Sovereign Immunity

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I

INTRODUCTION

A field as doctrinally complex as admiralty perhaps does not need the additional complexity of the doctrine of sovereign immunity. Yet it is inevitable that sovereign immunity should play an important role in admiralty law, both in theory and in practice.

At the theoretical level, sovereign immunity marks the boundary between admiralty law, concerned primarily with private actors in maritime commerce, and the law of the sea, concerned primarily with relations between governments and nations. Sovereign immunity marks the point where private law ends and public law begins. It is a point of some significance, because the value of the seas and other navigable waters as highways of commerce also make them a crucial sphere for the exercise of sovereign power. So much should be clear from any history of naval warfare.

At the practical level, sovereign immunity determines the remedies available to private individuals and corporations in any of their numerous encounters with government insofar as it acts upon or controls navigable waters. Activities as various as contracts with government corporations, collisions with government vessels, and disputes over treasure on government lands can trigger the doctrine of sovereign immunity. If the doctrine applies, it eliminates any remedy directly against a public entity, or at least, restricts and complicates any attempt to gain relief.

These general considerations yield three more specific questions. First, there is the perennial question in admiralty scholarship: How is sovereign immunity in admiralty different from its operation in any other field? A short answer is that the special admiralty remedies of arrest and maritime attachment cannot be applied to some sovereign activities. No government will allow its warships to be subject to arrest. This leads, in turn, to the

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second question, which is pervasive in the law of sovereign immunity: How do we separate government acting in its sovereign capacity from government acting in its private capacity, like any other participant in maritime commerce? On the one hand, this distinction must be drawn if the doctrine of sovereign immunity is to have any limits at all, but on the other, it is difficult to find any clear and simple way to draw it. A third question, then, is how to make the law of sovereign immunity work smoothly with the law of admiralty. Despite the complexity of both fields, the law has worked out many of the problems in dovetailing them together. The problems are not fundamental as they are, for instance, in the law of civil rights, where recognizing the defense of sovereign immunity conflicts with the very idea that individuals have rights enforceable against the state. No such fundamental conflict bedevils sovereign immunity in admiralty. The conflicts are matters mainly of implementation, but no less important for that.

These three specific questions about sovereign immunity arise with respect to three different levels of government. In order of increasing generality, they are the states, the Federal Government, and foreign nations. Each of these levels of government is taken up in the succeeding parts of this essay.

II

THE STATES AND THE ELEVENTH AMENDMENT

Most of the recent litigation over sovereign immunity, inside of admiralty and out, has concerned the Eleventh Amendment. Literally, the amendment applies only to suits “in law or equity,” but not in admiralty, and only to suits against a state by citizens of other states or of foreign nations, but not suits by its own citizens. Thus all admiralty actions fall outside the literal terms of the amendment and many are excluded on the further ground that they are brought against a state by its own citizens.1 These literal restrictions on the scope of the amendment have long since been superseded.2 Having extended the Eleventh Amendment immunity beyond the text of the amendment itself, the Supreme Court has had to limit it in various ways which inevitably appear ad hoc and paradoxical.

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1The full text of the amendment is as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

2In re New York (Petition of Walsh), 256 U.S. 490, 496 (1921); Hans v. Louisiana, 134 U.S. 1 (1890).
In the general jurisprudence of the amendment, *Ex parte Young*\(^3\) allows claims for injunctive relief against state officers requiring them to comply with federal law. Such claims are nominally against state officers in their personal capacity, so that strictly speaking, they are not suits against the state at all. By acting contrary to federal law, the state officers have acted without authority under state law.\(^4\) Yet the functional effect of the suit is the same as one against the state, because the injunctive relief sought against the state officers requires them to act in their official capacity; their powers as individual citizens are inadequate to secure compliance with federal law. The tenuous fiction that the suit is against state officers in their personal capacity rests upon the need, usually unquestioned,\(^5\) to assure access to a federal court to secure compliance with federal law.

