COMMENT

Amongst the "Waives": Whether Sovereign Immunity for Contractual Damages Is Waived under the Public Vessels Act or the Suits in Admiralty Act

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INTRODUCTION

The MV Orient, a newly refurbished fishing vessel, set out from California on its maiden voyage on December 1, 1969. The Orient, owned by Continental Tuna, was bound for the Philippines. Its owners, 99.5 percent of whom were Americans, hoped to do business in Philippine waters. Thus, Continental Tuna incorporated under Philippine law. Several unfortunate events then occurred. When the Orient was only seventy miles from the California coast, a US Navy missile frigate, the USS Parsons, drew too close to the Orient. The two vessels collided, and the collision ruptured the Orient's hull, causing the Orient to sink within minutes.[1] As a result, Continental Tuna realized losses of approximately $1 million,[2] but when it brought suit against the US government, the court refused to hear the case because the United States had not waived its sovereign immunity.[3]

The law that mandates this result is the Public Vessels Act[4] (PVA). The PVA waives sovereign immunity for "damages

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1 *United Continental Tuna Corp v United States*, 499 F2d 774, 775 (9th Cir 1974).

2 Brief for the Respondent, *United States v United Continental Tuna Corp*, No 74-869, *1–2 (US filed June 6, 1975) (available on Westlaw at 1975 WL 173785). See also *United Continental Tuna Corp v United States*, 550 F2d 569, 571–73 (9th Cir 1977); *Continental Tuna*, 499 F2d at 776.

3 *Continental Tuna*, 499 F2d at 775–76.

4 Pub L No 68-546, ch 428, 43 Stat 1112 (1925), recodified by Codification of the Shipping Act as Positive Law Act § 6(c) ("PVA Recodification"), Pub L No 109-304, 120 Stat 1485, 1521–23 (2006), codified at 46 USC § 31101 et seq.

caused by a public vessel,"[5] but the Act does *not* waive immunity for foreign plaintiffs whose governments have not waived immunity to be sued by American plaintiffs in like cases.[6] That is what happened in *United States v United Continental Tuna Corp*.[7] Since the Philippine government would not have allowed American plaintiffs to sue its public vessels in a similar situation,[8] the Philippine plaintiff could not recover tort damages against a US public vessel.

This story would have been different if the USS Parsons had been a merchant vessel, rather than a public vessel, when it collided with the Orient.[9] If the USS Parsons had been hauling cargo for the United States (characterizing it as a merchant vessel) instead of acting as a Navy missile frigate, Continental Tuna would have been able to recover any damages suffered as a result of the government's negligence. The stark contrast between these two cases stems from the application of different statutes. That is, the Suits in Admiralty Act[10] (SAA), not the PVA, governs cases brought against US merchant vessels.[11] Under the SAA, the US government allows suits against its vessels by foreign plaintiffs.[12]

Although courts agree on the disposition of tort cases against public vessels, such as *Continental Tuna*, courts disagree about whether the result should be the same if the suit were for contractual damages instead of tort damages.[13] Envision this contract scenario: The Orient (a Philippine ship) contracts with the USS Parsons (a public vessel) to provide the Parsons with a month's supply of fuel.[14] The USS Parsons then breaches the contract by refusing to pay the Orient for the fuel it delivered. Is there still no recovery for the Orient in this contract

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5 PVA § 1, 43 Stat at 1112, codified as amended at 46 USC § 31102(a)(1).

6 PVA § 5, 43 Stat at 1113, codified as amended at 46 USC § 31111.

7 425 US 164 (1976).

8 Id at 165–66.

9 See *Blevins v United States*, 769 F2d 175, 180 (4th Cir 1985).

10 Pub L No 66-156, ch 95, 41 Stat 525 (1920), recodified by Codification of the Shipping Act as Positive Law Act § 6(c) ("SAA Recodification"), 120 Stat 1485, 1517–21 (2006), codified at 46 USC § 30901 et seq.

11 See 46 USC § 30903(a); *Continental Tuna*, 425 US at 166–67.

12 See *Continental Tuna*, 425 US at 166; *Uralde v United States*, 614 F3d 1282, 1285 (11th Cir 2010).

13 Compare *Thomason v United States*, 184 F2d 105, 107–08 (9th Cir 1950), with *Eastern S. S. Lines, Inc v United States*, 187 F2d 956, 959 (1st Cir 1951).

