Oil Spill Liability, Where the Government is Never at Fault: Exploring the Eleventh Circuit's Holding in *Savage Services Corp. v. United States*

I. INTRODUCTION

Due to the U.S. Army Corps of Engineers' (Corps) alleged failure to notify the crew and confirm the vessel was within the miter walls, the *M/V Savage Voyager* released thousands of gallons of crude oil into the Jamie Whitten Lock when the Corps began de-watering the chamber.[1] Savage Services Corporation (Savage), as the owner of the vessel, was identified as the responsible party under the Oil Pollution Act of 1990 (OPA); as such, Savage paid the full costs of oil removal due to the strict liability standard built into the OPA.[2] The noted case examines Savage's efforts to recover its remediation expenses from the United States government

1. Savage Serv. Corp. v. United States, 25 F.4th 925, 928-29, 2022 AMC 40 (11th Cir. 2022).
2. *Id.* at 931.

on the grounds that the Corps' negligent operation of the lock was the sole cause of the discharge.[3]

Specifically, Savage asserted that it was entitled to recover the costs of oil removal, barge repair, loss-of-use, and lost-cargo damages.[4] In an effort to skirt the broad protections of sovereign immunity, Savage brought its claims under the Suits in Admiralty Act of 1920 (SAA), which contains a general waiver of sovereign immunity for most admiralty claims.[5] The government moved for partial dismissal of Savage's oil removal expense claims, contending that it had not waived its sovereign immunity for such damages.[6] Savage then moved for partial summary judgment seeking an affirmative ruling that the government had waived its sovereign immunity with respect to its oil removal claims.[7] The United States District Court for the Southern District of Alabama granted the government's motion to dismiss and found that the OPA was intended to effect an implied repeal of the general sovereign immunity granted under the SAA with respect to oil removal damages.[8] Savage timely appealed the ruling.[9] The Eleventh Circuit *held* that the OPA does not provide a cause of action nor a complete defense against the United States, and the exclusivity of the statute's liability scheme displaces any cause of action under common law or the SAA. *Savage Services Corp. v. United States of America*, 25 F.4th 925, 2022 AMC 40 (11th Cir. 2022).

II. HISTORICAL BACKGROUND

A. *The Suits in Admiralty Act of 1920*

The SAA applies broadly to any admiralty—or maritime—claim that may arise at sea.[10] The SAA provides that an *in personam* action may be brought against the United States in cases where private vessel, cargo, or property interests are involved and a civil action in admiralty can be maintained.[11] The SAA's express waiver of sovereign immunity does not create a cause of action against the government,[12] but instead applies a general waiver of immunity for most admiralty suits against the

3. *Id.* at 929.
4. *Id.* at 932.
5. *Id.* at 927.
6. *Id.* at 932 (emphasizing the fact the government did not move to dismiss Savage's other claims for damages).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 947.
11. *See* 46 U.S.C. § 30903(a).
12. Kasprik v. United States, 87 F.3d 462, 465, 1996 AMC 2508 (11th Cir. 1996).

government.[13] Such common law and maritime remedies pertain to a significant number of claims that may be brought against the government for its negligence,[14] including instances in which government personnel are negligent in performing their functions at sea.[15] The government's liability for claims pertaining to oil spills, however, has been supplanted by federal law.[16]

B. *The Federal Water Pollution Control Act*

The Federal Water Pollution Control Act (FWPCA), the predecessor to the OPA, was enacted to apportion liability following an oil spill.[17] Under the FWPCA, the rights and responsibilities of the government and those of the shipowners worked vis-à-vis one another.[18] Namely, the government was responsible for the removal or arrangement of the removal of oil and the discharging vessel owner is liable for such removal costs.[19] To finance these efforts, the FWPCA created a "revolving fund" in the treasury to cover the costs of removal that would later be recovered by responsible parties.[20]

Like the SAA, the FWPCA contained its own waiver of sovereign immunity. This provision was drafted as a complete defense to shipowners' strict liability,[21] and it was limited to instances in which the vessel owner could prove the oil discharge was caused "solely by . . . negligence on the part of the United States government."[22] In addition, vessel owners could bring contribution claims against any person that was liable or potentially liable to the oil discharge.[23] The FWPCA's liability scheme was tested following the *Exxon Valdez* oil spill in which a confusing, conflicting response ensued that put the cost of millions of gallons of oil removal—ultimately—on the taxpayers.[24]

