup> In order for a court to have admiralty tort jurisdiction, the death must occur on navigable waters<sup>5</sup>; as well as have a significant relationship to traditional maritime activity<sup>6</sup>, and the potential to affect maritime commerce.<sup>7</sup> The main question that courts have grappled with is how to determine whether a body of water is navigable to warrant admiralty jurisdiction.

This comment will analyze the history of admiralty jurisdiction, the language of the Seaman’s Manslaughter Statute itself, the legislative history of the statute, how the statute has been applied traditionally, and if a body of water does not fall under admiralty jurisdiction, should it still be subject to federal jurisdiction under the commerce clause of the United States Constitution.

## II. History of Admiralty Jurisdiction

### A. Admiralty Jurisdiction in Europe

Maritime law and the high seas have their origins in the old world.<sup>8</sup> The term “high seas” was typically used by writers of public law and in communications between different governments to designate ownership of the “open, unenclosed waters of the ocean.”<sup>9</sup> At one time, portions of the ocean were claimed by different countries.<sup>10</sup> In the sixteenth century, Spain claimed ownership of the Atlantic Ocean, and asserted its right to exclude all other nations from it.<sup>11</sup> Pope Alexander

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<sup>1</sup> 18 U.S.C.A. § 1115 (West, Westlaw through Pub. L. No. 116-259) (“Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both...”)

<sup>2</sup> *Id.* (“...When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.”)

<sup>3</sup> DAVID W. ROBERTSON & MICHAEL F. STURLEY, RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW AT THE NATIONAL LEVEL AND IN THE FIFTH AND ELEVENTH CIRCUITS, 41 Tul. Mar. L.J. 437 (2017) (citing *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23 (2004)) (“access to substantive federal maritime law is dependent on the existence of admiralty jurisdiction.”)

<sup>4</sup> Gretchen C.F. Shappert, *Homicide on the High Seas and Navigable Waters: The Seaman's Manslaughter Statute*, 18 U.S.C. S 1115, 67 DOJ J. Fed. L. & Prac. 55 (2019) (citing *U.S. v. Allied Towing Corp.*, 602 F.2d 612, 615 (1979))

<sup>5</sup> *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531-32 (1995).

<sup>6</sup> *Exec. Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 268 (1972).

<sup>7</sup> *Sisson v. Ruby*, 497 U.S. 358, 367 (1990) (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)).

<sup>8</sup> *See U.S. v. Rodgers*, 150 U.S. 249, 253 (1893).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

VI granted Portugal and Spain the exclusive use of the Atlantic Ocean, and England had ownership and the exclusive right to sail in the seas around Great Britain.<sup>12</sup>

During this time, scholars began using the term “high seas” in legal and political discourse.<sup>13</sup> The main question became whether the high seas, or any portion of it, could be the property or under the exclusive jurisdiction of one country, or whether they were open to every country.<sup>14</sup> In his treatise on the Rights of the Sea, scholar Sir Matthew Hale stated “that part of the sea which lies not within the body of a county is called the ‘main sea’ or ‘ocean’”.<sup>15</sup> The definition of “high seas” became a frequently litigated issue in English common law courts after Richard II and Henry IV passed statutes that formally defined the high seas as the “portion of the sea which washes the open coast.”<sup>16</sup>

Following the courts’ interpretation of this statute, the general rule in England barred admiralty from exercising jurisdiction over cases that arose “within the body of a country.”<sup>17</sup> In other words, admiralty jurisdiction became separate from the law of England; and the high seas fell under admiralty jurisdiction.<sup>18</sup> However, other bodies of water such as ports, creeks, and rivers were excluded from this interpretation, which led scholars to conclude that they were under the jurisdiction of England rather than admiralty jurisdiction.<sup>19</sup> However, Justice Field pointed out that commerce was still conducted on waters other than the ocean and the English seas, which were the only bodies of water that were included in admiralty jurisdiction at that time.<sup>20</sup> He stressed the importance of distinguishing between these different bodies of water and providing jurisdiction over the vessels that navigated them.<sup>21</sup>

According to Justice Field, the term “high seas” did not create a separate and distinct body of water, but only distinguished the open waters and the coast from the narrower waters near land.<sup>22</sup> He recognized that admiralty jurisdiction was more complicated than stating that the high seas and oceans fell under admiralty jurisdiction and the smaller ports and rivers did not. The United States would need more than a one size fits all solution to determine what qualities make a body of water fall under admiralty jurisdiction.<sup>23</sup>

## **B. Admiralty Jurisdiction in the United States**

Federal admiralty jurisdiction has its roots in Article III of the United States Constitution, which gives federal courts original jurisdiction over admiralty and maritime cases.<sup>24</sup> Congress

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<sup>12</sup> *Id.* (citing Wools. Int. Law, § 55).

<sup>13</sup> *Rodgers*, 150 U.S. at 253; the term “high seas” was first introduced by Hugo Grotius in the book *Mare Liberum*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (quoting *De Jure Mar.* c. 4)

<sup>16</sup> *Waring v. Clarke*, 46 U.S. 441, 453 (1847).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Rodgers*, 150 U.S. at 254.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See Id.* at 263 (“It does not seem reasonable to suppose that congress intended to confine its legislation to the high seas of the ocean, and to its navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any state, and to make no provision for offenses on those vast bodies of inland waters of the United States.”).

<sup>24</sup> U.S. Const. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime

codified this power by enacting 28 U.S.C. § 1333, which gives federal district courts original jurisdiction over “[a]ny civil case of admiralty or maritime jurisdiction.”<sup>25</sup> The goal behind federal admiralty jurisdiction was to provide a uniform body of law governing navigation and maritime activity.<sup>26</sup>

As Justice Field alluded to, the purpose behind having federal admiralty jurisdiction was to “protect commercial shipping with uniform rules of conduct.”<sup>27</sup> However, there was still a question whether smaller bodies of water fell under admiralty jurisdiction. According to Justice Field, whether the term “high seas” is applied to oceans, or to smaller seas, will depend upon the circumstances of its use.<sup>28</sup> He argued that the Great Lakes had every characteristic of the high seas despite consisting of fresh water that was not affected by the tides: “they are of large extent in length and breadth; they are navigable the whole distance, in either direction, by the largest vessels known to commerce;... they separate, in many instances, states, and in some instances constitute the boundary between independent nations...”<sup>29</sup>

An early record of the navigability standard for admiralty jurisdiction is present in the Judiciary Act of 1789.<sup>30</sup> The Act granted federal courts exclusive jurisdiction of “all crimes and offenses” on the high seas and of all civil cases that took place on the high seas and “on waters which are navigable from the sea by vessels of ten or more tons burthen.”<sup>31</sup> This act specifically expanded admiralty jurisdiction and made it so federal courts could have jurisdiction over lakes, rivers, and other bodies of water that did not fit the traditional high seas definition of maritime as long as they were navigable.

Admiralty jurisdiction in the context of criminal liability was formally defined in 18 U.S.C. § 7 as “the high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof...”<sup>32</sup> Additionally, the provision included the waters of the Great Lakes, or any body of water connecting them, and the Saint Lawrence River.<sup>33</sup> The Great Lakes Act extended admiralty jurisdiction to tort cases involving “any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes.”<sup>34</sup> These new statutes correspond with Justice Field’s argument that the Great Lakes

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Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

<sup>25</sup> 28 U.S.C.A. § 1333 (West, Westlaw through Pub. L. No. 116-259).

<sup>26</sup> *Livingston v. United States*, 627 F.2d 165, 169 (8th Cir. 1980).

<sup>27</sup> *LeBlanc v. Cleveland*, 198 F.3d 353 (2d Cir. 1999) (quoting *Sisson*, 497 U.S. 358, 362 (1990)).

<sup>28</sup> *Rodgers*, 150 U.S. at 255.

<sup>29</sup> *Id.*

<sup>30</sup> Maeva Marcus, Editor; et al. *Documentary History of the Supreme Court of the United States, 1789-1800* (1985-2007) at 515

<sup>31</sup> *Id.*

<sup>32</sup> 18 U.S.C.A. § 7 (1) (West, Westlaw through Pub. L. No. 116-259).

<sup>33</sup> 18 U.S.C.A. § 7 (2).