14 For a case in which a vessel was found capable of being liable for consuming fuel and subsequently failing to pay for it, see *Belcher Co of Alabama v M/V Maratha Mariner*, 724 F2d 1161, 1163 (5th Cir 1984).

case? Courts are split on the matter. Some courts would allow the Orient to recover damages for breach of contract; others would not.

The courts' disagreement arises from different interpretations of the waiver of sovereign immunity in the PVA, which states,

> A civil action in personam in admiralty may be brought, or an impleader filed, against the United States for—
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> (1) damages caused by a public vessel of the United States; or
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> (2) compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.[15]

Some courts believe that "damages caused by a public vessel" includes damages for a vessel's breaches of contract. Other courts believe that the phrase only refers to tort damages: collision damages and damages stemming from torts that occur aboard a vessel for which the vessel is liable. If the phrase does not include contractual damages, then any contractual damages suit must be brought under the SAA. The waiver of immunity provision in the SAA states,

> In a case in which, if a vessel were privately owned or operated, or if cargo were privately owned or possessed, or if a private person or property were involved, a civil action in admiralty could be maintained, a civil action in admiralty in personam may be brought against the United States or a federally-owned corporation.[16]

The SAA is widely acknowledged as more plaintiff friendly than the PVA. This is not because of the actual waivers of sovereign immunity but rather because of four other provisions in the PVA, which do not exist under the SAA, that limit or prohibit recovery. The four limitations in the PVA are: (1) a bar on the recovery of prejudgment interest,[17] (2) a subpoena restriction,[18]

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15 PVA Recodification, 120 Stat at 1521, codified at 46 USC § 31102.

16 SAA Recodification, 120 Stat at 1518, codified at 46 USC § 30903.

17 Compare PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31107 ("A judgment in a civil action under this chapter may not include interest."), with SAA § 5, 41 Stat at 526, codified as amended at 46 USC § 30911 ("A judgment against the United States or a federally-owned corporation under this chapter may include costs and interest."). For an

(3) the ability to stay court proceedings during wartime,[19] and (4) reciprocity.[20] *Continental Tuna* exemplifies the most stringent of these limitations: the Reciprocity Provision, which states,

> A national of a foreign country may not maintain a civil action under this chapter unless it appears to the satisfaction of the court in which the action is brought that the government of that country, in similar circumstances, allows nationals of the United States to sue in its courts.[21]

The Reciprocity Provision is the most stringent limitation in the PVA because it bars all suits by certain foreign nationals. Meanwhile, the other PVA limitations apply or potentially apply in every case, regardless of a plaintiff's nationality. Because the PVA and SAA apply different rules, it is important to know which Act governs a given admiralty case. Thus, this Comment seeks to resolve two questions about admiralty suits: First, are suits for contract damages caused by a public vessel allowed under the PVA, or must they be brought under the SAA? Second, if the PVA governs admiralty suits for contract damages, which contractual damages can be "caused by" a public vessel?

Few courts have offered perspectives on the second question because there is a split regarding the first question: whether contract damages fall under the PVA at all. The first question exists because there is an ambiguity, or perceived ambiguity, in the term "damages" in the PVA's phrase "damages caused by a public vessel." Statutory interpretation is further complicated in this instance by the fact that courts apply unique canons of construction to waivers of sovereign immunity.[22] When courts discuss whether the scope of the PVA includes contracts, some focus on sovereign immunity's canons of statutory construction. Other courts rely on more general canons of construction or

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example of an appeal disputing the application of prejudgment interest, see *Marine Coatings of Alabama v United States*, 71 F3d 1558, 1561 (11th Cir 1996).

18 PVA § 4, 43 Stat at 1112, codified as amended at 46 USC § 31110 (requiring the express consent of certain officials before officers and members of the crew of a public vessel may be subpoenaed).

19 If the United States is at war, the Secretary of the Navy may obtain a stay of any suit brought under the PVA if that suit would tend to interfere with naval operations. See 10 USC §§ 7721–30.

