Admiralty & Maritime Law—Ninth Circuit Relocates "High Seas" Under Death on the High Seas Act—*Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986 (9th Cir. 2011)

Article III of the United States Constitution extends federal judicial power to all cases arising under admiralty and maritime jurisdiction.[1] The Death on the High Seas Act (DOHSA) in turn provides the exclusive, albeit monetarily limited, maritime remedy for wrongful deaths that take place on the "high seas beyond 3 nautical miles from the shore of the United States."[2] In *Helman v. Alcoa Global Fasteners, Inc.*,[3] the Court of Appeals for the Ninth Circuit considered, as a matter of first impression, whether DOHSA applied to, and thus preempted other available claims arising from, a fatal helicopter accident that occurred approximately nine and a half nautical miles off the California coastline.[4] Finding little interpretive significance in the term "high seas," the Ninth Circuit held that DOHSA becomes unconditionally operative seaward of three nautical miles from U.S. shores.[5]

The USS *Bonhomme Richard* is a United States Navy amphibious assault ship designed to carry several types of combat aircraft to engagements around the world at a moment's notice.[6] On January 26, 2007, the *Bonhomme Richard*

1. *See* U.S. CONST. art. III, § 2, cl. 1 (extending federal courts' jurisdiction to all admiralty and maritime cases). Congress subsequently codified the majority of Article III's admiralty jurisdictional provision. *See* 28 U.S.C. § 1333 (2006) (granting exclusive jurisdiction to district courts over all civil actions in admiralty).

2. 46 U.S.C. § 30302 (2006). Section 30302 of DOHSA reads, in relevant part: "When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty . . . ." *Id.*; *see also* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 207 n.4 (1996) (explaining application and purposes of DOHSA); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 217 (1986) (stating intent and purpose of DOHSA); *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 202 (2d Cir. 2000) (discussing limited nature of recoverable damages under DOHSA and ambiguity of "high seas").

3. 637 F.3d 986 (9th Cir. 2011).

4. *See id.* at 988-90 (detailing relevant facts and issue on appeal).

5. *See id*. at 990 (deciding case by looking to DOHSA's "plain text" while not defining "high seas"). The *Helman* court rejected assigning a "firm meaning to the term 'high seas'" due in large part to its exclusive reliance on the modifying phrase "beyond 3 nautical miles from the shore of the United States" immediately succeeding the "high seas" in the statutory text. *Id.* at 990-91. The court thus concluded that DOHSA's use of the term "high seas" was inherently self-defining, although nothing in the statute actually sets forth a definition. *Id. See generally* Kenneth G. Engerrand, *DOHSA's Reach: What Are the High Seas Beyond a Marine League From Shore?*, 1 LOY. MAR. L.J. 1 (2002) (discussing legislative history of DOHSA and noting drafters left "high seas" undefined).

6. *See* Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *1 (C.D. Cal. June 16, 2009) (identifying USS *Bonhomme Richard* as vessel involved with case), *aff'd*, 637 F.3d 986 (9th Cir. 2011); *United States Navy Fact File: Amphibious Assault Ships*, NAVY, http://www.navy.mil/navydata/fact_display.asp?cid=4200&tid=400&ct=4%20target=_blank (last updated Nov.

was participating in a naval training exercise in U.S. waters, nearly ten nautical miles off the southern tip of Catalina Island, California.[7] Three members of the ship's Helicopter Combat Support Squadron—Cory Helman, Christopher Will, and Adam Dyer—were providing aerial support from a Sikorsky MH-60S Knighthawk, the Navy's state-of-the-art mine countermeasures and search-and-rescue helicopter.[8] At some point during the exercise, the Knighthawk abruptly spun out of control, crashing headlong into the Pacific Ocean and tragically killing crewmembers Helman, Will, and Dyer.[9]

Survivors of the deceased crewmen (collectively, Helman) subsequently filed suit in federal court, claiming that under state and general maritime law the Knighthawk's negligently defective manufacture caused the fatal training accident.[10] Defendants (collectively, Alcoa) moved to dismiss, countering that DOHSA—which would bar recovery of all nonmonetary damages such as pain and suffering and survivor's grief—preempted all of Helman's state and general maritime claims.[11] Helman responded that DOHSA was inapplicable

1, 2012) (detailing classes and characteristics of amphibious assault ships, including USS *Bonhomme Richard*); NAVSEA Shipbuilding Support Office, *USS* Bonhomme Richard, NAVAL VESSEL REG., http://www.nvr.navy.mil/nvrships/details/LHD6.htm (last updated Mar. 6, 2012) (providing class, design, home base, armament, operational capabilities, and other details of USS *Bonhomme Richard*).

7. *See* 637 F.3d at 988 (reciting relevant facts on appeal); Helman v. Alcoa Global Fasteners, Inc., 843 F. Supp. 2d 1038 (C.D. Cal. 2011); Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *1 (C.D. Cal. June 16, 2009) (detailing facts of case in lower court), *aff'd*, 637 F.3d 986 (9th Cir. 2011).