<sup>34</sup> ARTHUR A. CRAIS, JR., *THE LIMITATION OF SHIPOWNER’S LIABILITY ACT AS AN INDEPENDENT BASIS FOR FEDERAL JURISDICTION?*, 17 *Loy. Mar. L.J.* 205, 229 (2018); 28 U.S.C.A. § 1873 (West) (“In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and

had many of the characteristics of the high seas and should therefore be classified as such.<sup>35</sup> Jurisprudence has since determined that other lakes and rivers are navigable bodies of water and therefore subject to federal admiralty jurisdiction.<sup>36</sup>

According to 18 U.S.C. § 7, the admiralty jurisdiction does not include navigable waters that are also within the territorial jurisdiction of a state.<sup>37</sup> This became the subject of litigation in *U.S. v Allied Towing Corp.* In this case, Allied Towing Corporation was convicted of homicide under the Seaman's Manslaughter Statute for the death of two employees who died in an explosion while they were welding the hull of an Allied tank barge at a pier off of the Elizabeth River in Norfolk, Virginia.<sup>38</sup> The evidence indicated that Allied was negligent by not following Coast Guard regulations that required gasses to be secured.<sup>39</sup> The ignition of gasses within the barge caused an explosion that killed the two employees.<sup>40</sup> Allied appealed its conviction, arguing that admiralty jurisdiction, defined in 18 U.S.C. § 7, did not include navigable waters that are also subject to the jurisdiction of a particular state.<sup>41</sup> Allied argued that because the Elizabeth River is within Virginia jurisdiction, the district court did not have jurisdiction over it.<sup>42</sup> The issue before the court was whether this limitation in 18 U.S.C. § 7 precluded the application of the homicide statute to a death that occurred on navigable waters within both federal admiralty jurisdiction and the State of Virginia's jurisdiction.<sup>43</sup>

The Fourth Circuit held that the district court did have jurisdiction in this case notwithstanding the fact that Virginia also had jurisdiction.<sup>44</sup> In its reasoning the court discussed the legislative history of the Seaman's Manslaughter Statute.<sup>45</sup> The court cited the Revised Statutes of 1874 which placed § 1115's precursor in a chapter related to crimes "arising within the maritime and territorial jurisdiction of the United States."<sup>46</sup> The court was quick to point out, however, that while other statutes in the same chapter prohibiting murder, manslaughter, and rape expressly precluded federal jurisdiction over violations that occurred within a state's jurisdiction, § 1115's precursor did not contain any restrictions.<sup>47</sup>

The court concluded that Congress intended for § 1115's precursor to apply to violations that occurred anywhere within the general admiralty and maritime jurisdiction of the United States, regardless of whether the offense took place within a state's jurisdiction.<sup>48</sup> Section 1115 is different

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navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.")

<sup>35</sup> *Rodgers*, *supra* note 26.

<sup>36</sup> See *Hoopengartner v. U.S.* 270 F.2d 465, 471 (1959) (holding that Lake St. Clair, a connecting body of the Great Lakes, is navigable); *Jerome B. Grubart, Inc.*, 513 U.S. 527 at 548 (holding that the Chicago river is navigable); *Rodgers*, 150 U.S. at 266 (holding that the Detroit River is navigable; *Allied Towing Corp.*, 602 F.2d at 615 (holding that the Elizabeth River in Virginia is navigable).

<sup>37</sup> Shappert, *supra* note 3, at 64.

<sup>38</sup> *Allied Towing*, 602 F.2d at 613.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 613-14.

<sup>42</sup> *Id.* at 614.

<sup>43</sup> *Allied Towing*, 602 F.2d at 614.

<sup>44</sup> *Id.* at 615.

<sup>45</sup> *Id.* at 614.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Allied Towing*, 602 F.2d at 614.

from statutes that prohibit crimes such as murder where both the federal and state government would have an interest.<sup>49</sup> The court determined that the restrictions imposed in 18 U.S.C. § 7 indicted that Congress left the prosecution of these other crimes up to the states in which they were committed.<sup>50</sup> With respect to § 1115, “congress enacted this statute as an integral part of its regulation of the nation’s maritime commerce.”<sup>51</sup> Therefore, the Fourth Circuit concluded that federal courts have jurisdiction over crimes arising under § 1115.

The holding of *Allied Towing* provided clarification of the apparent conflict between 18 U.S.C. § 7 and 18 U.S.C. § 1115; but it also illustrates the importance of the legislative history behind the Seaman’s Manslaughter Statute and why it should be examined to understand Congress’s purpose behind its use.

### III. History of the Seaman’s Manslaughter Statute

As *Allied Towing* concluded, The Seaman’s Manslaughter statute arises from Congress’s power to regulate commerce.<sup>52</sup> Because of this fact, prosecutions for all violations of the statute are subject to the limitations of the Commerce Clause of the U.S. Constitution.<sup>53</sup> Although the current § 1115 was enacted in 1948, the concept of imposing criminal sanctions on seaman misconduct resulting in death has been part of the law of the United States since 1838.<sup>54</sup> The precursor to § 1115 was originally part of an act by Congress entitled “An Act to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam.”<sup>55</sup> The act was intended to prevent explosions on steamboats that navigated the “bays, lakes, rivers, or other navigable waters of the United States.”<sup>56</sup> Section 12 of the 1838 Act is the antecedent of § 1115.<sup>57</sup> The act provided:

That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years.<sup>58</sup>

At the time the statute was enacted, steamboat travel was very common in the United States, but so were tragic accidents that resulted in the deaths of employees and hundreds of passengers.<sup>59</sup> In order to prevent these accidents from happening, Congress used its Article I

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<sup>49</sup> *Id.* at 615.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> WILLIAM PITARD WYNNE & BRIAN MICHAEL BALLAY, SEAMAN’S MANSLAUGHTER: A POTENTIAL SEA OF TROUBLES FOR THE MARITIME DEFENDANT AND A CLEVER MECHANISM FOR TAKING ARMS AGAINST THE SLINGS AND ARROWS OF MARITIME PLAINTIFFS, 50 *Loy. L. Rev.* 869, 885 (2004); *Allied Towing*, 602 F.2d at 615.

<sup>53</sup> Pitard & Ballay, *supra* note 48, at 886.

<sup>54</sup> *Id.* at 887.

<sup>55</sup> *Id.*; Act of July 7, 1838, ch. 191, § 2, 5 Stat. 304.

<sup>56</sup> *Allied Towing*, 602 F.2d at 614 (quoting Act of July 7, 1838, ch. 191, § 2, 5 Stat. 304).

<sup>57</sup> Pitard & Ballay, *supra* note 48, at 887;

<sup>58</sup> Act of July 7, 1838, ch. 192, § 12, 5 Stat. 306.

<sup>59</sup> Pitard & Ballay, *supra* note 48, at 886 (citing *United States v. O’Keefe*, No. CRIM.A. 03-137, 2004 WL 224574 (E.D. La. Feb. 3, 2004))

authority allotted by the Constitution.<sup>60</sup> The goal of the act was to prevent future disasters by demanding increased vigilance from steamboat employees and attaching criminal penalties to any negligence that led to any loss of life on the vessel.<sup>61</sup> Section 13 of the act listed the types of events that constituted *prima facie* evidence of negligence: “injuries arising to person or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam.”<sup>62</sup>

Two important things stand out from this excerpt. First, the drafters of this act included damage to property as evidence for a negligence claim, suggesting that although preventing loss of life was the goal, any evidence of damage could be used.<sup>63</sup> Additionally, there is nothing in section 13 that suggests drowning or peril at sea because the injuries listed do not involve actually being on the water. This suggests that the drafters were mostly concerned with explosions that were occurring on these steamboats. It also suggests the intent to have jurisdiction over vessels that were both docked and at sea. The act not only created criminal penalties, but it also placed a list of duties and obligations on steamboat employees.<sup>64</sup>

In 1871, Congress enacted another statute involving steamboat safety and employee criminal liability.<sup>65</sup> Section 57 of this act recodified section 12 of the 1838 act.<sup>66</sup> This act regulated “steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation.”<sup>67</sup> It appears that the legislature’s intent in rewriting this act was to expand its jurisdiction beyond just “lakes, bays, and rivers” that were included in the 1838 act.<sup>68</sup> The use of the term “highway” is also notable and has been mentioned in caselaw. Justice Field wrote in the *Rodgers* opinion about the use of the term “high seas” to describe public waters: “the term ‘high,’ in one of its significations, is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a “high” way.”<sup>69</sup>

Though The *Rodgers* opinion came out twenty-two years after the 1871 act by Congress, Justice Field did not write about the 1871 act in his opinion. However, Field’s definition of “highway” and the act’s “highways of commerce open to general or competitive navigation” suggest that during this twenty-year period, the Article I and III branches of government were in agreement that common highways of commerce warranted federal admiralty jurisdiction.