This fiction has been applied with almost full force in admiralty. In his plurality opinion in *Florida Department of State v. Treasure Salvors, Inc.*,\(^6\) Justice Stevens ruled that a warrant of arrest could be issued against state officers in their personal capacity to recover property that they did not have a "colorable claim" to possess on behalf of the state.\(^7\) The property in that case was artifacts from a wreck undergoing treasure salvage. The artifacts had been transferred to the custody of the Florida Department of State on the supposition that the wreck was located on parts of the seabed owned by Florida. When this supposition proved to be false, Treasure Salvors sued *in rem* to recover the artifacts. The holding of the Supreme Court was only that the writ of arrest could issue, not that it could result in an adjudication of ownership binding upon the state. The state was not bound, according to the plurality, because the writ could be issued against the state officers only in their personal capacity, not in their official capacity as representatives of the state itself.\(^8\)

The decision in *Treasure Salvors* does not quite follow the fiction of *Ex parte Young* in two respects, both matters of ambiguity rather than explicit departures from the prior decision. First, the Court emphasized the absence of a "colorable claim" to possession by the state officers. Because the wreck was outside of Florida territorial waters, and therefore not on the seabed owned by the state, the state had no claim to the wreck as a matter of federal

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\(^3\)209 U.S. 123 (1908).

\(^4\)Id. at 159–60.


\(^7\)Id. at 672 (opinion of Stevens, J.) This opinion represents the views of four justices. Justice Brennan cast the decisive vote in that case on the ground that the Eleventh Amendment did not apply to suits against a state by its own citizens. Id. at 700–01 (Brennan, J., concurring in the judgment in part and dissenting in part).

\(^8\)Id. at 672 (opinion of Stevens, J.).
law; and even as a matter of state law, the state officers had no explicit authority to retain the artifacts in dispute. Under *Ex parte Young*, possession in violation of federal law would have been sufficient to support federal jurisdiction, even if the officers had asserted a colorable claim to possession. Second, despite the absence of a colorable claim, the Supreme Court stated that any decision on ownership would not be binding on the state. This holding accords with prior decisions outside of admiralty,⁹ but as Professor David J. Bederman has shown, it does not fit the admiralty decisions involving disputed ownership of property subject to a writ of arrest.¹⁰ These earlier decisions mainly were prize cases in which the states asserted an ownership interest in the seized vessel. In this situation, the Supreme Court uniformly held that the federal courts had power to adjudicate ownership of the prize binding upon the states.¹¹

In *Treasure Salvors*, the Court introduced these qualifications to its holding apparently to preserve some semblance of the state’s immunity under the Eleventh Amendment. Whether it preserved more than a semblance is the question raised by the Court’s subsequent decision in *California v. Deep Sea Research, Inc.*¹² That case, relying upon the historical arguments developed by Professor Bederman, concluded that a state has no immunity under the Eleventh Amendment for *in rem* actions involving property not within its possession. The property in question was another wreck undergoing treasure salvage. The wreck there was located on submerged lands owned by the state, but the state’s ownership of the wreck itself was contested on various grounds. None of these mattered to the Court’s decision, which depended entirely on the state’s failure to gain possession of the wreck. Although the wreck was embedded in state lands, the state made “no claim of actual possession of the res.”¹³

How this holding interacts with the decision in *Treasure Salvors* was the subject of two concurring opinions. Justice Stevens, speaking only for himself, suggested that his opinion for the plurality in *Treasure Salvors* might well need to be revised in light of the historical arguments presented in *Deep Sea Research* for the conclusion that the state could be bound by an adjudication of ownership.¹⁴ On behalf of three justices, Justice Kennedy suggested that the majority’s holding in *Deep Sea Research* might extend to

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⁹A similar qualification can be found in the leading decision on sovereign immunity as a defense to claims of ownership. United States v. Lee, 106 U.S. (16 Otto) 196, 222 (1882). This decision concerned a claim against the United States but invoked principles also applicable to the states.

¹⁰Bederman, Admiralty and the Eleventh Amendment, 72 Notre Dame L. Rev. 935 (1997).

¹¹Id. at 960–66.


¹³Id. at 506.

¹⁴Id. at 509–10 (Stevens, J., concurring).
property in possession of the state.\textsuperscript{15} Thus, four justices have suggested that
the state has no immunity under the Eleventh Amendment to actions in rem
involving a dispute over ownership to property.

This suggestion gains further force from the holding in Treasure Salvors
allowing a writ of arrest to be issued against state officers. If state officers
can be required to turn over disputed property in their possession to the
court, then under Deep Sea Research, the state loses both possession of the
property and any ground for objecting to federal jurisdiction. If Treasure
Salvors remains good law, this strategy is available to plaintiffs at least when
the state officers have no "colorable claim" to the property. But having
extended federal jurisdiction this far, there is little reason to refuse to extend
it to all claims of disputed ownership to property. If the state has more than
a colorable claim to ownership, it does have some ground for depriving the
plaintiff of the disputed property. It is not acting in flagrant disregard of the
plaintiff's rights under federal admiralty law. Even so, federal jurisdiction
remains necessary because the competing claims of private individuals and
the state are most in dispute. Only a federal court can adjudicate all of the
competing claims to the property because admiralty jurisdiction over actions
in rem is exclusive of the state courts.\textsuperscript{16}