8. *See* Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *1 (C.D. Cal. June 16, 2009) (noting function and whereabouts of Cory Helman, Christopher Will, and Adam Dyer during training exercise), *aff'd*, 637 F.3d 986 (9th Cir. 2011). *See generally MH-60S Knighthawk* (*Seahawk*) *Multimission Naval Helicopter, United States of America*, NAVAL-TECHNOLOGY.COM, http://www.naval-technology.com/projects/mh_60s/ (last visited Feb. 23, 2013) (describing military capabilities and usage of Sikorsky MH-60S Knighthawk).

9. *See* 637 F.3d at 988 (noting circumstances of helicopter crash giving rise to case). The Ninth Circuit referred to Helman, Will, and Dyer as "United States Navy crewmen." *Id.* The district court, on the other hand, referred to the men as "United States Navy officers." Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *1 (C.D. Cal. June 16, 2009), *aff'd*, 637 F.3d 986 (9th Cir. 2011). The slight difference in title reference ultimately proved insignificant, but because Navy officers—not crewmen—actually pilot the Navy's aircraft, it could have been a point of contention had the district court ruled on the merits. *Cf. Aviation Rescue Swimmer (AIRR)*, NAVY, http://www.navy.com/careers/special-operations/air-rescue.html (last visited Feb. 23, 2013) (stating no college degree required for career as helicopter search-and-rescue crewman); *Naval Aviators*, NAVY, http://www.navy.com/careers/aviation/naval-aviators.html (last visited Feb. 23, 2013) (requiring bachelor's degree and Officer Candidate School to become naval aviator).

10. *See* 637 F.3d at 988 (outlining Helman's complaint and procedural history of case). Helman asserted claims for strict products liability, negligence, failure to warn, breach of warranty, and wrongful death and survival under California state and federal maritime law. *Id.*

11. *See id.* (stating basis of defendants' motions to dismiss); Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *1 (C.D. Cal. June 16, 2009) (detailing substance of defendants' motions to dismiss), *aff'd*, 637 F.3d 986 (9th Cir. 2011). The named defendants included Parker-Hannifin Corporation, Alcoa Global Fasteners, Inc., Pacific Scientific, Hi-Shear Corporation, General Electric, and Sikorsky Aircraft. *See* Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *1 (C.D. Cal. June 16, 2009), *aff'd*, 637 F.3d 986 (9th Cir. 2011). After defendants removed the

because the crash occurred not on the "high seas," but a mere nine and a half miles from shore—well within U.S. territorial waters.[12] In siding with Alcoa, the district court found that, because the "high seas" referred only to the qualifying phrase "beyond 3 nautical miles" in the adjacent statutory text, DOHSA governed and thus preempted all non-DOHSA claims arising from the Knighthawk accident.[13]

In dismissing Helman's suit, however, the court certified for interlocutory appeal to the Ninth Circuit the question of whether DOHSA applies within U.S. territorial waters, staying its initial order pending further appellate review.[14] While the district court found "substantial ground for difference of opinion" concerning DOHSA's applicability between three and twelve nautical miles

case to the United States District Court for the Central District of California, it granted a consolidated motion to dismiss. *See id.* at *6. Parker-Hannifin Corporation, Alcoa Global Fasteners, Inc., Pacific Scientific, Hi-Shear Corporation, and General Electric had moved to dismiss for failure to state a claim, while Sikorsky Aircraft filed a separate motion for judgment on the pleadings. *See* 637 F.3d at 988; Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *1 (C.D. Cal. June 16, 2009) (outlining procedural history), *aff'd*, 637 F.3d 986 (9th Cir. 2011); *see also* FED. R. CIV. P. 12(b)(6) (allowing dismissal for failure to state claim); FED. R. CIV. P. 12(c) (allowing judgment based solely on pleadings).

12. *See* 637 F.3d at 989 (stating parties' dispute of DOHSA's applicability between three and twelve nautical miles from shore); Plaintiffs' Opposition to Defendants Sikorsky Aircraft Corp. & Sikorsky Support Services, Inc.'s Motion for Judgment on the Pleadings Pursuant to F.R.C.P. 12(c); Memorandum of Points and Authorities at 3, Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541 (C.D. Cal. June 16, 2009) (No. 209CV01353), 2009 WL 1471728, at *3 (arguing for denial of motion because accident occurred in territorial waters, 9.5 miles off coast).

13. *See* 637 F.3d at 988-89 (outlining district court's ruling on defendants' consolidated motions to dismiss); Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *6 (C.D. Cal. June 16, 2009) (finding DOHSA preempts Helman's state and general maritime claims), *aff'd*, 637 F.3d 986 (9th Cir. 2011). The district court found "persuasive the [portion of the] dissenting opinion of Judge Sotomayor" stating that, by including the phrase "beyond a marine league," Congress intended to avoid confusion and make clear that DOHSA only applied outside state territorial boundaries. Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *3-4 (C.D. Cal. June 16, 2009), *aff'd*, 637 F.3d 986 (9th Cir. 2011).