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13. *Savage*, 25 F.4th at 938.
14. *Id*. at 947.
15. Uralde v. United States, 614 F.3d 1282, 1286, 2010 AMC 2113 (11th Cir. 2010).
16. *Savage*, 25 F.4th at 943-44.
17. *Id*. at 929.
18. *Id*. at 937 (quoting *In re* Glacier Bay, 71 F.3d 1447, 1455, 1996 AMC 379 (9th Cir. 1995)).
19. *Id*.
20. *Id*. at 930; *see* 33 U.S.C. § 1321(k).
21. *See* 33 U.S.C. § 1321(f)(1).
22. *Id*.
23. *Id*. § 1321(h).
24. *Savage*, 25 F.4th at 930; *see also* S. REP. NO. 101-94, at 3 (1989).

C. The Oil Pollution Act of 1990

The aftermath of the *Exxon Valdez* oil spill revealed that the liability structure of the FWPCA did not incentivize oil spill resolution but instead contained "inadequate cleanup and damage remedies" and an inadequate revolving fund that relied on "taxpayer subsidies to cover cleanup costs."[25] Congress then enacted the OPA with the purpose of creating a comprehensive liability scheme that "internalize[d]" the costs of oil removal "within the oil industry and transportation sector" to incentivize oil spill prevention and efficient cleanup without government monitoring.[26] The OPA, similar to the FWPCA, identifies the vessel owner as the responsible party[27] and holds them strictly liable for removal costs and damages.[28] The OPA, however, departs from its predecessor because the government is responsible only for identifying the responsible party,[29] not for overseeing the oil's removal.[30] The damages for which the responsible party is liable are clearly listed in the OPA.[31] Its liability scheme does not extend to other types of damages and is limited to removal costs and statutory damages.[32] The statute additionally contains a savings clause that requires damages not subject to the OPA to be governed by ordinary methods of general maritime law.[33]

The OPA sets forth financial incentives to motivate responsible parties to fully perform their obligations and ensure oil removal resources are readily available when needed.[34] The OPA provides a responsible party complete defenses to liability if they can establish the damages and removal costs were "caused solely by . . . (1) an act of God; (2) an act of war; [or] (3) an act or omission of a third party."[35] If one of these defenses is proven after the responsible party has covered associated removal costs and damages,[36] they are entitled to either a claim against the revolving fund for reimbursement or to a subrogation claim against a third party

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25. *Id.* (quoting S. REP. NO. 101-94, at 2 (1989)).
26. *Id.* at 930-31 (alteration in original) (quoting S. REP. NO. 101-94, at 2 (1989)).
27. *See* 33 U.S.C. § 2701(32)(A).
28. *Id.* § 2702(a).
29. *Savage*, 25 F.4th at 931; *see id.* U.S.C. § 2714(a).
30. *Id.*; *see* 33 U.S.C. § 1321(f)(1).
31. 33 U.S.C. § 2702(b)(2) (listing damages to natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services).
32. *See* 33 U.S.C. § 2702(b).
33. *See* 33 U.S.C. § 2751€ ("Except as otherwise provided in this Act, this Act does not affect . . . admiralty and maritime law").
34. *Savage*, 25 F.4th at 931.
35. *See* 33 U.S.C. § 2703(a).
36. 33 U.S.C. § 2708(a).

proven to be solely responsible for the discharge.[37] These defenses are not available if the responsible party fails to report the incident or provide reasonable cooperation in the removal of oil.[38] In providing these defenses, the OPA expressly repealed the provision of the FWPCA that affords an additional defense to liability if the responsible party can prove the accident was caused solely by "negligence on the part of the United States government."[39] The OPA in turn, decided to mirror the complete defenses seen in a sister-statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), that provides a liability scheme for non-oil-related hazardous spills.[40]