20 PVA § 5, 43 Stat at 1113, codified as amended at 46 USC § 31111.

21 PVA § 5, 43 Stat at 1113, codified as amended at 46 USC § 31111.

22 See, for example, *Lane v Pena*, 518 US 187, 192 (1996). See also Norman J. Singer and J.D. Shambie Singer, 3 *Statutes and Statutory Construction* § 62:1 at 380 & n 3 (West 7th ed 2008); William N. Eskridge Jr, Philip P. Frickey, and Elizabeth Garrett, *Legislation and Statutory Interpretation* 336–39 (Foundation 2000).

delve into legislative history to determine the purpose of the PVA. Results among courts have been mixed. In the 1950s, the Court of Federal Claims and the Ninth Circuit held that contract damages do count as damages for the purposes of the PVA.[23] During the same decade, the First Circuit and another panel of the Court of Federal Claims came to the opposite conclusion.[24] The issue lay dormant until the Eleventh Circuit entertained the issue in 1996 and held that the PVA did not include contract damages.[25] In 2011, the Ninth Circuit asserted, albeit in dicta, that it would continue to abide by its prior holding that the PVA allows contract damages.[26] Though the Supreme Court has recognized the disagreement among courts, it has not resolved it.[27]

This Comment endeavors to resolve the split. First, this Comment argues that courts should hold that contract damages, if caused by a public vessel, fall under the PVA. In coming to this conclusion, this Comment relies on the close relationship between the SAA and PVA.[28] The tie between the two Acts arises from the PVA's Default Provision. The Default Provision requires that the PVA adopt all SAA provisions unless the SAA's provisions are *inconsistent* with the PVA's text.[29] Since it is uncontroverted that the SAA has always allowed suits for breach of contract against vessels, and since the PVA's language does not preclude contractual damages, the PVA must allow suits against public vessels for breaches of contract resulting in damages.

Second, this Comment argues that damages are "caused by" a public vessel if a suit could have been brought against the vessel in rem for a breach of contract had the vessel not belonged to the government. Because these types of contractual damages do not conflict with the plain language of the PVA, suits for contractual damages against public vessels should be subject to the PVA's stricter limitations on suits.

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[23] *Sinclair Refining Co v United States*, 124 F Supp 628, 633–34 (Ct Cl 1954); *Thomason*, 184 F2d at 108.

[24] *Eastern*, 187 F2d at 959; *Continental Casualty Co v United States*, 156 F Supp 942, 945–46 (Ct Cl 1957).

[25] *Marine Coatings*, 71 F3d at 1564 & n 8.

[26] *Tobar v United States*, 639 F3d 1191, 1198–99 (9th Cir 2011).

[27] See *Calmar Steamship Corp v United States*, 345 US 446, 456 n 8 (1953). See also *Continental Tuna*, 425 US at 180–81 & n 21.

[28] See *Calmar*, 345 US at 451 (describing the PVA as the SAA's "sister statute").

[29] PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31103.

The Comment's structure is as follows. Part I introduces admiralty law and the rules of statutory construction that govern sovereign immunity waivers. It also describes the history of sovereign immunity waivers in admiralty, including the reasons for which Congress passed the SAA and the PVA. Part II details the state of the circuit split and why courts have come to divergent conclusions. Part III suggests that the ambiguity in the term "damages" is merely a perceived ambiguity because all courts, even those with which this Comment agrees, have been using a "claims framework" rather than a "remedies framework." The claims framework asks what claims the PVA allows. This Comment instead advocates a remedies framework, under which courts ask whether the PVA allows certain remedies regardless of the plaintiff's cause of action.

I. SUING THE GOVERNMENT IN ADMIRALTY

This Part provides background information about admiralty, sovereign immunity, and waivers of that immunity. It describes several important differences between admiralty and common law, summarizes the rules governing waivers of sovereign immunity, and describes the methods by which the SAA and the PVA waive immunity—and how they differ.

A. Admiralty-Specific Rules and Vessel Categories

1. Admiralty versus common law.

Admiralty law differs from the common law in a number of ways. For instance, though admiralty and common law use many of the same terms, these terms only sometimes have the same meaning. This subsection cannot explain all the differences between the common law and admiralty law, but it does provide an overview of several admiralty rules pertinent to understanding this Comment. These rules include limits to admiralty jurisdiction, differences between in rem and in personam suits, and causes of action unique to admiralty.