14. *See* 28 U.S.C. § 1292(b) (2006) (allowing certification for immediate appellate review upon satisfaction of certain conditions). The interlocutory appeal statute allows a court to certify an order if: (1) the order "involves a controlling question of law"; (2) "as to which there is substantial ground for difference of opinion"; and (3) an immediate appeal "may materially advance the ultimate termination of the litigation." *Id.*, *see also* 637 F.3d at 989 (describing briefly district court's certification for interlocutory appeal); Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *7 (C.D. Cal. June 16, 2009) (staying case and certifying dismissal order for immediate appellate review), *aff'd*, 637 F.3d 986 (9th Cir. 2011). The district court found that Helman's request for interlocutory appeal presented a controlling legal question because "[t]he outcome . . . affects, among other things, whether the case will be tried as a suit in admiralty, who are the proper plaintiffs, and what damages can be recovered." Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *5 (C.D. Cal. June 16, 2009), *aff'd*, 637 F.3d 986 (9th Cir. 2011). Because "persuasive arguments exist[ed] on both sides" and "because the issue . . . [was] one of first impression in the Ninth Circuit," the district court found adequate grounds to certify the case for interlocutory appeal. *Id.* at *6. Finally, the district court found that an immediate appeal would "materially advance the ultimate determination" of the case, because "whether DOHSA applies is crucial for determining the extent of damages," which, "in turn, will largely determine whether it is worthwhile for the parties to pursue a case that would require them to expend substantial sums of money in order to essentially reconstruct a destroyed military helicopter." *Id.*

from shore, the Ninth Circuit affirmed, concluding that "high seas" possessed no "independent geographical significance."[15] Indeed, the three-judge panel reasoned that Congress's inclusion of the descriptive phrase "beyond 3 nautical miles" would be superfluous if the "high seas" referred to any other location.[16] The Ninth Circuit ultimately held that DOHSA applies in all wrongful-death claims involving tortious conduct occurring beyond three nautical miles from the coast, irrespective of the geographic boundary of the "high seas."[17]

In 1886 the United States Supreme Court decided *The Harrisburg*, a highly criticized opinion, which held that admiralty courts did not recognize common-law causes of action for wrongful death.[18] Specifically rejecting the Court's ruling, Congress thereafter set out to codify a statutory remedy for wrongful deaths occurring on the "high seas"—that is, the area beyond state and federal territorial waters.[19] Despite intense congressional backlash to *The Harrisburg*, early drafts of what would eventually become DOHSA struggled to gain meaningful traction, as Congress thrice offered a bill for vote between years 1900 and 1915 and failed each time to enact it.[20] Meanwhile, after the

15. *See* 637 F.3d at 991 (explaining interpretive insignificance of DOHSA's use of "high seas"); Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *6 (C.D. Cal. June 16, 2009) (finding "substantial ground for difference of opinion" because "persuasive arguments exist on both sides"), *aff'd*, 637 F.3d 986 (9th Cir. 2011).

16. *See* 637 F.3d at 992 (claiming independent meaning of "high seas" would "subsume" statutory phrase "beyond 3 nautical miles").

17. *See id.* at 993 (applying DOHSA to Helman's claims because statute applies unconditionally "beyond three nautical miles" from coast).

18. *See* The Harrisburg, 119 U.S. 199, 213 (1886) (holding no general maritime cause of action exists in cases of death at sea), *overruled by* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). The Court's prohibition of wrongful-death claims in admiralty led to strong reaction to and much criticism of its decision. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 378 (1970) (criticizing *The Harrisburg* as "somewhat dubious . . . when rendered" and "an unjustifiable anomaly"); Stephen R. Ginger & Will S. Skinner, *DOHSA's Commercial Aviation Exception: How Mass Airline Disasters Influenced Congress on Compensation for Deaths on the High Seas*, 75 J. AIR L. & COM. 137, 142 (2010) (describing judicial and legislative hostility towards *The Harrisburg*'s prohibition on maritime wrongful-death claims). The analysis in *Moragne* consisted almost entirely of a repudiation of *The Harrisburg*, with the Court criticizing both the logic and veracity of the precedent upon which the *Harrisburg* Court relied. *See generally* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

19. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 214 (1986) (acknowledging contentious environment in which Congress enacted DOHSA); Engerrand, *supra* note 5, at 2-3 (discussing early bill proposals and reasons Congress chose to enact DOHSA); *see also In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 207 (2d Cir. 2000) (highlighting termination of both state and federal territorial waters at three miles offshore). The original draft of DOHSA used the antiquated phrase "beyond a marine league," which Congress clarified in 2006 by substituting "beyond 3 nautical miles" in its stead. *See* 637 F.3d at 991. One "marine league" is actually equal to three nautical miles. *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 205 (2d Cir. 2000) (noting then-Secretary of State Thomas Jefferson placed original territorial sea border three nautical miles offshore).