In addition to these complete defenses, the OPA also permits a responsible party to "bring a civil action for contribution against any other person who is liable or potentially liable under this Act or any other law."[41] This provision then goes on to define "person" to mean an "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."[42] The OPA identifies the appropriate jurisdiction under which suits shall be brought and establishes the applicable statute of limitations for such claims.[43]

III. COURT'S DECISION

In the noted case, the Eleventh Circuit examined the interplay of the OPA liability structure and the SAA's waiver of sovereign immunity, an issue of first impression for the federal courts.[44] The court relied on the plain meaning of the statute and found that the OPA by itself does not create a cause of action for contribution in favor of oil-spillers against the United States, nor does it provide a complete defense to liability based on governmental negligence.[45] Further, the court found the OPA to be an exclusive, detailed statute designed to preempt general common law remedies found in the SAA based on its text, other circuits' decisions, and

37. 33 U.S.C. § 2702(d)(B).
38. 33 U.S.C. §§ 2703(c), 2704(c)(2).
39. *Savage*, 25 F.4th at 930; 33 U.S.C. § 1321(f)(1)(i).
40. *Id*. at 935.
41. 33 U.S.C. § 2709.
42. 33 U.S.C. § 2701(27). The OPA additionally defines the "'United States' and 'State' [to] mean the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States." 33 U.S.C. § 2701(36) (alteration in original).
43. *See* 33 U.S.C. § 2717.
44. *Savage*, 25 F.4th at 943.
45. *Id*. at 936-38.

current policy.[46] Lastly, despite the appellant's contentions, the court found that the OPA does not implicitly repeal the SAA, but serves instead as a narrow exception applicable only to the apportionment of liability for oil spills.[47]

In reaching its conclusions, the court examined the tension between sovereign immunity and the repeal-by-implication doctrine.[48] Sovereign immunity shields the United States government from possible suits that may be brought against it.[49] In the absence of an express waiver, any ambiguities found in a statute are to be construed in favor of immunity.[50] The repeal-by-implication doctrine dictates that statutes which relate to the same subject matter should be construed together, harmoniously, before having one impliedly repeal the other.[51] Savage argued that, although the government does not waive its sovereign immunity under the OPA, it can still bring a common-law admiralty claim against the government for removal costs and damages by construing the OPA with the SAA's sovereign immunity waiver.[52] The government, however, contended that the OPA's comprehensive remedial scheme for oil removal costs is exclusive and displaces any cause of action that could be brought under the SAA.[53] Before analyzing this apparent conflict, however, the court reviewed the statutory text of the OPA to devise its plain meaning and determine whether it forecloses the oil-removal claim being brought forth.[54]

A. Does the OPA Create a Cause of Action Against the United States?

The court explains that the OPA holds any discharging vessel strictly liable for the costs of oil removal, but allows such responsible parties to bring a civil action for contribution against another person who is liable or potentially liable under this act or another law.[55] Under the plain language of the statute, the court determined that Congress purposefully excluded the United States from contribution claims because it was not listed under the statute's definition of "person."[56] Additionally, to

46. *Id*. at 938-45.
47. *Id*. at 948.
48. *Id*. at 932-33.
49. *Id*. at 933.
50. *Id*.
51. *Id*.
52. *Id*. at 938.
53. *Id*.
54. *Id*.
55. *Id*. at 933; 33 U.S.C. § 2709.
56. *Id*. at 933-34; *see* 33 U.S.C. § 2701(27).

construe the terms "United States" and "States" together under the provision would "strain language and logic" based on statutory canons and the responsibilities of the government under the statute.[57]

The court utilizes the canon of *expressio unius est exclusio alterius*[58] and the surplusage canon[59] to explain why "States" cannot be construed to mean the "United States."[60] The term "person" under the contribution provision lists several entities of the same kind as the "United States," but does not expressly include it; therefore, the court inferred that the omission was intentional.[61] Additionally, in several clauses of the OPA, Congress referred to both the "United States" and the "States" separately.[62] Therefore, a reading of the OPA that construes "United States" and "State" together would be in violation of the surplusage canon because it would make other provisions of the statute redundant.[63] Lastly, the court points to the awkward situation that would result if the United States were considered a person for contribution.[64] As stated previously, the government is responsible for enforcing liability under the OPA so to hold the United States as a person under the contribution provision would make the government liable to itself.[65] Ultimately, the text of the OPA creates no cause of action against the United States, as it cannot be construed as a "person" under the OPA contribution provision.