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<sup>60</sup> See *supra*, note 21.

<sup>61</sup> *United States v. O’Keefe*, No. CRIM.A. 03-137, 2004 WL 224574 (E.D. La. Feb. 3, 2004).

<sup>62</sup> Act of July 7, 1838, ch. 192, § 13, 5 Stat. 306.

<sup>63</sup> *Id.*

<sup>64</sup> Pitard & Ballay, *supra* note 48, at 888; Act of July 7, 1838, ch. 191, § 3, 5 Stat. 304 (“...it shall be the duty of the judge of the United States... upon the application of the master or owner of any steamboat or vessel propelled in whole or in part by steam, to appoint, from time to time, one or more persons skilled and competent to make inspections of such boats and vessels, and of the boilers and machinery employed in the same...”)

<sup>65</sup> Act of Feb. 28, 1871, ch. 100, §57, 16 Stat. 456.

<sup>66</sup> Pitard & Ballay, *supra* note 48, at 889; *Allied Towing Corp.*, 602 F.2d at 614; Act of Feb. 28, 1871, ch. 100, § 5716 Stat. 440.

<sup>67</sup> *Allied Towing*, 602 F.2d at 614; Act of Feb. 28, 1871, ch. 100, § 41, 16 Stat. 453.

<sup>68</sup> Act of July 7, 1838, ch. 191, § 2, 5 Stat. 304.

<sup>69</sup> *Rodgers*, 150 U.S. at 258-59.

Three years later, section 57 was codified in section 5344 of the Revised Statutes of 1874.<sup>70</sup> As mentioned above, the court in *Allied Towing* noted that other criminal statutes in this section expressly prohibited federal jurisdiction over crimes that occurred on waters in which states also had jurisdiction.<sup>71</sup> The legislative decision to recodify the statute and include it among other maritime criminal statutes with these restrictions suggest that its intent was to enforce evenhanded rules along the above mentioned “highways of commerce.”<sup>72</sup>

In 1905, Congress added a second paragraph to section 5344 to include corporations and officers of corporations.<sup>73</sup> This second paragraph is similar to the second paragraph of the current Seaman’s Manslaughter statute.<sup>74</sup> The statute was revised again in 1909 and designated as section 282 of the new criminal code.<sup>75</sup> Although similar to the prior statute, the 1909 revision included vessels other than steamboats<sup>76</sup> suggesting Congress’s intent to keep up with technological advances in maritime travel.<sup>77</sup> As a result of its new placement in the criminal code, the statute was limited by the definition of admiralty jurisdiction in section 272 of the Criminal Code.<sup>78</sup> Thus, this new version of the law did not apply to homicides committed on waters that fell within the jurisdiction of any state.<sup>79</sup> The 1926 recodification moved sections 272 and 282 to 18 U.S.C. sections 451 and 461, but the jurisdictional limitation of the 1909 revision was still in place.<sup>80</sup> In 1948, Congress removed this jurisdictional restriction.<sup>81</sup> The old chapter on crimes within the special maritime and territorial jurisdiction was abolished, and its sections were incorporated into other parts of Title 18.<sup>82</sup> The old 18 U.S.C. § 461 was moved to its current place in the homicide chapter as 18 U.S.C. § 1115.<sup>83</sup> The reviser’s note for the new statute provided an explanation for the change in the meaning of the law over the years:

Section (1115) restores the intent of the original enactments, R.S. § 5344, and act Mar. 3, 1905, ch. 1454, § 5, 33 Stat. 1025, and makes this section one of general application. In the Criminal Code of 1909, by placing it in Chapter 11, limited to places within the special maritime and territorial jurisdiction of the United States, such original intent was inadvertently lost as indicated by the entire absence of report or comment on such limitation.<sup>84</sup>

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<sup>70</sup> Pitard & Ballay, *supra* note 48, at 890; *Allied Towing*, 602 F.2d at 614; 18 Stat. 1, § 5344 (1778-1875) (“Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed, and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years.”).

<sup>71</sup> *Allied Towing Corp.*, 602 F.2d at 614.

<sup>72</sup> Act of Feb. 28, 1871, ch. 100, § 41, 16 Stat. 453.

<sup>73</sup> Pitard & Ballay, *supra* note 48, at 893; Act of Mar. 3, 1905, sec. 5, § 5344, 33 Stat. 1023, 1025-26.

<sup>74</sup> Pitard & Ballay, *supra* note 48, at 890.

<sup>75</sup> Act of Mar. 4 1909, ch. 11, sec. 282, 35 Stat. 1088, 1144.

<sup>76</sup> Pitard & Ballay, *supra* note 48, at 890.

<sup>77</sup> Pitard & Ballay, *supra* note 48, at 890; *U.S. v. LaBrecque*, 419 F. Supp. 430, 435 (1976).

<sup>78</sup> Pitard & Ballay, *supra* note 48, at 891; *Allied Towing Corp.*, 602 F.2d at 614-15; Act of Mar. 4 1909, ch. 11, sec. 282, 35 Stat. 1088, 1142-43.

<sup>79</sup> *Allied Towing Corp.*, 602 F.2d at 615.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (citing Act of June 30, 1926, ch. 712, 44 Stat. 498, 499).

<sup>82</sup> *Allied Towing*, 602 F.2d at 615 (citing H.R.Rep. No. 304, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess. A6-A7 (1947)).

<sup>83</sup> *Id.*

<sup>84</sup> *Allied Towing*, 602 F.2d at 615 (quoting H.R.Rep. No. 304, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess. A91 (1947)).

This revision note indicates that Congress recognized its mistake in narrowing the reach of Seaman's Manslaughter and corrected that mistake by restoring the statute's intended general application.<sup>85</sup> Even though the language and placement of the statute changed throughout the years, this note demonstrates that the Seaman's Manslaughter Statute was intended to be one of general application, and not limited to places within admiralty jurisdiction.<sup>86</sup> This change restored the sole purpose of the statute which was and still is to hold all operators and owners of vessels criminally responsible for deaths that occur on their watch.

#### IV. Language and Interpretation of the Seaman's Manslaughter Statute

The Seaman's Manslaughter Statute holds any employee of a vessel criminally liable for negligent conduct that leads to the death of another person.<sup>87</sup> When the owner of the vessel is a corporation, any executive officer of the corporation may be held criminally liable.<sup>88</sup> Three questions emerge from this basic reading of the statute: First, what is a vessel? Second, what constitutes a "person employed"? Finally, what is an executive officer?

##### A. What is a Vessel?"

According to 1 U.S.C.A. § 3, "[t]he word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."<sup>89</sup> As mentioned above, the antecedent to § 1115 was written to prevent explosions on steamboats.<sup>90</sup> Later enactments of the statute included the term vessel to indicate Congress's intent to keep the statute relevant in the modern age.<sup>91</sup> As new boats and modes of transportation are created, so is the need to protect passengers and other persons from any negligent operation.

Interpretation of this statute leads to a very important question: is every mode of water transportation a vessel? A literal interpretation of the vessel definition could lead someone to conclude that a surfboard or a paddle boat is a vessel because both can be used for transportation on water. What about a makeshift raft? Did Congress intend for operators of these rudimentary devices to be held criminally liable under a statute originally designed for steamboats? The answer is obviously no because Congress's purpose behind § 1115 was the regulation of maritime commerce<sup>92</sup> As a result, the statute typically applies to commercial vessels. Judge Bright provided a good explanation in the *Livingston* opinion: "Federal admiralty jurisdiction had its genesis in the felt need to provide a uniform body of law governing navigation and commercial maritime activity. Admiralty law, as a consequence, is concerned almost exclusively with the special needs of the shipping industry."<sup>93</sup> Implicit in this explanation is the rule that a vessel must be capable of

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<sup>85</sup> Brief of Petitioner-Appellant at 34, *United States v. Kenneth Scott McKee*, No. 20-3671 (2021 WL 1081568).

<sup>86</sup> *Supra*, note 84.

<sup>87</sup> *See supra*, note 1.

<sup>88</sup> *See supra*, note 2.

<sup>89</sup> 1 U.S.C.A. § 3 (West); *See Stewart v. Dutra Constr. Co.*, 125 S. Ct. 1118 (2005); *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013) (Court eschewed the concept that every vessel that floats is a vessel as defined in the statute).

<sup>90</sup> *See supra*, note 58

<sup>91</sup> *See supra*, note 79.

<sup>92</sup> *See supra*, note 53.