20. *See* Robert M. Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 117 (1921) (summarizing iterations and lengthy voting history of maritime wrongful-death act); *supra* note 18 and accompanying text (summarizing Congress's reaction to *The Harrisburg*). Congress had the opportunity to vote on the wrongful-death bill three times and failed to pass the legislation each time. Hughes, *supra*, at 117-18 (outlining history of voting on wrongful-death bill).

catastrophic sinking of RMS *Titanic* in April 1912, the public had become increasingly concerned with Congress's inability to pass any maritime wrongful-death bill.[21] By the time Congress enacted DOHSA's predecessor on March 30, 1920, its focus had fundamentally shifted from an act based on uniformity and state-law preemption to a supplemental remedy intended to apply only in those waters beyond state jurisdictional limits.[22]

From 1793 until the late twentieth century, the outer boundaries of state and federal waters generally coincided at "the utmost range of a cannon ball, usually stated at one sea league."[23] Waters beyond a sea league—approximately three miles from shore—were considered the "high seas" governed exclusively by international imperative.[24] While Congress chose not to define the term "high seas" in DOHSA, the Supreme Court's turn-of-the-century maritime jurisprudence regularly described the "high seas" by reference to its extraterritorial connotations.[25] In the decades following DOHSA's passage, the courts continued to maintain that, under established principles of international law, the "high seas" were defined as "international

21. *See* Ginger & Skinner, *supra* note 18, at 142 (suggesting *Titanic* disaster greatly motivated Congress to pass DOHSA); Hughes, *supra* note 20, at 117 (stating effect of *Titanic*'s sinking on DOHSA's passage). Fifteen hundred and three passengers and crewmembers perished when *Titanic* sank on April 15, 1912 into the frigid waters of the North Atlantic Ocean. *See* Paul Louden-Brown, *Titanic: Sinking the Myths*, BBC, http://www.bbc.co.uk/history/british/britain_wwone/titanic_01.shtml (last updated Mar. 3, 2011) (providing timeline and history of *Titanic* sinking).

22. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 225-26 (1986) (detailing legislative history and shift in focus of DOHSA from beginning to end of drafting); *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 204 (2d Cir. 2000) (concluding DOHSA's focus shifted from uniform remedy to state law supplementation); Hughes, *supra* note 20, at 118 (stating opposition grew to uniform wrongful-death remedy with new draft intended as gap-filler).

23. *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 205 (2d Cir. 2000) (quoting Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. O.L.C. 238, 244 (1988)). The court in *TWA Flight 800* discussed then-Secretary of State Thomas Jefferson's original designation of U.S. territorial seas in 1793. *See id.*; *see also* Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 TERRITORIAL SEA J. 1, 8 (1990) (providing substantive discussion of Jefferson's 1793 designation of U.S. territorial seas).

24. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 398 (1970). "The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem." *Id.*; Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355 (1909) (defining "high seas" as area "subject to no sovereign"); Deslions v. La Compagnie Generale Transatlantique, 210 U.S. 95, 115 (1908) (describing "high seas" as waters where no nation controls); Old Dominion S.S. Co. v. Gilmore, 207 U.S. 398, 403 (1907) (defining "high seas" as "outside the territory, in a place belonging to no other sovereign"); The 'Scotland,' 105 U.S. 24, 29 (1881) (defining "high seas" as area "where the law of no particular State has exclusive force, but all are equal"). *But see* United States v. Dewey (*The Manila Prize Cases*), 188 U.S. 254, 271 (1903) (including "high seas" in coastal waters "without the boundaries of low-water mark"); Ross v. McIntyre, 140 U.S. 453, 471 (1891) (describing "high seas" as beyond national jurisdictional limits and "boundaries of low-water mark").

25. *See* 637 F.3d at 990 (stating "high seas" not defined in DOHSA); *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 205-06 (2d Cir. 2000) (describing general understanding of "high seas" around time of DOHSA's enactment); *supra* note 24 and accompanying text (summarizing several decisions defining "high seas" mostly by reference to extraterritoriality).

waters not subject to the dominion of any single nation."[26] Thus, in nearly all pre- and post-DOHSA cases, culminating in *Moragne v. States Marine Lines, Inc.*, which expressly overruled *The Harrisburg*, the Court proceeded on the premise that the end of U.S. territorial waters marked the beginning of the "high seas."[27]