Jurisdiction is always the first question in an admiralty case.[30] Admiralty jurisdiction for tort claims is determined by a two-part test: (1) either a tort must occur on navigable water or

[30] See, for example, *Doe v Celebrity Cruises, Inc*, 394 F3d 891, 900 (11th Cir 2004); *Burie v Overseas Navigation Corp*, 205 F Supp 182, 185–86 (SDNY 1962).

a vessel on navigable water must cause an injury on land,[31] and (2) there must be a connection with a traditional maritime activity.[32] Admiralty jurisdiction exists over contract claims when the nature of a transaction references either maritime services or maritime transactions.[33] For contracts that include both maritime and nonmaritime elements, admiralty jurisdiction exists in cases in which the maritime portions of the contract are not "insubstantial."[34]

Within admiralty jurisdiction, causes of action may be brought either in rem or in personam. In rem suits are suits against a vessel itself, and these suits may only be brought when a maritime lien has been created.[35] A maritime lien is a property right in a ship that arises when a vessel owes a debt for its action, whether that action is committing a tort or breaching a contract.[36] The lien's value is capped by the value of the vessel that caused the harm,[37] which in practice limits vessel liability and protects maritime commerce. In contrast, in personam suits may be brought against any legal person that is not a vessel, and liability is not capped at the value of the vessel.[38]

Admiralty jurisdiction allows familiar tort and contract suits,[39] but it also recognizes several causes of action that lack common law counterparts such as "maintenance and cure," "towage," and "salvage." These causes of action (or "libels" as they were traditionally called[40]) predate the bright-line categories of

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31 See *Jerome B. Grubart, Inc v Great Lakes Dredge & Dock Co*, 513 US 527, 534 (1995).

32 See id at 533–34.

33 See *Norfolk Southern Railway Co v Kirby*, 543 US 14, 23–24 (2004).

34 Id at 27.

35 See *Crimson Yachts v Betty Lyn II Motor Yacht*, 603 F3d 864, 868 (11th Cir 2010), citing *The Rock Island Bridge*, 73 US (6 Wall) 213, 215 (1867).

36 See Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-1 at 442–46 & nn 6–7 (West 4th ed 2004). See also *Galehead, Inc v M/V Anglia*, 183 F3d 1242, 1247 (11th Cir 1999).

37 See 46 USC § 30505(a) ("[T]he liability of the owner of a vessel for any claim, debt, or liability . . . shall not exceed the value of the vessel and pending freight."). See also Schoenbaum, *Admiralty and Maritime Law* § 7-1 at 449 (cited in note 36).

38 See *Belcher Co of Alabama v M/V Maratha Mariner*, 724 F2d 1161, 1163–64 (5th Cir 1984).

39 See *De Lovio v Boit*, 7 F Cases 418, 442–44 (CC D Mass 1815) (holding that although contracts would have been excluded from English admiralty law, contracts were included within American admiralty and maritime jurisdiction due to the inclusion of the word "maritime" in US Const Art III, § 2).

40 A libel is simply another name for a cause of action or a claim. See, for example, *Brown v Universal Marine Co*, 317 F2d 279, 280 (6th Cir 1963) (using the terms "cross-libel" and "cross-libelant" rather than "cross-claim" and "cross-claimant").

contract and tort.[41] The remedies for these claims are equitable,[42] and they range from quasi-contractual,[43] to quantum meruit, to court awards without any contractual basis.[44] It is against an admiralty background that the PVA and SAA must be understood.

2. The distinction between merchant vessels and public vessels.

In order to understand the PVA, it is important to understand the distinction between "public vessels" and "merchant vessels." Though this Comment is about the meaning of "damages" in the phrase "damages caused by a public vessel," the PVA does not apply unless damages are caused by a public vessel. Damages caused by merchant vessels fall under the SAA.

Government vessels typically are categorized as either public vessels or merchant vessels. Public vessels are "owned, or demise chartered, and operated by the United States Government . . . and not engaged in commercial service."[45] Merchant vessels are not defined by statute but, in general, merchant vessels are those government vessels that transport cargo or passengers.[46]

B. Sovereign Immunity, Generally

Typically, a party may sue the federal government only when the United States has waived its sovereign immunity.[47] To decide whether the government has waived its immunity, courts rely on unique canons of statutory construction that go beyond the canons that apply to all statutes.[48] The following canons govern waivers of sovereign immunity: (1) the statutory text must

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41 See *Atlantic Sounding Co v Townsend*, 557 US 404, 422 n 9 (2009) ("[T]he right of maintenance and cure 'was firmly established in the maritime law long before recognition of the distinction between tort and contract.'"), quoting *O'Donnell v Great Lakes Dredge & Dock Co*, 318 US 36, 42 (1943).

42 See notes 200 (salvage), 209–21 (towage) and accompanying text.

43 See Schoenbaum, *Admiralty and Maritime Law* § 19-14 at 1112 (cited in note 36).

44 See notes 200–21 and accompanying text.

45 46 USC § 2101(24)(A)–(B).