Denying federal jurisdiction would leave the claims to property subject to
piecemeal adjudication, if any adjudication is possible at all. After Alden v.
Maine,\textsuperscript{17} immunity under the Eleventh Amendment in federal court allows
the state to create a corresponding immunity in state court. It follows that no
state forum may be open, even for a claim of ownership asserted only against
the state. But even if one is open, an action binding on all other claimants to
the property would have to be brought in admiralty. Moreover, making
federal jurisdiction turn on possession encourages a race for possession
between the private parties and the state. Perhaps state officers are not likely
to act on this incentive, but everything depends upon how valuable the
disputed property is and how easily the state can gain possession of it.

All of these considerations argue for extending Deep Sea Research to all
disputes over ownership to property. Even with this extension, however, the
states would still enjoy significant protection under the Eleventh Amend-
ment. First, federal jurisdiction would not be available on ordinary claims,
such as maritime torts that usually support an action in rem against a vessel.
If the vessel involved is owned by the state, its ownership is not in dispute

\textsuperscript{15}Id. at 510 (Kennedy, J., concurring).

\textsuperscript{16}The Hine v. Trevor, 71 U.S. (4 Wall.) 555, 569 (1867). The in rem nature of the property claim in
Deep Sea Research was the ground for distinguishing it from the property claim in Idaho v. Coeur d'Alene
Tribe of Idaho, 521 U.S. 261 (1997), in which the state successfully asserted immunity under the Eleventh

\textsuperscript{17}119 S. Ct. 2240 (1999).

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and, as Justice Stevens noted in *Treasure Salvors*, the existence of a maritime lien cannot be used to bring what is in effect an action for damages directly against the state.\(^{18}\) Second, federal jurisdiction would be available only on ownership claims in admiralty, leaving disputes over ownership purely under state law still subject to the Eleventh Amendment. This result accords with the principle that the states cannot be forced into federal court on purely state law claims.\(^{19}\) And lastly, the requirement of a colorable claim to ownership still would play a role, but on the plaintiff's side, not on the state's side. A plaintiff who did not have a colorable claim to ownership could not assert federal jurisdiction for lack of a substantial federal claim.\(^{20}\) Arrest warrants could not be issued against state vessels and other property used in the ordinary course of state government. These would remain immune from process except in the truly extraordinary case in which the plaintiff claimed ownership based on federal admiralty law. Because contracts to build a vessel and for the sale of vessels fall outside the admiralty jurisdiction,\(^{21}\) it is difficult to imagine any such cases apart from treasure salvage.

The end result of this modest expansion of *Deep Sea Research* would be to restore part, but not all, of the exclusion of admiralty claims from the literal terms of the Eleventh Amendment. This result has more to be said for it as a matter of history than of logic, but logic has hardly played a role in the development of the law under the Eleventh Amendment. To paraphrase Justice Holmes, in this field, a page of history is worth a volume, not of logic, but illogic.\(^{22}\) As a matter purely of legal doctrine, the partial exclusion of admiralty actions *in rem* makes as much sense as the partial exclusion of claims against state officers under *Ex parte Young*. By bringing admiralty law into conformity with that decision, it is possible both to safeguard the sovereign interests of the states and to simplify the operation of the Eleventh Amendment in admiralty.

III

CLAIMS AGAINST THE FEDERAL GOVERNMENT

The problems associated with suing a state, or its officers, in admiralty only arise when the state has refused to waive its immunity under the Eleventh Amendment. All of the problems with suing the Federal Government arise for the opposite reason: because it has waived its immunity in too

\(^{18}\)458 U.S. at 697–99.
many separate ways. If the plaintiff chooses the wrong way—by supposing, for instance, that a tort claim falls outside the admiralty jurisdiction when it actually falls within it—the statute of limitations may prevent the claim from being pursued at all, even in the right way because the time limit for doing so may have run. To paraphrase another saying of Justice Holmes, a litigant must turn square corners in dealing with the government and they must be the right corners.23

The Federal Government has waived sovereign immunity in five statutes that bear upon admiralty claims: the Suits in Admiralty Act (SAA),24 the Public Vessels Act (PVA),25 the Federal Tort Claims Act (FTCA),26 the Tucker Act,27 and the Contract Disputes Act (CDA).28 Most claims that might be brought against the United States must be brought under one of these statutes. The only question is, “Which one?” Several attempts have been made to simplify the process of answering this question, which depends almost entirely on the existence of admiralty jurisdiction. The first two statutes, the SAA and the PVA, cover all claims against the United States that fall within the admiralty jurisdiction. The last three, the FTCA, the Tucker Act, and the CDA, cover nonadmiralty claims against the United States.