While the outskirts of state and federal waters remained jurisdictionally coterminous for nearly two centuries, their legal and geographic relationship to the "high seas" underwent a sea change in the late 1980s.[28] On December 27, 1988, President Reagan issued a presidential proclamation, unilaterally extending the outer periphery of federal waters from three to twelve nautical miles offshore.[29] Relying heavily on the text of the United Nations Convention on the High Seas, the Reagan Administration's Office of Legal Counsel (OLC) recognized the "high seas" as "the remainder of the ocean beyond the territorial sea" and under no nation's exclusive control.[30] While the OLC opined that the proclamation could potentially affect certain domestic legislation, the OLC never considered its potential impact on DOHSA.[31] Ten years later, however,

26. United States v. Louisiana, 394 U.S. 11, 23 (1969); *see, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 749 (2004) (Scalia, J., dissenting) ("[T]he law of nations was understood to refer to the accepted practices of nations in their dealings with one another . . . and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates)."); United States v. Bowman, 260 U.S. 94, 96 (1922) ("[Defendant] laid the offense [in the present case] on the high seas, out of the jurisdiction of any particular state, and out of the jurisdiction of any district of the United States, but within the admiralty and maritime jurisdiction of the United States."); Doe v. Exxon Mobil Corp., 654 F.3d 11, 79 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) ("Tortious conduct that occurs in a foreign nation's territory is regulated by the foreign sovereign. Tortious conduct on the high seas, by contrast, is regulated by no nation in particular."); *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 211 (2d Cir. 2000) ("This court has generally interpreted 'high seas' to mean international waters.").

27. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970) (overruling *The Harrisburg* and allowing recovery in admiralty for wrongful death); *see supra* notes 25-26 and accompanying text (discussing extraterritoriality based definitions of "high seas" given in pre- and post-DOHSA case law).

28. *See In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 205 (2d Cir. 2000) (recalling borders of state and federal territorial waters coincided with one another). "Proclamation [No. 5928] thus alters the three-mile boundary that had historically defined the territorial sea." *Id*. at 213; Kmiec, *supra* note 23, at 6-26 (discussing detailed history and effects of extending jurisdiction over territorial seas).

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

30. Kmiec, *supra* note 23, at 4 & n.9. President Reagan's OLC drew its language largely from the United Nations Convention on the High Seas, which defines the "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." U.N. Convention on the High Seas art. I, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962) [hereinafter Convention on the High Seas]. Under basic principles of statutory construction, the Convention on the High Seas' definition of "high seas" displaces all contradictory meanings set forth in any prior congressional acts, including DOHSA, which was enacted forty-two years before the Convention on the High Seas entered into force. *See id.* at art. 1; The Cherokee Tobacco, 78 U.S. 616, 621 (11 Wall. 1870) (declaring that "treaty may supersede a prior act of Congress"); *In re* Air Crash Disaster near Honolulu, Haw., on February 24, 1989, 783 F. Supp. 1261, 1263 (N.D. Cal. 1992) ("[T]o the extent that the [Warsaw Convention and DOHSA] directly conflict, the Warsaw Convention, ratified by the United States Senate in 1934, supersedes the conflicting provisions of DOHSA, which was enacted in 1920.").

31. *See* Kmiec, *supra* note 23, at 22-36 (offering comprehensive analysis of extension's effects on

in what would become the "seminal" post-1988 DOHSA analysis, the Second Circuit explained that, despite its three-mile reference, DOHSA's "high seas" were fundamentally international in nature, concluding the presidential proclamation "alter[ed] the three-mile boundary that had historically defined the territorial sea."[32] Accordingly, the Second Circuit held DOHSA inapplicable to anywhere other than the "high seas," reasoning that the term's legal import could not be changed by virtue of its textual proximity to DOHSA's ambiguous three-mile descriptor.[33]

In *Helman v. Alcoa Global Fasteners, Inc.*, the Ninth Circuit split with the Second Circuit, dismissing the notion that the "high seas" have anything to do with international law or geopolitical boundaries.[34] The *Helman* court acknowledged the Second Circuit's contrary holding but maintained that, because Congress had amended DOHSA to include commercial airline accidents occurring inside twelve miles from shore, its ruling would not create an actual circuit split.[35] The court also rejected the idea that an executive extension of U.S. territorial waters could lawfully alter DOHSA, surmising that such an effect would encroach upon legislative prerogatives in violation of the

domestic legislation). The OLC focused the majority of its attention on the Coastal Zone Management Act (CZMA) partly because the OLC believed Congress intended the territorial sea in the CZMA to include only the three-mile belt instead of any potential extension. *Id.* at 24; *see also* Coastal Zone Management Act, 16 U.S.C. §§ 1451-66 (2006). Interestingly, the OLC discussed only specific legislation that targeted the territorial seas, rather than the "high seas." *See* Kmiec, *supra* note 23, at 22-23 (focusing on statutes concerning Congress's treatment of territorial seas). DOHSA's remedial scheme covers only the "high seas" and not the territorial seas, which is perhaps the reason the OLC omitted DOHSA from its advisory opinion. *See* 46 U.S.C. § 30302 (2006) (providing federal maritime remedy for wrongful death on "high seas"); Kmiec, *supra* note 23, at 22-36 (omitting DOHSA from evaluation of Proclamation No. 5928's impact on domestic legislation).