<sup>93</sup> *Livingston*, 627 F.2d 165 (citations omitted).

sustaining maritime commerce in order to be subject to § 1115. Courts also tend to conclude that noncommercial vessels do not fall under maritime jurisdiction.<sup>94</sup>

However, there is inconsistency across the different circuits. The Sixth Circuit in *Hoopengarner v. United States* held that a non-commercial motorboat fell under federal admiralty jurisdiction because it was “registered, licensed, and enrolled under the laws of the United States”, and was travelling along a connecting waterway of the Great Lakes.<sup>95</sup> The court relied on paragraph 2 of 18 U.S.C. § 7 which states that “[a]ny vessel registered, licensed, or enrolled under the laws of the United States” that is travelling on the waters of the Great Lakes or any waters connecting them will fall under admiralty jurisdiction in a criminal case.<sup>96</sup> The court placed more emphasis on the characteristics of the water and the boat’s registration rather than the boat itself. This case illustrates that a boat that is not traditionally capable of sustaining maritime commerce may nonetheless be subject to criminal liability if it is registered with the federal government.

A more modern example of this inconsistency was presented in *Keys Jet Ski, Inc. v. Kays*. Here, the Eleventh Circuit held that a Jet Ski fell under federal admiralty jurisdiction.<sup>97</sup> The court reasoned that there was “no reasonable distinction” between a small motor boat and a jet ski because both are capable of being used as a means of water transportation.<sup>98</sup> As a result, the court concluded that a jet ski should be considered a vessel for purposes of admiralty jurisdiction.<sup>99</sup> In this case, the court placed more emphasis on the qualities of the boat rather than its registration status or ability to sustain maritime commerce. Overall, there is an inconsistency regarding which vessels will fall under admiralty jurisdiction. The Seventh Circuit in *Chapman v. United States* held that small pleasure boats operated in waters that, although once used for commercial transportation, are now used only for recreational activities are not subject to Federal admiralty jurisdiction.<sup>100</sup>

Is a dredge with limited mobility a “vessel” under 1 U.S.C.A. § 3? The Supreme Court, in *Stewart v. Dutra Construction Co.*, held that it is.<sup>101</sup> The Commonwealth of Massachusetts commissioned a project to extend the Massachusetts Turnpike through a tunnel running under South Boston and Boston Harbor to Logan Airport.<sup>102</sup> The Commonwealth hired Dutra Construction Company to assist with the project.<sup>103</sup> At the time, Dutra owned the world’s largest dredge, the *Super Scoop*, which was capable of digging the large trench underneath Boston Harbor to create the Ted Williams Tunnel.<sup>104</sup> The *Super Scoop* is a massive floating platform from which a clamshell bucket is suspended under the water to remove silt from the ocean floor.<sup>105</sup> The *Super Scoop* had some characteristics that are similar to sea vessels, such as a captain and crew,

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<sup>94</sup> See *LaBrecque*, 419 F. Supp. at 437 (No admiralty jurisdiction over a noncommercial sailboat).

<sup>95</sup> *Hoopengarner*, 270 F.2d at 470.

<sup>96</sup> 18 U.S.C.A. § 7 (2).

<sup>97</sup> *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1230 (11th Cir. 1990). By holding the jet ski is a vessel, the owner was entitled to petition the court to limit liability under the Shipowner’s Limitation of Liability Act, 46 U.S.C. Se. 3501 et seq.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Chapman v. U.S.*, 575 F.2d 147, 147 (1978).

<sup>101</sup> *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 497 (2005).

<sup>102</sup> *Id.* at 484.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

navigational lights, ballast tanks, and a crew dining area.<sup>106</sup> However, it lacked other important features of a sea vessel.<sup>107</sup> The *Super Scoop* has very limited ability of self-propulsion; it is moved long distances with the assistance of a tugboat.<sup>108</sup> It navigates short distances by manipulating its anchors and cables.<sup>109</sup> While dredging the Boston Harbor trench, it only moved once every couple of hours, traveling a distance of only 30 to 50 feet each time.<sup>110</sup>

Dutra hired marine engineer Willard Stewart to maintain the mechanical systems on the *Super Scoop* during the dredging operation.<sup>111</sup> Stewart was injured during a collision of the *Super Scoop* and one of its scows.<sup>112</sup> Stewart sued Dutra under the Jones Act, alleging that he was a seaman injured by Dutra's negligence.<sup>113</sup> He also filed a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA), which authorizes covered employees to sue a vessel owner as a third party for an injury caused by the owner's negligence.<sup>114</sup> The district court held, and the court of appeals later affirmed, that the *Super Scoop* was not a vessel under either the Jones Act or the LHWCA.<sup>115</sup> The Supreme Court granted certiorari to determine whether the *Super Scoop* was a vessel for purposes of the LHWCA.<sup>116</sup>

The Supreme Court held that the *Super Scoop* was a vessel.<sup>117</sup> The Court relied on the definition of vessel provided in section 3 of 1 U.S.C.A.<sup>118</sup> Justice Thomas, writing for a unanimous Court (Justice Rehnquist took no part in this opinion), stated that section 3 requires a watercraft to be "used or capable of being used" for transportation on water to qualify as a vessel; however, the watercraft does not have to be used primarily for that purpose to qualify as a vessel.<sup>119</sup> The Court stated that the *Super Scoop*'s purpose was to move through Boston Harbor, digging the bottom of the ocean as it moved; therefore, the *Super Scoop* was not only capable of transporting equipment and workers over water, but it actually accomplished these things.<sup>120</sup> The Court also states that the *Super Scoop* would not have been able to dig the Ted Williams Tunnel if it was unable to navigate the Boston Harbor.<sup>121</sup>

In *Dutra*, Justice Thomas eschewed a temporal element for vessel status stating that a watercraft does not have to presently be in motion to qualify as vessel under section 3.<sup>122</sup> The Court states that the transportation requirement of section 3 was not to assess the watercraft's movement at a specific point in time, but rather to point out that a watercraft may lose its status as a vessel if it has been taken out of the water for an extended period of time.<sup>123</sup> The opinion further

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<sup>106</sup> *Dutra*, 543 U.S. at 484.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Dutra*, 543 U.S. at 485.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 486.

<sup>116</sup> *Dutra*, 543 U.S. at 486.

<sup>117</sup> *Id.* at 497.

<sup>118</sup> *Id.* at 495.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Dutra*, 543 U.S. at 495.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 496.

stated that because the *Super Scoop* had not been taken out of service or permanently anchored, it did not lose its status as a vessel just because it was not in motion at the time of the accident.<sup>124</sup>

*Dutra* establishes a new rule regarding vessels: a vessel is any watercraft that is capable of maritime transportation regardless of its primary purpose or current state of transit at a specific point in time.<sup>125</sup> This rule answers the inquiries at the beginning of this section. A surfboard or paddle boat would not be vessels for purposes of section 3, not because they are incapable of transit or because they are primarily used for recreational purposes, but rather because they are incapable of commercial maritime transportation.

### B. What is a “Person Employed”?

Paragraph 1 of § 1115 states that “every captain, engineer, pilot, or other person employed” can be held criminally liable.<sup>126</sup> This leads to the question: What constitutes “other person employed?” Additionally, can the seaman’s manslaughter statute apply to any employee of a vessel? In *United States v. Kaluza*, the Fifth Circuit held that it does not.<sup>127</sup> Two employees of BP working on Transocean Horizon, Kaluza and Vidrine were indicted in U.S. district court in the aftermath of the *Deepwater Horizon* oil spill in 2010.<sup>128</sup> On April 20, 2010, there was a blowout of oil, natural gas, and mud during deepwater drilling operations at the Macondo well in the Gulf of Mexico.<sup>129</sup> At the time of the explosion, the *Deepwater Horizon*, a BP chartered drilling rig, was attached to the Macondo well.<sup>130</sup> This blowout resulted in explosions and fires that killed eleven men and released millions of barrels of oil into the Gulf of Mexico.<sup>131</sup>

At the time of the explosion, Robert Kaluza and Donald Vidrine were “well site leaders,” the highest ranking BP employees working on the rig.<sup>132</sup> Kaluza had a degree in petroleum engineering and had 35 years of experience in the oil and gas industry, including more than eight years employed as a well site leader.<sup>133</sup> Vidrine had been a well site leader for over 30 years, and had been working on the *Deepwater Horizon* since January 2010.<sup>134</sup> As well site leaders, Kaluza and Vidrine were responsible for conducting and assessing the validity of “negative pressure testing,” also referred to as “negative testing.”<sup>135</sup> During negative testing, the well was monitored for pressure increases and fluid flows, either of which could indicate that the well was not secure and that oil and gas could be entering the well.<sup>136</sup> An uncontrolled leak of fluids and gas from the

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<sup>124</sup> *Id.* at 497.