Past reforms have tried to minimize the consequences of mistakenly assuming that a claim either is or is not within the admiralty jurisdiction. The unification of admiralty procedure with procedure in law and equity had this as one of its objectives.29 The 1966 amendments to the Federal Rules of Civil Procedure abolished the difference between the “admiralty side” and the “civil side” of the federal district court, and so allowed claims erroneously filed under one heading of jurisdiction to be treated as if they had been properly filed under the other heading.30

An earlier set of statutory reforms, by amendments in 1960 to the SAA and to the Judicial Code, had also addressed these problems, first, by allowing transfer of cases between the federal district courts and what is now the Court of Federal Claims, and second, by clarifying the distinction between claims under the SAA and claims under the PVA.31 The transfer

31Pub. L. No. 86–770, 74 Stat. 912 (1960). Sections 1 and 2 enacted the transfer provision which is
provision handles cases that have been incorrectly filed in either the federal district courts, the Court of Federal Claims, or the Court of Appeals for the Federal Circuit. The last two courts have exclusive jurisdiction, respectively, over claims under the Tucker Act in excess of $10,000, and contract claims covered by the CDA. Neither of these courts has jurisdiction over maritime claims, so that a mistake about the existence of admiralty jurisdiction—either assuming it exists when it does not or the reverse—can result in a claim being filed in the wrong court. The transfer provision allows this mistake to be cured without dismissing the claim and forcing the plaintiff to file it again, perhaps too late to satisfy the appropriate statute of limitations. The clarifying amendment to the SAA eliminated a possible gap between the Federal Government's waiver of sovereign immunity in the SAA and its waiver under the PVA. Any claim in admiralty against the United States can now be brought under one statute or the other.

These reforms, for all they have accomplished, still have left some problems unresolved and, in particular, in cases in which the plaintiff mistakenly sues under the FTCA, instead of either the SAA or the PVA. Under the FTCA, a claim must be filed with the appropriate federal agency within two years of the alleged tort and, if denied by that agency, must be the subject of a judicial action brought within six months of the agency's denial of the claim. In addition, if the agency does not promptly deny the claim, the plaintiff must wait at least six months from the initial filing with the agency before bringing an action in court. By contrast, claims under the SAA and the PVA must be filed in court within two years of the events giving rise to the claim. These two different procedural schemes create the risk that a plaintiff might file a timely claim under the FTCA but not under the SAA or the PVA. If, for instance, the plaintiff files a claim with a federal agency just before the two-year period under the FTCA expires, waits six months for an agency decision, and then files in court, the claim will not be timely under the SAA or the PVA, which requires a filing in court within the


3341 U.S.C. § 607(g).
34For a proposal to remedy these problems by legislation, see Nosek, Unifying Maritime Claims Against the United States: A Proposal to Repeal the Suits in Admiralty Act and the Public Vessels Act, 30 J. Mar. L. & Com. 41 (1999).

3628 U.S.C. § 2675(a).
3746 U.S.C. app. §§ 745, 782. Only if these claims are brought under the Admiralty Extension Act must the plaintiff exhaust administrative remedies. Under this Act, covering various "ship-to-shore" situations, the plaintiff must file a claim with the appropriate federal agency and must then wait six months to sue. Id. § 740.
two-year period. This discrepancy in the statutes of limitations does not
make any difference so long as the claim is pursued only under the FTCA,
but if the claim falls within the admiralty jurisdiction and can only be
brought under the SAA or PVA, then it will be barred. The merger of
admiralty with law and equity (or the ability to transfer the case from one
court to another) will not cure this defect. The claim will remain untimely so
long as it was filed in court outside the two-year limitation period.