32. *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 213 (2d Cir. 2000); Helman v. Alcoa Global Fasteners, Inc., No. CV 09-1353 SVW (FFMx), 2009 WL 2058541, at *2 (C.D. Cal. Jun. 16, 2009) (describing *TWA Flight 800* as "seminal case interpreting . . . DOHSA"), *aff'd*, 637 F.3d 986 (9th Cir. 2011). While the Second Circuit did not mention specific Supreme Court precedent involving international law, the court based *TWA Flight 800* in large part on how principles of statutory construction would accord DOHSA with the Convention on the High Seas and on the President's power to extend territorial waters for purposes of international relations. *See* The Cherokee Tobacco, 78 U.S. 616, 621 (11 Wall. 1870); Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (2 Cranch 1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."); *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 211-213 (2d Cir. 2000) (explaining "high seas" means international waters and Proclamation No. 5928 excludes territorial waters from DOHSA).

33. *See In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 207 (2d Cir. 2000) ("We should interpret both 'high seas' and 'beyond a marine league' to have independent meaning."). The Second Circuit also explained why defining "high seas" independently of its adjacent three-mile qualifier would accord with the canon of statutory construction that statutes should be interpreted so as not to render some words wholly redundant. *See id.* "Defendants' definition violates this canon of statutory construction because it renders 'high seas' superfluous . . . . The dissent would also violate this canon of statutory construction by equating 'high seas' with 'beyond a marine league.'" *Id.*; *supra* note 32 and accompanying text (discussing unstated doctrines of international law applicable in *TWA Flight 800* opinion).

34. *See* 637 F.3d at 992 (acknowledging conclusion that DOHSA applies within U.S. territorial waters opposite of *TWA Flight 800*).

35. *See id.* (pointing out 2000 and 2006 DOHSA amendments unavailable to Second Circuit).

separation-of–powers doctrine.[36] The Ninth Circuit ultimately held that DOHSA's "high seas" referred only to those waters "beyond 3 nautical miles" from U.S. shores, the only explicitly stated geographical reference contained in the statute; any other reading of DOHSA, according to the court, would be illogical and inconsistent with congressional intent.[37]

By overemphasizing the phrase "beyond 3 nautical miles," while ignoring the significance and firmly established meaning of "high seas," the *Helman* court incorrectly applied DOHSA within U.S. territorial waters.[38] Despite the court's concern that the three-mile phrase would be "render[ed] meaningless" if "high seas" were independently defined, it completely discounted the consequence that the "high seas"—the very namesake of the statute—would be reduced to mere ornamentation if "beyond 3 nautical miles" controlled the entirety of DOHSA.[39] The Ninth Circuit also erroneously concluded that, because Congress understood as *functionally* equivalent the terms "beyond 3 nautical miles" and "high seas," Congress likewise considered them *conceptually* equivalent.[40] At the time of DOHSA's enactment, the triggering

36. *See id.* at 992-93 (suggesting President lacks constitutional power to alter scope of DOHSA). According to the OLC, however, the Reagan Administration was clearly of the mindset that a Presidential proclamation could and, if the circumstances warranted, would alter the scope of one or more congressional acts. *See* Kmiec, *supra* note 23, at 22-23 (explaining Proclamation No. 5928's effects on legislation depends on congressional intent, absent direct statutory language). The OLC further explained that Proclamation No. 5928 would likely affect the scope of domestic legislation focused on the territorial seas where the statute "invoke[s] the *concept* of the territorial sea . . . ." *See id.* at 23 (emphasis added); *cf. infra* note 40 and accompanying text (explaining why DOHSA incorporates *concept* of "high seas" rather than geographic three-mile limitation).

37. *See* 637 F.3d at 991-92 (deciding DOHSA's applicability through plain reading, because independent definition of "high seas" illogical).

38. *See* Convention on the High Seas, *supra* note 30, at pmbl. ("[T]he United Nations Conference on the Law of the Sea . . . adopted the following provisions as generally *declaratory of established principles of international law* . . . .") (emphasis added); 637 F.3d at 991-92 (discounting significance of "high seas" and relying instead on "beyond 3 nautical miles").

39. *See* 46 U.S.C. § 30302 (2006) (providing federal maritime remedy for wrongful death on "high seas"). It is indisputable that DOHSA applies only on the "high seas"; DOHSA reads, in relevant part: "When the death of an individual is caused by wrongful act, neglect, or default occurring *on the high seas* beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty . . . ." *Id*. (emphasis added). *Compare In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 208 (2d Cir. 2000) (concluding, through legislative history, meaning of "high seas" independent of "beyond a marine league"), *with* 637 F.3d at 993 (holding DOHSA applies to all waters beyond three miles, regardless of U.S. territorial seas).