<sup>125</sup> *Id.*; *but see* *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 133 (2013) (holding that a floating home that could only move under tow was not a “vessel” for purposes of 1 U.S.C. § 3).

<sup>126</sup> 18 U.S.C.A. § 1115

<sup>127</sup> *U.S. v. Kaluza*, 780 F.2d 647, 664 (2015).

<sup>128</sup> *Id.* at 650.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Kaluza*, 780 F.2d at 650.

<sup>133</sup> *Id.* at 652.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

surrounding rock into the well could cause explosions, therefore competent negative testing was crucial.<sup>137</sup>

On April 20, 2010, the *Deepwater Horizon* employees were engaged in the process of temporarily abandoning the Macondo well: sealing it with cement so that a different vessel could later collect the oil and natural gas reserves.<sup>138</sup> It was routine procedure to perform several negative tests to determine whether the well was properly sealed.<sup>139</sup> Kaluza and Vidrine both conducted the negative testing that day.<sup>140</sup> The original indictment alleged that their negligence in performing the negative tests led to the resulting explosion.<sup>141</sup>

The district court charged defendants, in part, with 11 counts of seaman's manslaughter under 18 U.S.C. § 1115.<sup>142</sup> Defendants argued that these counts did not charge an offense because they were not persons covered under the statute.<sup>143</sup> The district court dismissed the counts brought under the Seaman's Manslaughter Statute for failure to charge an offense.<sup>144</sup> The government appealed, arguing that defendants were persons covered under § 1115.<sup>145</sup>

The Fifth Circuit stated that it focused specifically on the language "[e]very... other person employed on any... vessel"<sup>146</sup> The court stated that this was the only relevant language because the defendants were not captains, engineers, or pilots.<sup>147</sup> It determined that because the statute was ambiguous, it would apply the principal of *ejusdem generis* to define the phrase "every other person employed."<sup>148</sup> According to the statutory interpretive principle of *ejusdem generis*, "where general words follow an enumeration of specific terms, the general words are read to apply only to other items like those specifically enumerated."<sup>149</sup>

Applying this logic to the statute, the court concluded that the three words "captain," "engineer," and "pilot," define a general class of people that are involved in the "maritime operations, maintenance, or navigation of the vessel."<sup>150</sup> The panel further explained that captains, engineers, and pilots are all persons in positions of authority who are responsible for ensuring that the vessel can successfully be used, or is capable of being used, as a means of transportation on water.<sup>151</sup> Because the defendants were not tasked with ensuring that the rig could be successfully used as transportation on water, they did not fall within the definition of § 1115.<sup>152</sup> As a result, the Fifth Circuit affirmed the district court's decision, and defendants were excluded from criminal liability under the Seaman's Manslaughter Statute.<sup>153</sup>

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<sup>137</sup> *Kaluza*, 780 F.2d at 652.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Kaluza*, 780 F.2d at 653.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 657 (quoting 18 U.S.C. § 1115).

<sup>147</sup> *Kaluza*, 780 F.2d at 657.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 660-61 (quoting *Garcia v. United States*, 469 U.S. 70, 74 (1984)).

<sup>150</sup> *Id.* at 662.

<sup>151</sup> *Id.*

<sup>152</sup> *Kaluza*, 780 F.2d at 662.

<sup>153</sup> *Id.* at 669.

The *Kaluza* decision adds to understanding that the ability of the vessel to be used as maritime transportation is weighed heavily by courts when determining whether a case falls under the liability provisions of § 1115. Additionally, *Kaluza* answers the question posed at the beginning of this section: not all employees on a vessel can be held criminally liable under the statute. Only employees that are directly involved with the vessel's success at being capable of water transportation can be held liable. Like the vessel requirements mentioned in the previous section, the employee requirement of the statute places a heavy emphasis on transportation.

### C. What is an "Executive Officer?"

The second paragraph of the Seaman's Manslaughter Statute states that when the owner or charterer of the vessel is a corporation<sup>154</sup>, any executive officer<sup>155</sup> that is currently in charge of the control and management of the vessel can be prosecuted under the statute if they have knowingly and willfully caused or allowed any fraud, neglect, connivance, misconduct, or violation of law, that caused the life of any person to be destroyed.<sup>156</sup> The Statute imposes different liability standards depending on whether the defendant is (1) a person employed on the vessel; (2) an owner, charterer, inspector or "other public officer;" or (3) an "executive officer" of a corporation charged with the control and management of the vessel.<sup>157</sup> If a defendant is a public officer, the United States only has to prove that his "fraud, neglect, connivance, misconduct, or violation of law" caused the death. If the defendant is an executive officer, the United States must prove that he "knowingly and willfully caused and allowed such fraud, neglect, connivance, misconduct, or violation of law" and it was this activity that caused the death.<sup>158</sup> The court in *United States v. Ryan* explained that there is an inconsistency in the treatment of public officers and executive officers and that this is likely due to the fact that they were added to the statute at different times and in response to different events.<sup>159</sup> Overall, a court will apply different standards depending on the individual's role on the vessel.

## V. Admiralty Jurisdiction in State Waters

### A. Tragedy At Table Rock Lake – *United States v. McKee*

Following the criminal indictment of duck boat captain Kenneth Scott McKee for the 17 lives lost on a tragic duck boat accident, U.S. Attorney Tim Garrison made the following statement:

"Our entire community was shocked and saddened by the loss of 17 lives in this tragic event last summer. Today's indictment alleges that the misconduct, negligence and inattention to duty by the ship's captain caused or contributed to the loss of those lives."<sup>160</sup>

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<sup>154</sup> CORPORATION, Black's Law Dictionary (11th ed. 2019) (A corporation is an entity (i.e. a business) that has authority under law to act as a single juridical person distinct from the shareholders who own it and that has rights to issue stock and exist indefinitely).

<sup>155</sup> EXECUTIVE, Black's Law Dictionary (11th ed. 2019) (An executive officer is a corporate officer at the upper levels of management).

<sup>156</sup> 18 U.S.C.A. § 1115.

<sup>157</sup> *U.S. v. Ryan*, 365 F.Supp.2d 338, 340 (2005).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Duck Boat Captain Indicted For Misconduct, Negligence Resulting In 17 Deaths At Table Rock Lake, 2018 WL 5876953.

Duck Boats (formal name DUKW) are World War II era amphibious vehicles that are now commonly used for sightseeing tours and are common tourist attractions.<sup>161</sup> On July 19, 2018, the *Stretch Duck 7*, a commercial tourism duck boat, sank in a thunderstorm during a routine trip on Table Rock Lake.<sup>162</sup> This accident killed 17 of the 31 persons aboard, 16 of whom were paying passengers.<sup>163</sup> A grand jury later returned an indictment, charging Kenneth Scott McKee, Charles V. Baltzell, and Curtis P. Lanham each with 17 counts of Seaman's Manslaughter in violation of 18 U.S.C. § 1115, alleging that McKee, the captain of the boat, and Baltzell and Lanham, managers of the tourism business, caused those deaths through their "misconduct, negligence, and inattention to duty."<sup>164</sup>

Ripley Entertainment, Inc., doing business as Ride the Ducks Branson, managed and operated duck boat tours on Table Rock Lake in Missouri.<sup>165</sup> Ripley owned the duck boats, which could be driven on land and navigated on water.<sup>166</sup> The United States Coast Guard regulated Ripley's activities on the Lake: the duck boats could not operate on the lake unless they were registered with the Coast Guard, passed Coast Guard inspection, and operated within the restrictions listed in each duck boat's certificate of inspection.<sup>167</sup> The *Stretch Duck 7*'s certificate prohibited its operation on the Lake when winds exceeded 35 miles per hour or when the wave height exceeded two feet.<sup>168</sup> The Coast Guard also issued the credentials and licenses for the captains of these duck boats on the lake.<sup>169</sup>

On July 19, 2018, McKee, Baltzell, and Lanham were on duty and operated duck boat tours throughout the day.<sup>170</sup> The tours typically began with a tour on land followed by a tour on Table Rock Lake.<sup>171</sup> McKee, the captain of the *Stretch Duck 7*, was a Coast Guard credentialed merchant mariner.<sup>172</sup> Baltzell was the operations supervisor and manager on duty, with duties including monitoring the weather and serving as dispatcher for the boats.<sup>173</sup> Lanham was the general manager; he was responsible for setting policies and procedures and had authority over the entire staff.<sup>174</sup>

At 11:24 a.m. on July 19, 2018, the National Weather Service (NWS) issued a severe thunderstorm watch for the area including Branson and Table Rock Lake.<sup>175</sup> These warnings continued throughout the day leading up to the accident.<sup>176</sup> Ride the Ducks Branson had just started doing 6:30 p.m. tours only two weeks prior to increase revenue.<sup>177</sup> Before McKee's 6:30 p.m. tour, he and codefendant Baltzell viewed the weather radar, which showed an approaching thunderstorm

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<sup>161</sup> Land and Lake Tours, Inc. v. Lewis, 738 F.2d 961, 962 (8th Cir. 1984).