The simplest solution to this problem is to toll the running of the statute
of limitations while a claim is pending before a federal agency under the
FTCA. The leading decision to reach this result is *McCormick v. United
States*, which concerned a collision between a recreational boat and an
unmarked piling near the end of a pier maintained by the United States
Army. This accident occurred on August 22, 1976, and the plaintiffs
submitted claims to the United States Army on January 25, 1978, and July
21, 1978. The Army denied these claims on September 22, 1978, more than
two years after the accident, and the plaintiffs filed an action in court on
November 6, 1978, within the six-month time limit from denial of the claims
under the FTCA. The federal district court dismissed the case because it was
within the admiralty jurisdiction but was not timely under the SAA. The
Fifth Circuit held that the statute of limitations under the SAA was tolled
while the plaintiffs’ claims were pending before the Army. The court
reasoned, in support of the latter conclusion, that the statute of limitations
should not be restrictively interpreted in statutes waiving sovereign immu-
nity: “limitations provisions in statutes waiving sovereign immunity are
designed to serve the same purposes as are ordinary statutes of limitations,
the primary purpose being to encourage the prompt presentation of
claims.”

This reasoning has not been widely followed. Most courts have, on the
contrary, returned to the principle that waivers of sovereign immunity must
be narrowly construed. The leading case applying this principle to the
statute of limitations under the SAA is *McMahon v. United States*, which

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38 680 F.2d 345, 1984 AMC 1799 (5th Cir. 1982).
39 Id. at 350.

Some cases, however, have allowed tolling, but only if the plaintiff has acted with reasonable
(3d Cir. 1965) (plaintiff acted diligently to exhaust administrative remedies), with Justice v. United
States, 6 F.3d 1474, 1478–83, 1994 AMC 317 (11th Cir. 1993) (tolling denied because plaintiff did not
act diligently to file new action after prior action was dismissed), and Loeber v. Bay Tankers, Inc., 924
F.2d 1340, 1343–44, 1992 AMC 1300 (5th Cir.) (tolling denied because plaintiff did not act diligently
held that the filing of an administrative claim did not postpone the date on
which the statute of limitations began to run. This holding concerns an issue
slightly different from tolling: when the statute of limitations begins to run
instead of when it is suspended after it has begun to run. Yet the decision
clearly rejects filing of an administrative claim as any reason to prolong the
limitations period.

_McMahon_ has, however, one overriding weakness as a precedent. It was
decided before the 1960 amendments to the SAA and the Judicial Code.
These amendments sought to minimize the consequences of improperly
filing a claim against the United States. Both the transfer provisions and the
provisions expanding the scope of the SAA had this as their overriding aim.
Congress did not go on to address the issue of tolling, most plausibly
because it is a question usually left to the courts. Tolling is entirely
consistent with the basic judgment underlying the 1960 amendments: that
the difference between the various procedures for suing the United States
should not be used to defeat claims that can be made against the United
States under some procedure.

This is the principle that has been applied to claims under the CDA. In
_Dalton v. Southwest Marine, Inc._,\(^{42}\) the Court of Appeals for the Federal
Circuit held that the procedures under that act supersede the two-year statute
of limitations under the SAA and the PVA.\(^{43}\) Claims under the CDA must
be presented to the contracting federal agency within six years after they
accrue\(^{44}\) and they can be appealed to a federal court within 120 days of the
final agency decision.\(^ {45}\) Most of these appeals are to the Court of Appeals
for the Federal Circuit, but those involving maritime contracts remain subject to
the SAA and the PVA to the extent, as the CDA says, “that those chapters
are not inconsistent with this chapter.”\(^ {46}\) As interpreted by the Federal
Circuit, this provision requires appeals in cases involving maritime contracts
to be made to the federal district courts, but it supersedes the two-year statute
of limitations under the SAA and the PVA, which is inconsistent with the
time limits for administrative remedies and judicial review under the CDA.
It follows that an appeal filed with the Federal Circuit can simply be
transferred to the appropriate federal district court, so long as the appeal was
filed within the 120-day time limit under the CDA.\(^ {47}\)

\(^{42}\)120 F.3d 1249, 1998 AMC 1216 (Fed. Cir. 1997).

\(^{43}\)Id. at 1250–52.

\(^{44}\)41 U.S.C. § 605(a).

\(^{45}\)41 U.S.C. § 607(g).

\(^{46}\)41 U.S.C. § 603.

\(^{47}\)120 F.3d at 1251–52; see Century Marine Inc. v. United States, 153 F.3d 225, 229 & n.4, 1999
AMC 608 (5th Cir. 1998), cert. denied, 119 S. Ct. 1334 (1999).