40. *See In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 207 (2d Cir. 2000) (endorsing DOHSA interpretation that "defines 'beyond a marine league' as a geographical boundary and 'high seas' as a political boundary subject to change"). *But see* 637 F.3d at 991-92 (stating DOHSA Congress understood "high seas" and "beyond 3 nautical miles" as equivalent). The "high seas," however, are only defined as those areas of the sea outside a nation's territorial waters; whether such waters begin at three or twelve miles is irrelevant to the actual concept of the "high seas." *See* Convention on the High Seas, *supra* note 30, at art. 1 (defining "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State"); Keith S. Gibel, *Defined by the Law of the Sea: "High Seas" in the Marine Mammal Protection Act and the Endangered Species Act*, 54 NAVAL L. REV. 1, 30 (2007) (referring to "high seas" as "term of art in international law" remaining unchanged since 1958).

functions of both phrases were identical whether the tortious conduct occurred on the "high seas" or beyond three nautical miles from shore, but their conceptual underpinnings were, and continue to be, mutually exclusive.[41] Indeed, the location of the "high seas" conceptually depends not on arbitrary borders but instead on the internationally recognized boundaries demarcating a nation's territorial waters.[42] Thus, the Ninth Circuit lent undue emphasis to DOHSA's three-mile reference at the expense of properly focusing on the "high seas" as the controlling statutory concept.[43]

While the *Helman* court conceded that the "high seas" "describe the scope" of DOHSA, the court also dismissed the term of art as an "independent and fluid political concept" with an inherently conflicting meaning that was not intended to be incorporated into the statute.[44] But even if Congress had not intended to incorporate such ideas into DOHSA, the Supreme Court's admonition that a subsequent treaty may supersede prior domestic legislation undermines *Helman's* statutory construct, as the definition of "high seas" in DOHSA now directly controverts that set forth in the 1958 Convention on the High Seas.[45] Additionally, the *Helman* court turned a blind eye to the doctrine that courts should avoid construing domestic statutes as to "violate the law of nations if any other possible construction remains."[46] As *TWA Flight 800*

41. *See supra* note 40 and accompanying text (detailing conceptual independence of "high seas").

42. *See* Convention on the High Seas, *supra* note 30, at art. II (outlining legal significance of "high seas" and delimiting rights of vessels on high seas). Article II of the Convention on the High Seas reads, in relevant part:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas . . . comprises . . . : (1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over the high seas . . . .

Id.; *see also* Gibel, *supra* note 40, at 30.

43. *See* 637 F.3d at 991-92 (deciding DOHSA's applicability through plain reading and disagreeing with independent meaning of "high seas"); *cf.* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 397-98 (1970) (concluding "high seas" rest beyond U.S. territorial seas because DOHSA created to address that area); *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 213 (2d Cir. 2000) (concluding DOHSA applies to waters outside U.S. territorial seas).

44. 637 F.3d at 990; *see* Gibel, *supra* note 40, at 30.

45. *See* 46 U.S.C. § 30302 (2006) (providing maritime remedy for wrongful death on "high seas"); Convention on the High Seas, *supra* note 30, at art. I; 637 F.3d at 991-92 (concluding DOHSA's "high seas" possess no independent meaning). If the meaning of "high seas" in DOHSA conflicts with that set forth in the subsequently ratified Convention on the High Seas, the Convention on the High Seas must supersede DOHSA as to the location and meaning of the "high seas." *Cf.* The Cherokee Tobacco, 78 U.S. 616, 621 (11 Wall. 1870); *supra* note 30 and accompanying text (discussing effect of subsequently ratified treaty on prior conflicting domestic legislation).

46. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (2 Cranch 1804). The "law of nations" the *Helman* court disregarded was both the Convention on the High Seas, which unambiguously defines the "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State," and the common law governing international relations, which recognizes that the term "high seas" connotes extraterritorial waters. *See* Convention on the High Seas, *supra* note 30, at art. I; Sosa v. Alvarez-Machain, 542

demonstrates, by construing DOHSA to apply only on the internationally accepted location of the "high seas"—that is, extraterritorial waters under the control of no singular nation—the Ninth Circuit could readily have accorded DOHSA with the law of nations.[47] While the *Helman* court was concerned that assigning international connotations to the "high seas" in DOHSA would create incongruent statutory text, because "[an]other possible construction" of the statute clearly existed, such minor inconsistencies do not justify departing from established international standards.[48]

The *Helman* decision, in addition to misinterpreting DOHSA and running afoul of international norms, also created unnecessary conflicts among the circuits in the application of maritime wrongful-death remedies.[49] To maintain consistency with Congress's true intent in enacting DOHSA, as *TWA Flight 800* correctly pointed out, waters within the post-1988 territorial zone should be covered by *Moragne* and other maritime remedies traditionally applicable within U.S. territory.[50] Instead, by applying *Moragne* to territorial waters up to three miles from shore and an entirely different maritime remedy (DOHSA) to territorial waters between three and twelve miles, the Ninth Circuit created an "inconsistent [and] arbitrary" remedial scheme.[51] Additionally, despite claims of not splitting with the Second Circuit, the *Helman* court addressed the exact issue of DOHSA's applicability between three and twelve miles from shore, yet came to the polar opposite conclusion.[52] More significant, however, are *Helman*'s transoceanic implications, as DOHSA's applicability now depends in

U.S. 692, 749 (2004) (Scalia, J., dissenting).