B. Does the OPA Provide a Complete Defense to Liability for Governmental Negligence?

The court then examined the complete defenses afforded to responsible parties under the OPA and compared those with its predecessor, the FWPCA, to devise the congressional intent behind the provision.[66] The OPA provides a list of complete defenses like the FWPCA but omits the complete defense of "sole . . . negligence on the

57. *Savage*, 25 F.4th at 934, 936.
58. Norman Singer & Shambie Singer, *2A Sutherland Statutory Construction* § 47:23 (7th ed. updated Nov. 2021) (defining expressio unius to instruct a court to infer all omissions were intentional exclusions when a statute designates a form of conduct, a manner of its performance and operation, and the persons and things to which it refers).
59. *See In re* Shek, 947 F.3d 770, 777 (11th Cir. 2020) (stating the surplusage canon cautions courts to avoid a reading of a statute that renders some words redundant or insignificant).
60. *Savage*, 25 F.4th at 935-36.
61. *Id.*; 33 U.S.C. § 2701(27).
62. 33 U.S.C. §§ 2706(a), 2712(f).
63. *Savage*, 25 F.4th at 935.
64. *Id.* at 936.
65. *Id.*
66. *Id.* at 937.

part of the United States government."[67] The court interpreted this omission as Congress's intention to purposefully exclude governmental negligence from the complete defenses awarded under the FWPCA's amended statute.[68]

Moreover, the court explained how the United States could not otherwise be included in the list of complete defenses as a "third party."[69] The court found that the United States could not be interpreted as a third party because it would cause the FWPCA's list of complete defenses to be in violation of the surplusage canon.[70] Specifically, it would cause the defense of negligence on the part of the United States to be redundant.[71] The court also found that the structure of the OPA prohibits the government from being categorized as a third party.[72] The structure of the OPA divides the liability for the oil spill, the responsibility for remedying it, and the authority to direct the oil spill cleanup costs amongst the responsible party and the government.[73] Such structure places these two entities as the principal parties responsible for the enactment and enforcement of the law of the OPA, thus making them unable to be classified as third parties in suits brought under it.[74]

C. *Is the OPA an Exclusive Remedy?*

The court then moved to the main argument brought forth by Savage: that the OPA should be construed with the SAA, and its waiver of sovereign immunity, to create a valid common law admiralty claim for oil-removal damages against the United States.[75] The court reached its decision under the principle that, when Congress crafts a detailed and precise remedy to address a previous problem in the legislature, that remedy represents Congress's exclusive judgment on such issue.[76] In the OPA, Congress created a detailed liability scheme that assigns strict liability to vessel owners; provided a specified list of available defenses and possible contribution claims; and assigned jurisdiction, venue, and time limitations for claims to be brought.[77] This precise remedy was

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67. *Id.* at 936; *see* 33 U.S.C. § 2703(a).
68. *Id.* at 937.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Third Party*, Black's Law Dictionary (11th ed. 2019) (defining "third party" as "someone other than the principal parties"); *Savage*, 25 F.4th at 936-37.
75. *Savage*, 25 F.4th at 938.
76. *Id.* at 939.
77. *Id.*

created as a "veritable super-structure of oil cleanup rights, duties, and obligations" to strike the right incentives within the oil industry that the FWPCA failed to reach.[78] Therefore, the court concluded that the remedies offered under the OPA preempt the general oil-removal remedies that are offered under the SAA.[79]

1. Preemption and the Notwithstanding Clause

In addition to the detailed comprehensive structure that the OPA creates, the statute also includes a notwithstanding clause that, according to the court, suggests the law's remedial scheme is exclusive.[80] The court found that such clauses indicate Congress's intention to have the statute take precedence over any preexisting or subsequently enacted legislation on the same topic.[81] In addition, the court noted that the OPA was enacted with a detailed remedial scheme, with specific attention on oil removal, and a clear emphasis on amending the shortcomings present under the FWPCA;[82] thus, the court found that the entire context of the statute further supports the contention that the notwithstanding clause is exclusive.[83]