Contract claims that are brought directly in the federal district courts under the SAA or the PVA,
In a recent decision under the SAA, the Supreme Court has reached a similar conclusion about the special procedures for suing the United States. In *Henderson v. United States*, the Court held that the requirement of service "forthwith" under the SAA was superseded by the ordinary procedures for service of process upon the United States under the Federal Rules of Civil Procedure. It relied both on the fact that the United States received prompt notice of the suit within the limitations period and that the 1960 amendments to the SAA and the Judicial Code sought to "afford plaintiffs multiple forum choices and spare plaintiffs from dismissal for suing in the wrong place or under the wrong Act." This reasoning applies equally to tolling of the statute of limitations. If the plaintiff has filed a claim with the appropriate federal agency within two years, as required by the FTCA, then the United States has received notice of the claim within the limitations period specified in the SAA and the PVA.

Only the dissent in *Henderson* relied on the principle that waivers of sovereign immunity should be narrowly construed. Whatever the force of this principle in the abstract, it makes little sense as a basis for judicial decisions when Congress has abandoned it. Congress has explicitly waived sovereign immunity in the SAA and the PVA, and the Supreme Court itself has recognized that once sovereign immunity has been waived, the statute of limitations can be tolled in claims against the United States. In admiralty, the sovereign interests of the United States are fully protected by the prohibition against seizure of government vessels and substitution of actions *in personam* for those that would otherwise be *in rem*. Making the

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50517 U.S. at 659.
51Id. at 667.
52Id. at 654 (Thomas, J., dissenting); see Nagle, Waiving Sovereign Immunity in an Age of Clear Statement Rules, 1995 Wis. L. Rev. 771, 777–96.
uncertain boundaries of admiralty jurisdiction into a further obstacle to recovery is entirely unnecessary. Congress has provided several different, but complementary, procedures for suing the Federal Government. Following the animating purpose of the 1960 amendments to the SAA and the Judicial Code, the courts should minimize the consequences of an erroneous choice between these procedures.

IV
THE FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (FSIA) codifies the jurisdiction, procedures, and defenses for claims against foreign nations and their agencies or instrumentalities, a body of law that has its American origins in Chief Justice Marshall’s opinion in the admiralty case of The Schooner Exchange v. McFadden. In modern admiralty law, claims against corporations owned by foreign governments have posed particular problems, especially when the claim is based on a maritime lien against a vessel. The FSIA prohibits arrest or attachment of a vessel owned by a foreign government, except to enforce a preferred ship mortgage. The difficulty confronted by a plaintiff with claims against foreign vessels is ascertaining whether or not they are owned by a foreign government. These problems were severe under the act as originally passed, but have been alleviated through amendments proposed by the Maritime Law Association. The recurring problem for judicial interpretation is what constitutes “commercial activity” that supports a claim under the act.

As originally enacted, the FSIA punished erroneous arrest or attachment of a vessel owned by a foreign government through forfeiture of any claim by the plaintiff, whether in rem or in personam. This remedy for erroneous seizure was thought to be unduly harsh and resulted in amendments to the FSIA that substituted an award of damages “if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved.” This provision has been interpreted to insulate a plaintiff entirely from liability if the foreign government’s interest does not appear in the vessel’s registry. Thus a plaintiff who had obtained the arrest of a vessel under bareboat charter to a corporation wholly owned by the government of

57 11 U.S. (7 Cranch) 116 (1812).
59 28 U.S.C. §§ 1605(d), 1610(e).
Estonia was held not liable for erroneous arrest because the government corporation was not listed as an owner pro hac vice in the vessel’s registry. And, even if the plaintiff had been held liable, liability would have been limited to detention damages. These restrictions on liability eliminate erroneous arrest as a serious concern for plaintiffs who have claims against foreign corporations and foreign governments. Moderate precautions by plaintiffs can protect them entirely from a limited form of liability.

The converse situation gives rise to more problems: seizure of a vessel owned by American interests at the instance of a foreign government. In many such cases, of course, procuring release of the vessel in the foreign proceedings is the most immediate and effective remedy. In any developed legal system, a vessel owner can take advantage of procedures to vacate the seizure or post a bond to obtain release of the vessel. Nevertheless, the vessel owner may incur expenses in doing so or may suffer detention damages. Does the FSIA allow claims for wrongful arrest against a foreign government in the same circumstances as claims against a private party? This question is most likely to arise when the government acts through an agency or instrumentality, especially a corporation in which it has only a majority interest. In this situation, the government is most likely to be carrying on a “commercial activity” for which it is liable under the FSIA and to be acting outside the protection of the “act of state” doctrine.