<sup>162</sup> Brief of Petitioner-Appellant at 4, United States v. Kenneth Scott McKee, No. 20-3671 (2021 WL 1081568).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 6.

<sup>166</sup> *Id.*

<sup>167</sup> Brief of Petitioner-Appellant at 6-7, United States v. Kenneth Scott McKee, No. 20-3671 (2021 WL 1081568).

<sup>168</sup> *Id.* at 7.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Brief of Petitioner-Appellant at 7, United States v. Kenneth Scott McKee, No. 20-3671 (2021 WL 1081568).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 7-8

<sup>177</sup> Brief of Petitioner-Appellant at 8, United States v. Kenneth Scott McKee, No. 20-3671 (2021 WL 1081568).

and lightning.<sup>178</sup> At 6:28 p.m., Baltzell instructed McKee to conduct the water portion of the 6:30 tour first due to the incoming storm.<sup>179</sup> At 6:32 p.m., just before *Stretch Duck 7* departed, the NWS issued another severe thunderstorm warning reporting that the storm was approaching the lake at 50 miles per hour and contained gusts of 60 miles per hour.<sup>180</sup> This was well over the 35 miles per hour threshold set by the Coast Guard's certificate of inspection.<sup>181</sup>

Five minutes after *Stretch Duck 7* entered the water, the thunderstorm reached it, noticeably increasing the winds and wave height.<sup>182</sup> Despite the surrounding winds reaching gusts up to 73 miles per hour, McKee failed to instruct passengers to put on life preservers.<sup>183</sup> At 7:09 p.m., the storm capsized the *Stretch Duck 7* and it sank, killing sixteen passengers and a crew member.<sup>184</sup>

Following their indictment, the district court for the Western District of Missouri granted McKee, Baltzell, and Lanham's motion to dismiss, citing lack of admiralty jurisdiction.<sup>185</sup> The Government then appealed this ruling on December 17, 2020.<sup>186</sup> In its appellate brief to the Eighth Circuit, the Government argued that because the Seaman's Manslaughter statute was enacted under Congress's commerce power, the district court used the wrong standard of navigability.<sup>187</sup> According to the Government, the court should have used the historical navigability standard under the commerce clause, rather than the current navigability standard of admiralty jurisdiction.<sup>188</sup> An understanding of the different definitions of navigability, and their implications, is crucial to our understanding of whether the Seaman's Manslaughter Statute can be applied to crimes such as these.

### A. Navigability

Black's Law Dictionary defines navigability as "naturally usable for travel or commerce in the present condition."<sup>189</sup> However, navigability as a maritime law concept is a lot more complex than this simplified definition makes it appear. Navigability has been developed through federal statutes, federal agency regulations, and jurisprudence to have several different definitions that ultimately determine whether admiralty jurisdiction applies in a case.

Additionally, navigability as a definition performs several different roles. The United States Supreme Court has identified four separate purposes underlying the definition of "navigability:" "to delimit the boundaries of the navigational servitude; to define the scope of Congress' regulatory authority under the commerce clause; to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Act of 1899; and to establish the limits of federal admiralty jurisdiction."<sup>190</sup> The Court also points out that each of these areas of law might require a different definition of "navigability."<sup>191</sup> For example, a river that may be navigable under

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See supra*, note 163 and accompanying text.

<sup>182</sup> Brief of Petitioner-Appellant at 9, *United States v. Kenneth Scott McKee*, No. 20-3671 (2021 WL 1081568).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1

<sup>186</sup> *Id.*

<sup>187</sup> Brief of Petitioner-Appellant at 29, *United States v. Kenneth Scott McKee*, No. 20-3671 (2021 WL 1081568).

<sup>188</sup> *Id.* at 42-44.

<sup>189</sup> NAVIGABLE, Black's Law Dictionary (11th ed. 2019).

<sup>190</sup> *Livingston*, 627 F.2d at 169 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979)).

<sup>191</sup> *Livingston*, 627 F.2d at 169; *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979).

the United States' commerce clause power might not be navigable for purposes of admiralty jurisdiction.<sup>192</sup>

The justification for reserving admiralty jurisdiction to the federal courts is “the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation.”<sup>193</sup> Navigability continues to play an important role in determining whether a court has admiralty jurisdiction.<sup>194</sup> Traditionally, admiralty jurisdiction only encompassed the sea, including waters within the ebb and flow of the tide.<sup>195</sup> In the nineteenth century, admiralty jurisdiction was extended to freshwaters that satisfied the test of navigability.<sup>196</sup> Rivers, streams, lakes, and other bodies of water are within the jurisdiction if they are deemed “navigable waters.”<sup>197</sup> Navigability, as a legal concept, has implications not only in admiralty jurisdiction, but also in constitutional and property law as well.<sup>198</sup> As a constitutional law concept, navigability determines states' rights under the Equal Footing Clause<sup>199</sup> and is used to determine Congress' regulatory authority under the Commerce Clause.<sup>200</sup> The admiralty and maritime aspect of navigability is related to but also different from the constitutional concepts.<sup>201</sup>

The original test to determine whether a waterbody is navigable for purposes of admiralty jurisdiction was created by the Supreme Court in *The Daniel Ball*.<sup>202</sup> The Court determined that a body of water is navigable, and thus subject to admiralty jurisdiction, when it is “navigable in fact.”<sup>203</sup> Waterbodies are navigable in fact when they are “. . . used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”<sup>204</sup>

Modern applications of this “navigability in fact” standard have varied across federal circuit courts. The Eighth Circuit in *Livingston v. United States* held that navigability requires evidence of actual contemporary commercial use.<sup>205</sup> The Ninth Circuit adopted a less rigorous standard in *Adams v. Montana Power Company*: “admiralty jurisdiction need and should extend

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<sup>192</sup> *Adams v. Montana Power Co.*, 528 F.2d 437, 441 (1975) (“We therefore conclude that, notwithstanding the [Missouri River’s] navigable status under the commerce clause, it was not navigable for purposes of exercising admiralty jurisdiction.”).

<sup>193</sup> *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *abrogated by Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 12 (6th ed. 2019).

<sup>194</sup> SCHOENBAUM, *supra* note 152, at 12.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982)).

<sup>198</sup> *Id.*

<sup>199</sup> SCHOENBAUM, *supra* note 152, at 13; *United States v. Oregon*, 295 U.S. 1, 14 (1935) (citations omitted) (“. . . upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new state.”).

<sup>200</sup> SCHOENBAUM, *supra* note 152, at 13; U.S. Const. art. I, § 8, cl. 3 (“The Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”)

<sup>201</sup> SCHOENBAUM, *supra* note 152, at 14.

<sup>202</sup> *The Daniel Ball*, 77 U.S. 557, 563 (1870).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> JOHN F. BAUGHMAN, *BALANCING COMMERCE, HISTORY, AND GEOGRAPHY: DEFINING THE NAVIGABLE WATERS OF THE UNITED STATES*, 90 Mich. L. Rev. 1028, 1043 (1992); *Livingston*, 627 F.2d at 170.

only to those waters traversed or susceptible of being traversed by commercial craft.”<sup>206</sup> In other words, this more flexible standard extended the navigability label to waters that are capable but not presently used for commercial shipping. The Seventh Circuit also adopted this approach in *Chapman v. United States*.<sup>207</sup>

As mentioned above in the section regarding vessels, federal admiralty jurisdiction was created to provide a uniform body of law governing commercial maritime activity, and therefore is almost exclusively concerned with the needs of the shipping industry.<sup>208</sup> Admiralty jurisdiction has been extended as a consequence of more waterbodies being opened to commercial shipping.<sup>209</sup> The corollary to this is if a waterbody has been closed to commercial shipping, it will no longer fall under admiralty jurisdiction.<sup>210</sup>

The current standard for navigability mirrors the Ninth Circuit’s more flexible approach: “a waterway is navigable for admiralty jurisdiction purposes if it presently supports interstate commercial activity or if, in its present condition, it is capable of supporting interstate commercial activity.”<sup>211</sup> Thus, in order for a body of water to be navigable for admiralty purposes, it must either have the present or potential ability to support interstate commercial activity.