Savage claimed that the savings clause of the OPA affords the responsible party the ability to bring causes of action not found in the OPA, such as the common law admiralty claim asserted by Savage in this case.[84] The court rejected that argument, finding that the savings clause allows responsible parties to bring actions under maritime law when the OPA has not "provided otherwise."[85] The court held that the OPA's unambiguous language, however, proves that the statute itself provides the exact remedy afforded in this case.[86] Therefore, the court concluded that the statute was drafted unambiguously and contains a valid notwithstanding clause that supports the OPA's exclusivity.[87]

2. Policy and Other Circuits

Although this is a case of first impression, the courts look to the federal circuits that have ruled that the OPA provides an exclusive remedy

78. *Id.*
79. *Id.*
80. *Id.* at 941.
81. *Id.*
82. *Id.* at 942.
83. *Id.*
84. *Id.* at 941.
85. *Id.*
86. *Id.* at 942.
87. *Id.*

for oil-removal claims that fall within the statute's reach.[88] The court noted that circuits have upheld the OPA as an exclusive remedy that cannot be altered by other laws due to the carefully drafted structure of its liability scheme and its ability to balance the various concerns in such disasters.[89] In addition, the court opined that current policy eliminates Savage's contention that such reading of the statute is unfair when the government is the negligent tortfeasor.[90] Primarily, the court pointed out that it is not its position to rule on the legislature's fairness determinations, but if it were to determine the purpose of the statute, it would reference the Legislature's intention to relieve the taxpayers' burden in the event of an oil spill.[91] The court found that the OPA was drafted to relieve such burden and incentivize the oil industry to internalize the negative externalities of its business so oil spills are disincentivized in the future.[92]

D. *Implied Repeal*

Finally, the court returned to examine the repeal-by-implication argument that Savage asserted initially.[93] The court agreed that when two statutes pertain to the same material, courts must first attempt to construe them in harmony before having one preempt another.[94] The doctrine, however, was meant to resolve issues in which such preemption "would extend to virtually every case in which the statute had application."[95] The SAA applies broadly to any claim that may arise at sea, while the OPA only pertains to liability in the limited circumstances of oil spills—a mere exception to the admiralty claims that can be brought under the SAA.[96] Therefore, the court found that the repeal-by-implication doctrine was not applicable in this case and the OPA was valid.[97]

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88. *Id.* at 943.
89. *Id.* (first citing United States v. American Commercial Lines, L.L.C., 759 F.3d 420, 425, 2014 AMC 2400 (5th Cir. 2014); then citing S. Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 66, 2001 AMC 609 (1st Cir. 2000)).
90. *Id.* at 945.
91. *Id.* at 945.
92. *Id.*
93. *Id.* at 946.
94. *Id.*
95. *Id.* (quoting United States v. United Cont'l Tuna Corp., 425 U.S. 164, 169 (1976)).
96. *Id.*
97. *Id.*

IV. ANALYSIS

In determining that the OPA does not provide a complete defense to liability,[98] the court relied on the statutory text of the OPA and the omission of "negligence on the part of the United States government" from its listed criteria of complete defenses.[99] The OPA amended the FWPCA to exclude this complete defense and mirror the complete defenses afforded under CERCLA.[100] In determining whether the United States could be included as a third party in this amended list of complete defenses, the court disregarded the contention as a violation of the surplusage canon that ran counter to the government's role as a principal party under the OPA.[101] Classifying the United States as a third party, however, may not be in violation of the surplusage canon because the originally listed complete defenses to liability under the FWPCA require different actions to be the sole cause of the oil's removal.