An illustrative case is Transamerican Steamship Corp. v. Somali Democratic Republic, in which an American vessel owner brought claims against the Somali Shipping Agency and the Somali Democratic Republic for wrongful seizure of a vessel for nonpayment of port fees in Somalia. The Somali Shipping Agency did not contest the commercial nature of its seizure, but only whether the seizure had effects within the United States sufficient to trigger liability for commercial activity outside the United States that “causes a direct effect in the United States.” The D.C. Circuit held that it did because the agency sought payment in the United States and

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63Id. at 1088.
64See generally W. Tetley, Maritime Liens and Claims chs. 26, 28 (2d ed. 1998).
65For the definition of “agency or instrumentality,” see 28 U.S.C. § 1603(b).
66For the definition of “commercial activity,” see 28 U.S.C. § 1603(d).
6928 U.S.C. § 1605(a)(2). This subsection contains two other exceptions for commercial activity and provides in relevant part:
because its seizure of the vessel resulted in a loss to the American owner. The only question about "commercial activity" concerned the actions of the Somali government, through its embassy in Washington, D.C., in seeking collection of the port fees. The D.C. Circuit held that these actions were commercial and not distinctively government activities because they did not differ in kind from the activities of private collection agencies.

In reaching this conclusion, the court anticipated the test for commercial activity set forth by the Supreme Court in Republic of Argentina v. Weltover, Inc. The FSIA does not itself define "commercial activity" beyond requiring that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." Because the purpose of an activity can affect its nature—giving money to someone can either be a subsidy or the purchase of goods depending upon its purpose—the Court narrowly interpreted "purpose" in the statutory definition to mean ulterior motive:

[W]hen a government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than by its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce"...

In Weltover, the disputed activity was issuing bonds as part of a currency stabilization plan, and under the quoted test, it amounted to commercial activity because it was similar to the issuance of bonds by a private

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

Division of the First Circuit.

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

70767 F.2d at 1004. If payment were sought through banks overseas, of course, the grounds for finding a "direct effect in the United States" would be weaker.

71Id. at 1003.


74504 U.S. at 614 (citations omitted).
company. The decisive issue, according to the Supreme Court, is whether a private person could engage in the same activity as the foreign sovereign.

In a subsequent decision, *Saudi Arabia v. Nelson*, the Court addressed the question of how closely government action must resemble private action to constitute commercial activity. That case involved retaliation against an American citizen hired to work in a government hospital in Saudi Arabia. He was recruited while he lived in the United States, but after he began work in Saudi Arabia, he reported unsafe practices at the hospital and, according to the complaint, was arrested, imprisoned, and tortured by the Saudi police in retaliation for his reports. These actions, in the Court’s view, were not commercial because they were done by police and penal officers and could not be performed by private individuals. Accordingly, his claim that the defendants committed various intentional torts, and the related claim that they failed to warn him that they might commit such torts, were not “based upon” commercial activity as required by the FSIA. In separate opinions, Justices White and Stevens both disagreed with this reasoning, on the ground that private businesses sometimes resort to similar methods to achieve their commercial goals, acting either through the government or through private “enforcers.”

This argument has some force, but so does the majority’s reasoning. The difference between them has both descriptive and normative dimensions and reveals the need to elaborate on the test for commercial activity in *Weltover*. If private businesses in Saudi Arabia could resort to the government processes of arrest and imprisonment in the same circumstances as the government hospital allegedly did, then its actions in obtaining government assistance would be no different from those of a private business accused of false arrest or malicious prosecution. If, however, private businesses did not have these drastic remedies available to them, then they could only resort to various methods of private enforcement. These would pose a risk, not just to the plaintiff, but to the sovereignty of the government of Saudi Arabia itself.

This is the rationale for the majority’s conclusion that the conduct alleged in the complaint “is not the sort of action by which private parties can engage in commerce.” Arrest, imprisonment, and torture by private individuals goes beyond the kind of illegality that typically supports a claim

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75 Id. at 615.
77 Id. at 361–62.
78 Id. at 356–58. The particular clause in § 1605(a)(2) that the plaintiff relied on was the first, denying immunity for “a commercial activity carried on in the United States by the foreign state.” Justice White concurred in the judgment on the ground that the defendants had not engaged in any commercial activity in the United States. Id. at 370 (White, J., concurring in the judgment).
79 Id. at 364–70 (White, J., concurring in the judgment); id. at 378 (Stevens, J., dissenting).
80 Id. at 362.
against private businesses. The illegality that gives rise to ordinary private litigation goes to the merits of a claim under the FSIA, not to the issue of immunity. Under the FSIA, foreign governments retain sovereign immunity to the extent that they exercise distinctively governmental powers. The legality of the government's exercise of these powers cannot be questioned on the merits, precisely because a private individual could not do the same thing—not without undermining the powers of the sovereign. Seizure of individuals by force falls well within this narrow definition of conduct that distinguishes government activity from commercial activity. It is conduct which would, if done by someone outside of government, undermine an essential attribute of sovereignty: the government's monopoly on the use of force within its territory.