The next logical question is which waterbodies fall under this navigability standard? – and further, do state waters fall under this navigability standard? Statutory language has established that the high seas, the Great Lakes or any of the waters connecting them, and the Saint Lawrence River are subject to admiralty jurisdiction of the United States.<sup>212</sup> The predecessor to the current Seaman’s Manslaughter Statute regulated “steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States...”<sup>213</sup> This language clearly intended for several types of navigable waterways to be included under admiralty jurisdiction.

Definitions of navigability created by administrative agencies such as the U.S. Coast Guard and the U.S Army of Engineers while not conclusive, may still be taken into account and given substantial weight in court.<sup>214</sup> Regulations for the Coast Guard state that navigable waters include the territorial seas of the United States, and internal waters of the United States that are subject to tidal influence.<sup>215</sup> Internal waters of the United States that are not subject to tidal influence are still navigable if they are capable of supporting interstate or international maritime commerce.<sup>216</sup> When faced with a smaller body of water that is not as conspicuously capable of supporting commerce as are the Great Lakes and the Mississippi River,<sup>217</sup> the courts have to use more analysis to determine whether the water is navigable and thus subject to admiralty jurisdiction.<sup>218</sup> Courts have

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<sup>206</sup> BAUGHMAN, *supra* note 169, at 1043; *Adams*, 528 F.2d at 439.

<sup>207</sup> 575 F.2d at 151; BAUGHMAN, *supra* note 169, at 1043

<sup>208</sup> *Livingston*, 627 F.2d at 169.

<sup>209</sup> *Id.* (citing *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (1851)).

<sup>210</sup> *Id.*

<sup>211</sup> SCHOENBAUM, *supra* note 152, at 15 (quoting *Aqua Log, Inc. v. Lost & Abandoned Pre-Cut Logs & Rafts of Logs*, 709 F.3d 1055, 1056 (11th Cir. 2013)).

<sup>212</sup> 18 U.S.C.A. § 7 (1) (2).

<sup>213</sup> *See supra*, note 62.

<sup>214</sup> SCHOENBAUM, *supra* note 152, at 14 n.101; *Oregon*, 295 U.S. at 15;

<sup>215</sup> 33 C.F.R. § 2.36

<sup>216</sup> *Id.*

<sup>217</sup> *Entergy Mississippi, Inc. v. Marquette Transportation Co., LLC*, No. 3:13-CV-879-HTW-LRA, 2015 WL 13823423 (S.D. Miss. Mar. 27, 2015) (“No party disputes that the Mississippi River is a ‘navigable water’”).

<sup>218</sup> *See supra*, note 32.

held that a smaller body of water is navigable when it connects to a larger, clearly navigable waterway like the Great Lakes.<sup>219</sup>

A natural or manmade waterbody that is completely within the borders of one state and is not capable of being used as an “interstate artery of commerce, either because of a dam or because of natural conditions, is not navigable for purposes of admiralty jurisdiction.<sup>220</sup> However, a waterbody that is completely within one state may fall under admiralty jurisdiction if it is part of an interstate waterway system.<sup>221</sup> A waterway may be within admiralty jurisdiction even if it is blocked to waterborne travel during certain times of the year.<sup>222</sup> A canal, reservoir, or other artificial waterway can be within admiralty jurisdiction regardless of whether it is owned by the state or by private citizens.<sup>223</sup> Although historically applied to commercial activity, admiralty jurisdiction can extend to pleasure craft (vessels not engaged in commercial activity) if they are operating on a waterbody that is capable of commercial navigability.<sup>224</sup> This standard for pleasure craft is a lot more lenient in admiralty tort jurisdiction.

### B. Lessons from Admiralty Tort Jurisdiction – The *Sisson* Standard

The traditional test for admiralty tort jurisdiction was based solely on location, whether the incident occurred on navigable waters.<sup>225</sup> However, this test that relied only on navigability became unworkable in practice; the emphasis on locality alone meant that many inappropriate cases were falling under admiralty jurisdiction.<sup>226</sup> In 1972, the Supreme Court started to refine the test for admiralty tort jurisdiction.<sup>227</sup> In *Foremost Insurance Co. v. Richardson*, the Supreme Court rejected the idea that traditional maritime activity is exclusive to *commercial* maritime activity.<sup>228</sup> The Court reasoned that although the primary focus of admiralty jurisdiction is to protect maritime commerce, this federal interest cannot be satisfied if admiralty jurisdiction is restricted to individuals that are actually engaged in commercial maritime activity.<sup>229</sup> Maritime commerce can be fully protected only if all vessel operators are subject to uniform rules of conduct.<sup>230</sup>

The Supreme Court in its 1990 *Sisson v. Ruby* opinion extended the reach of admiralty jurisdiction with the location and connection test.<sup>231</sup> According to this two prong test: a party seeking to invoke federal admiralty jurisdiction over a tort claim must determine whether the tort

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<sup>219</sup> *Hoopengartner*, 270 F.2d at 471 (Holding that Lake St. Clair is navigable because it is “...a connecting waterway of the Great Lakes, through which a channel extended accommodating more tonnage than goes through the Panama and Suez Canals combined”).

<sup>220</sup> SCHOENBAUM, *supra* note 152, at 15.

<sup>221</sup> *Id.* at 16 (citing *In re Boyer*, 109 U.S. 629 (1884)).

<sup>222</sup> *Sanders v. Placid Oil Co.*, 861 F.2d 1374, 1378 (5th Cir. 1988) (holding that Catahoula lake in Louisiana is navigable despite being seasonally non-navigable).

<sup>223</sup> SCHOENBAUM, *supra* note 152, at 16.

<sup>224</sup> *Id.*

<sup>225</sup> SCHOENBAUM, *supra* note 160, at 24

<sup>226</sup> *Id.*

<sup>227</sup> SCHOENBAUM, *supra* note 160, at 24; *Exec. Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 268 (1972) (holding that a jet aircraft that struck a flock of sea gulls and crashed into the navigable Lake Erie did not fall under admiralty jurisdiction because the wrong did not have a significant relationship to traditional maritime activity).

<sup>228</sup> SCHOENBAUM, *supra* note 160, at 24; *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982)

<sup>229</sup> *Foremost*, 457 U.S. at 674-75 (1982).

<sup>230</sup> *Id.*

<sup>231</sup> *Sisson*, 497 U.S. 358 (This case litigated a civil tort case under 28 U.S.C. § 1333. This framework has not been applied to 18 U.S.C. § 1115).

occurred on navigable water (location), or whether an injury suffered on land was caused by a vessel on navigable water (connection).<sup>232</sup> The connection test has two sub elements.<sup>233</sup> First, a court must “assess the general features of the type of incident involved” to determine whether it has “a potentially disruptive impact on maritime commerce.”<sup>234</sup> Second, a court must determine whether the general character of the activity leading up to the incident shows a “substantial relationship to traditional maritime activity.”<sup>235</sup>

In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, a barge was used to replace wooden pilings around the piers of several bridges on the Chicago river.<sup>236</sup> The barge damaged a nearby tunnel, and seven months later the tunnel collapsed, causing nearby buildings to flood.<sup>237</sup> The Supreme Court held that although the damage was done to land well after the repairs had already been completed, admiralty jurisdiction still applied because the activity giving rise to the incident (bridge repairs) had a substantial relationship to traditional maritime activity.<sup>238</sup>

The *Sisson* framework is interesting because it allows for tortfeasors to be sued in admiralty even if the harm does not occur on navigable waters. As long as the wrongdoing has the *potential* to disrupt maritime commerce and has a connection to traditional maritime activity, the case can fall under admiralty jurisdiction. Therefore, it is a lot easier for a plaintiff to prove a civil suit in admiralty than it is for the government to convict someone under a maritime criminal statute such as 18 U.S.C.A. § 1115.

## VI. Argument for Federal Jurisdiction under the Commerce Clause

Returning to Table Rock Lake, the Government in its brief makes an argument that the district court used the wrong definition for navigability when dismissing for lack of federal admiralty jurisdiction.<sup>239</sup> More specifically, appellants argue that the district court’s decision in requiring admiralty jurisdiction for prosecution under the seaman’s manslaughter statute was incorrect because congress created this statute pursuant to its commerce power.<sup>240</sup> Based on the history of the statute, there is a governmental interest in its uniform application to cover death related to all commercial maritime activities regardless of location or present navigability of the waterway. This final section will address the merits of the Government’s argument in its appellant brief in *United States v. McKee* and some suggested next steps that courts should take.