The complete defenses to oil spill liability seen in the FWPCA include proving the sole cause of the accident was due to negligence on part of the United States government or due to some act or omission of a third party.[102] Such structure outlines one avenue in which the United States' negligence is the sole cause and an alternative avenue in which a mere act or omission by a third party was the sole cause.[103] Thus, the defenses set out two different criteria for what needs to occur as the sole cause of the oil spill: negligence or a mere act or omission.[104] Ultimately, a situation in which an act or omission by the United States is the sole cause of the oil spill, as seen in this case, would not be a violation of the surplusage canon if the United States were considered a third party because the other complete defense pertains to only the United States' negligence.[105]

This then delves into a different inquiry of whether the United States can be considered a third party. The court held that the OPA prohibits the United States from being viewed as a third party because its liability scheme categorizes the United States as a principal party.[106] Such a conclusion, however, relies primarily on the structure of the OPA and the

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98. *Id.* at 938.
99. *Id.* at 936-37.
100. *Id.*; *see* 42 U.S.C. § 9607(b) (listing defenses to include an act of God, an act of war, an act or omission of a third party other than an employee or agent of the defendant).
101. *Id.* at 937.
102. 33 U.S.C § 1321(f)(1).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Savage*, 25 F.4th at 937.

role the government has in enforcing its provisions, not the facts of the case in front of it.[107] Third parties are identified from the perspective of the government's claim for liability against another party who was at sole fault for the oil discharge.[108] This is further expanded to include "any party other than the discharging vessel as a potential source of . . . liability."[109] Although this definition pertains to the definition of third parties under the FWPCA,[110] the fact that the language is different under the OPA does not mean the language of the FWPCA does not apply.[111] In the facts of the noted case, the acts of the Corps' employees operating the lock were allegedly the sole cause of the oil spill, and therefore, a potential source of liability for the discharge.[112]

Although the court rejected such a contention, Savage may also have claims against the revolving fund and for subrogation, as the OPA allows responsible parties to be reimbursed from the fund if they are entitled to a complete defense to liability.[113] An interpretation of the United States as a third party, therefore, would allow Savage to make a claim against the fund.[114] The court correctly determined that Savage could not bring a cause of action for contribution against the United States government because of the statutory definitions of the term "person."[115] However, the OPA provides an additional claim in subrogation against third parties who are solely responsible for the discharge of oil.[116] Being that contribution is distinct from rights to subrogation,[117] the language of the contribution claim does not limit Savage's remedies for subrogation against third parties solely at fault.

V. CONCLUSION

The OPA is well-accepted amongst circuit courts as providing an exclusive remedy for liability following an oil spill. The noted case

107. *Id.*

108. Frederick E. Bouchard, Inc. v. United States, 583 F.Supp. 477, 481, 1985 AMC 668 (Mass. Dist. Ct. 1984) (defining a tug as a third-party for purposes of Federal Water Pollution Control Act recovery provisions).

109. *Id.*

110. *Id.*

111. *In re* Deepwater Horizon, 745 F.3d 157, 173, 2014 AMC 2600 (5th Cir. 2014).

112. *See Savage*, 25 F.4th at 928-29.

113. 33 U.S.C. § 2708(a).

114. *Id.*

115. *Savage*, 25 F.4th at 934.

116. 33 USC § 2702(d)(B).

117. *In re* Settoon Towing, LLC, 859 F.3d 340, 347-48, 2017 AMC 1521 (5th Cir. 2017) (defining the contribution and subrogation claims available under the OPA and identifying them as distinct legal concepts).

challenges the exclusivity of the statute's liability scheme and presents the issue of whether defenses and causes of action can be brought against the United States under the SAA's waiver of sovereign immunity. Reaffirming the OPA's exclusivity and preemption to SAA general maritime claims, the court determined that Savage could not pierce the veil of sovereign immunity afforded to the United States under the OPA. In rendering its decision, the court primarily relied on the plain meaning and statutory text of the statute without considering other interpretations. Such analysis, although supported by the statute, neglects to consider the facts of the case presented in which the United States was the sole cause for the oil discharge. By not allowing the United States to be considered a third party under the complete defenses afforded to responsible parties, the OPA does not fulfill one of its intended and cardinal purposes, namely incentivizing the oil industry to prevent spills from occurring in the future. Had the Corps' workers been employees of a private entity, Savage would have received reimbursement for the oil removal claims and incentivized to abide by the OPA's structure in the future. Since the Corps' workers were government employees, however, Savage had no claim for reimbursement and was primarily incentivized to avoid interactions with the government in the future.

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