What can be said about seizure of individuals can also be said about seizure of vessels. In the decision of the D.C. Circuit discussed earlier, Transamerican Steamship Corp., the Somali Shipping Agency that seized the American owned vessel engaged in the equivalent of a wrongful arrest of the vessel. On the assumption that this remedy would have been available to any private business in Somalia, the shipping agency was right to concede the commercial nature of its activity. A seizure in these circumstances would be entirely analogous to the debt collection activities that the Somali embassy performed for the agency and that could have been performed by it, or by a private collection agency, for any private business. On the other hand, if seizure of the vessel were not generally available to private businesses, but only to public agencies and instrumentalities of the Somali government, then it would have been an exercise of governmental powers outside the exception for commercial activity in the FSIA. Indeed, because this action occurred in Somali territory, it would also have been subject to an additional defense under the "act of state" doctrine, which "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."[81]

This defense, as well as the defense of sovereign immunity, was the subject of Royal Embassy of Saudi Arabia v. S/S Ioannis Martinos,[82] a case that arose from the loss of over 300 containers of cargo owned by the government of Saudi Arabia from a vessel chartered to the Transamerican Steamship Line Corp. Prior to its arrest in the United States, the vessel had been detained by the Saudi government to inquire into the cause of the loss. When the vessel was later arrested on the claim for loss of the containers, Transamerican counterclaimed against the government for detention damages. The counterclaim was dismissed on two grounds: because the Saudi

82 1986 AMC 769 (E.D.N.C. 1984) (opinion of magistrate judge accepted by district judge).
government was immune, since it was not engaged in commercial activity in seizing the vessel; and because its action fell within the “act of state” doctrine. Both holdings assume that the seizure in Saudi Arabia was not an arrest that would ordinarily be available to a commercial shipper, but an action by the Saudi government “for a coast guard investigation.”  

The failure of Transamerican to come forward with any evidence of commercial activity, beyond speculation that the seizure might have been for the purpose of obtaining compensation, proved fatal.

Even if accurate, however, the inquiry into purpose was foreclosed by the definition of “commercial activity” in the FSIA, which makes an examination of such an ulterior motive irrelevant.  

By the same token, however, if Transamerican had established that any private business in Saudi Arabia could have procured the arrest of a vessel in the same circumstances, then the Saudi government should have lost its immunity and been held liable to the same extent as a private person. This liability, however, would not have been for the arrest, but for wrongfully procuring it, which is the only action that a private person could have engaged in. Liability on the merits would have been limited accordingly.

Deciding whether a foreign sovereign has engaged in “commercial activity” requires separating two strands of government activity: those that can be done only by government and those that can be done also by private businesses. In the case of seizure of vessels, this separation can be achieved only by comparing the action of the government to the action of a private business. As Weltover frames the inquiry, could the disputed action be done by a private actor in the market place? If so, then the government is liable to the same extent as a private actor, even if the private actor would have required government assistance to accomplish its action. In this hypothetical situation, the private actor would be subject to suit for wrongful arrest; the government would not be liable at all because it was exercising its monopoly on the use of force that is one attribute of sovereignty. Under the exception for commercial activity in the FSIA, the foreign government’s liability is limited to the same situations and the same extent as the liability of a private actor.

V

CONCLUSION

This brief survey of sovereign immunity in admiralty has examined problems in three distinct areas involving suits against three different

83 Id. at 769–70.

84 Id. at 770.
sovereigns: the states, the Federal Government, and foreign governments. The constitutional provisions, statutes, and decisions which bear upon these problems all are different. Yet there is a common thread that pulls them together: simplifying the law of sovereign immunity does more to protect the interests of the government than routinely resolving close cases of immunity in favor of the government. It is only the close cases, after all, that result in litigation. Minimizing the number of these cases, and minimizing the uncertainty surrounding them, safeguards the power of government to act in the public interest. In admiralty, this means restricting the extraordinary remedies of arrest and maritime attachment to prevent interference with the ordinary activities of government. Beyond that primary purpose, little is to be gained by expanding—or even worse, confusing—the law of sovereign immunity.