As a general rule, navigability under the commerce clause focuses on *historic* navigability, whereas navigability for purposes of admiralty jurisdiction depends upon the present *capability* of navigability and the possibility of interstate travel by water.<sup>241</sup> The history of the commerce clause’s application to navigation and the history of the Seaman’s Manslaughter Statute indicate that the purpose of the statute would best be served by applying the commerce clause’s “historical standard” of navigability.

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<sup>232</sup> *Jerome B. Grubart*, 513 U.S. 527 at 534 (citing *Sisson*, 497 U.S. 358).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 530.

<sup>237</sup> *Jerome B. Grubart*, 513 U.S. 527 at 530.

<sup>238</sup> *Id.* at 539.

<sup>239</sup> Brief of Petitioner-Appellant at 20, *United States v. Kenneth Scott McKee*, No. 20-3671 (2021 WL 1081568).

<sup>240</sup> *Id.* at 19.

<sup>241</sup> SCHOENBAUM, *supra* note 152, at 18.

In the landmark case *Gibbons v. Ogden*, the Supreme Court held that the constitution grants congress the power to regulate commerce between the states and with foreign nations.<sup>242</sup> As a result, any state law that conflicts with the federal government's interest in regulating commerce will be void.<sup>243</sup> More specifically, the Court held that the power to regulate commerce includes power over navigation.<sup>244</sup> The Court also alluded to admiralty jurisdiction, navigable water, and its connection to the commerce clause: "It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, so far as navigation is concerned. Their use is navigation. The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters."<sup>245</sup> The Court mentioned the existence of admiralty jurisdiction<sup>246</sup>, but did not indicate that it was intended to be separate from congress's regulatory power under the commerce clause. Rather, the Court's assertion that the United States has power over navigation, and the use of navigable waters, suggests that navigability should not have a different meaning under congress's commerce power and admiralty jurisdiction as it does today.<sup>247</sup>

Later cases elaborated on the importance (or lack thereof) of navigability. The Supreme Court in *Kaiser Aetna v. United States* stated that "congressional authority over the waters of this Nation does not depend on a stream's 'navigability.'"<sup>248</sup> Rather, "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved."<sup>249</sup> The Eighth circuit adopted a similar view in *Land and Lake Tours, Inc. v. Lewis* by stating that navigability "is not necessary to support Congressional authority to regulate vessel safety under the commerce clause after *Kaiser Aetna*..."<sup>250</sup> As mentioned above, the Eighth Circuit has adopted a more rigorous standard for determining navigability for purposes of admiralty jurisdiction: evidence of actual contemporary commercial use.<sup>251</sup> It is interesting that its standard under the commerce clause is not as rigorous.

The Government in *United States v. McKee* recently filed its appellate brief with the Eighth Circuit in March of 2021. If the Government fails to prove that Table Rock Lake is navigable for purposes of admiralty jurisdiction under the Eighth Circuit's standard of actual current commercial use, they should introduce the problem of inconsistencies within this circuit. The Eighth Circuit is strict with respect to its admiralty standard (actual navigation required), but lenient when faced with a commerce clause issue (no navigability required). This illustrates why the inconsistency between the admiralty and commerce clause definitions of navigability is problematic: it produces inconsistent results in otherwise similar cases.

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<sup>242</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 72. ("All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed.")

<sup>245</sup> *Id.* at 10.

<sup>246</sup> *See id.* at 10.

<sup>247</sup> *See supra* note 196 and accompanying text.

<sup>248</sup> *Kaiser Aetna v. U. S.*, 444 U.S. 164, 174 (1979); Brief of Petitioner-Appellant at 29, *United States v. Kenneth Scott McKee*, No. 20-3671 (2021 WL 1081568).

<sup>249</sup> *Id.*

<sup>250</sup> *Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961, 964 (1984); Brief of Petitioner-Appellant at 29, *United States v. Kenneth Scott McKee*, No. 20-3671 (2021 WL 1081568).

<sup>251</sup> *See supra*, note 200 and accompanying text.

If the purpose behind having federal admiralty jurisdiction is to “protect commercial shipping with *uniform* rules of conduct.”<sup>252</sup>, the Eighth and Ninth Circuits certainly frustrate this goal by applying different standards to determine navigability. Suppose defendant A and defendant B are both indicted under the seaman’s manslaughter statute for involvement in separate but similar boat crashes that occurred upon waterbodies that are both potentially navigable, but not currently used for commercial use. Both defendants are convicted and they appeal. Suppose defendant A’s case was brought before the Eighth Circuit and defendant B’s case was brought before the Ninth Circuit. It is likely that defendant A’s case will be reversed, while defendant B’s case will be affirmed. Because a body of water that is not currently used for commercial shipping is not navigable under Eighth Circuit precedent, this court will not have admiralty jurisdiction, and the Seaman’s Manslaughter Statute will not apply. On the other hand, because Ninth Circuit precedent permits water that merely has the *potential* for commerce, this court will have admiralty jurisdiction, and the Seaman’s Manslaughter Statute will apply. This difference in results across the circuits contradicts the entire purpose behind congress’s admiralty powers: *uniform* rules of conduct to protect commercial shipping.<sup>253</sup>

## VII. Conclusion

Despite the different quirks and eccentricities across the different Circuits<sup>254</sup>, and the differences between how admiralty jurisdiction is applied in criminal and tort cases<sup>255</sup>, one thing remains constant: the importance of regulating commercial shipping. Congress’s commerce power remains in the shadows of maritime law: not always mentioned, but always there. It is relevant in tort causes of action and in the seaman’s manslaughter statute. The current standard of navigability used in admiralty jurisdiction has led to inconsistent results and it is not the uniform solution to interstate commerce that the framers intended. The original precursor to the seaman’s manslaughter statute “was enacted by congress in the proper exercise of its constitutional power ‘to regulate commerce with foreign nations and among the several states.’”<sup>256</sup> By applying a different standard of navigability for commerce clause cases and maritime cases, the courts have strayed from the original purpose of the Statute. Therefore, it is in the best interest of justice and uniformity that the commerce clause standard of navigability be used to determine whether a body of water is navigable for purposes of the Seaman’s Manslaughter Statute.

Fortunately for the families of the Duck Boat crash victims, they have another avenue to justice for their loved ones even if the federal admiralty charges are denied by the Eighth circuit. The three defendants in this case are facing a total of 63 charges related to the incident, according to the Missouri attorney general’s office.<sup>257</sup> The three men involved in the accident were each charged, in part, with 17 counts of first-degree involuntary manslaughter.<sup>258</sup> By filing charges against the defendants in state court, the Missouri government can hold these Duck Boat employees accountable even if the Eighth Circuit determines that the Seaman’s Manslaughter

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<sup>252</sup> See *supra*, note 27 and accompanying text.

<sup>253</sup> See *supra*, note 250.

<sup>254</sup> See *supra*, notes 200-202 and accompanying text.

<sup>255</sup> See *supra* section V(C). The *Sisson* framework for determining admiralty tort jurisdiction allows for an incident on land to fall under the jurisdiction; no such standard exists for criminal statutes.

<sup>256</sup> *LaBrecque*, 419 F. Supp. 430, 435 (1976).

<sup>257</sup> Carma Hassan, *3 facing charges in deadly 2018 duck boat sinking near Branson, Missouri*, CNN (July 16, 2021), <https://www.cnn.com/2021/07/16/us/branson-duck-boat-charges/index.html>.

<sup>258</sup> *Id.*

Statute does not apply. Tom Bath, an attorney for one of the defendants told a local newspaper that, "Although this was a tragedy, we do not believe that any of those charged committed any criminal conduct and intend to fight the matter in both state and federal court."<sup>259</sup>

The three defendants have a long legal battle ahead of them in both state and federal court. The willingness to charge the defendants in state court adds additional questions to the discussion of the Seaman's Manslaughter Statute itself: what is the point of the statute if it is only applicable to a small number of specific cases? And is the statute essentially useless today if defendants will be prosecuted under state criminal statutes instead? Hopefully the upcoming litigation in this Duck Boat case will help answer these questions and give us some insight into the future of the Seaman's Manslaughter Statute and how it can be used in future cases.

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<sup>259</sup> *Id.*