47. *See In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 208-09 (2d Cir. 2000) (discussing remedies available in state waters, federal waters, and on "high seas").

48. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (2 Cranch 1804); *see supra* note 32 and accompanying text (discussing relevant international law and Supreme Court's view of interplay between domestic and international law).

49. *See supra* note 43 and accompanying text (comparing and contrasting *Helman*, *Moragne*, and *TWA Flight 800*'s definitions of "high seas"); Brief of Appellants at 2, Helman v. Alcoa Global Fasteners, Inc., 637 F.3d 986 (9th Cir. 2011) (No. 09-56501), 2010 WL 6415482 at *2 (arguing *Helman*'s potential split with *TWA Flight 800* will cause far-reaching geographical implications); Reply Brief of Appellants at 8, Helman v. Alcoa Global Fasteners, Inc., 637 F.3d 986 (9th Cir. 2011) (No. 09-56501), 2010 WL 5162552 at *8 (asserting contrary decision to *TWA Flight 800* will cause circuit split).

50. *Compare* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 402-03 (1970) (concluding general maritime remedies not precluded by DOHSA in territorial waters), *and In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 213 (2d Cir. 2000) (concluding DOHSA applies to waters outside U.S. territorial seas), *with* 637 F.3d at 991-92 (applying DOHSA to territorial waters because of Congress's understanding).

51. *See In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 215 (2d Cir. 2000) (expressing concern over imposing two different remedies in territorial waters). "[I]t would be more inconsistent, and more arbitrary, to impose one remedial scheme over certain federal territorial waters (up to three miles) and a different remedial scheme over other federal territorial waters (from three to 12 miles)." *Id.*

52. *See* 637 F.3d at 989 (addressing circuit split despite denying same). "Only one of our sister circuits has squarely addressed the issue of DOHSA's applicability to this area." *Id.* "The issue on which the [Second Circuit] mainly relied, and which primarily divides the parties in our case, is the definition of the term 'high seas' as it is used in DOHSA's text." *Id.* at 990.

part on whether the wrongful death occurs on the Pacific Ocean, which is wholly within Ninth Circuit jurisdiction, or on the Atlantic Ocean, a portion of which is within Second Circuit jurisdiction.[53] Thus, by disregarding the importance of the relationship between international and territorial waters, the *Helman* court created unnecessary confusion among coastal circuits and upset the overarching goal of uniformity in the realm of admiralty and maritime jurisprudence.[54]

In *Helman v. Alcoa Global Fasteners, Inc.*, the Ninth Circuit considered DOHSA's applicability to maritime accidents within U.S. territorial waters, between three and twelve nautical miles from shore. The court held that, for purposes of DOHSA, the term "high seas" possessed no independent geographic significance and was defined solely by the phrase "beyond 3 nautical miles" immediately succeeding it in the statutory text. In declining to follow established principles of domestic and international law, however, the Ninth Circuit misinterpreted DOHSA and improperly expanded its remedial scheme to U.S. territorial waters. The *Helman* court also failed to assess the practical consequences of its holding, ultimately creating needless uncertainty and an intercircuit conflict with the Second Circuit.

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53. *See* Brief of Appellants at 2, Helman v. Alcoa Global Fasteners, Inc., 637 F.3d 986 (9th Cir. 2011) (No. 09-56501), 2010 WL 6415482; *Court Locator*, U.S. CTS., http://www.uscourts.gov/court_locator.aspx (last visited Mar. 7, 2013) (providing visual representation of circuit courts' geographic jurisdictional boundaries).

54. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 221 (1986) (stating language, legislative history, purpose, and uniformity concerns in admiralty law control statutory interpretations); 637 F.3d at 993 (holding DOHSA applies to territorial waters between three and twelve miles from shore); *cf.* 46 U.S.C. § 30302 (2006) (providing federal maritime remedy for wrongful death on "high seas"); Convention on the High Seas, *supra* note 30, at art. I; Moragne v. States Marine Lines, Inc., 398 U.S. 375, 397-98 (1970) (concluding DOHSA's "high seas" mean waters beyond territorial seas "because that was the extent of the problem"); *In re* Air Crash off Long Island, N.Y., on July 17, 1996 (*TWA Flight 800*), 209 F.3d 200, 215 (2d Cir. 2000) (holding DOHSA inapplicable to U.S. territorial waters).