46 See *Calmar Steamship Corp v United States*, 345 US 446, 456 (1953). See also *Fixing the Status of Government Owned or Operated Vessels, and Providing Relief for Maritime Torts, Hearing before the House Committee on the Judiciary*, 66th Cong, 1st Sess 9, 10 (1919) (statement of La Rue Brown, Former Assistant Attorney General of the United States) ("1919 SAA Hearings").

47 See, for example, *United States v Lee*, 106 US 196, 204 (1882); *Cohens v Virginia*, 19 US (6 Wheat) 264, 380, 411–12 (1821); *Gray v Bell*, 712 F2d 490, 506 (DC Cir 1983).

48 See note 22 and accompanying text.

"unequivocally express[]" a waiver of immunity; (2) ambiguous waivers are narrowly construed against waiving immunity;[49] (3) courts will not extend a waiver of immunity beyond what a statute's language *requires*;[50] and (4) if a waiver does not appear in the statute's text, courts will not find an implied waiver based on legislative history.[51]

C. History of Admiralty Statutes

The US government first waived immunity for suits in admiralty in 1887 via the Tucker Act.[52] This waiver was only for suits based on admiralty contracts, and the amount of money a plaintiff claimed determined which court would hear the suit. The Court of Federal Claims had the right to hear *all* contractual admiralty claims against the federal government.[53] District courts had concurrent jurisdiction over admiralty claims of up to $1,000.[54] Similarly, the circuit courts had concurrent jurisdiction to entertain claims greater than $1,000 but less than $10,000.[55] Unlike subsequent admiralty waivers of immunity, the Tucker Act did not discriminate by vessel type.

The Tucker Act remained the only admiralty immunity waiver until the First World War. During the war, plaintiffs filed an increasingly large number of admiralty suits against the government. At that time, tort claims against US vessels could not be brought in court. Plaintiffs seeking tort damages had to seek relief from Congress by filing a private bill.[56] In response to the flood of tort claims against US vessels, Congress passed the Shipping Act of 1916.[57] It stated, "[V]essels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."[58] The Shipping Act

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49 See *United States v Nordic Village, Inc*, 503 US 30, 33–34 (1992).

50 See id at 34; *Lane v Pena*, 518 US 187, 192 (1996).

51 See *Lane*, 518 US at 192.

52 Ch 359, 24 Stat 505 (1887), codified as amended at 28 USC § 1491. The predecessor to the Tucker Act was a grant solely of jurisdiction. The Tucker Act amended this, including a waiver of sovereign immunity. See Court of Claims Act of 1855, ch 122, 10 Stat 612; *United States v Sherwood*, 312 US 584, 586–87 (1941).

53 Tucker Act § 1, 24 Stat at 505.

54 Tucker Act § 2, 24 Stat at 505.

55 Tucker Act § 2, 24 Stat at 505.

56 See *Marine Coatings of Alabama v United States*, 71 F3d 1558, 1560 (11th Cir 1996).

57 Pub L No 64-260, ch 451, 39 Stat 728.

58 Shipping Act § 9, 39 Stat at 730–31.

subjected government merchant vessels (but not its public vessels) to all "liabilities" applicable to private vessels.[59] Three years after the Shipping Act's passage, the Supreme Court entertained a case determining the scope of the term "liabilities." In *The Lake Monroe*,[60] the Supreme Court held that "liabilities" included the prejudgment remedies of seizure, attachment, and arrest.[61] The haste with which Congress passed a new act suggests that it intended "liabilities" to be read more narrowly than the Supreme Court's holding.[62] Only one year after the Supreme Court's decision in *The Lake Monroe*, Congress passed a new law governing suits against US vessels.

Congress's new statute, the SAA, expressly barred arrest and seizure in § 1:

> [N]o vessel owned by the United States . . . and no cargo owned or possessed by the United States . . . shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions.[63]

The SAA also repealed all contradictory provisions in other acts,[64] which caused it to replace the Shipping Act's waiver of immunity.[65] Unlike the Shipping Act, which had allowed only in rem claims against merchant vessels,[66] the SAA waived immunity for both in rem and in personam suits. The SAA addressed in personam suits in § 2:

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59 Shipping Act § 9, 39 Stat at 730–31. Though the Shipping Act permitted suit for "all liabilities," it did not specify which courts could hear such cases. As such, many cases were originally heard in district court. See, for example, *The Lake Monroe*, 250 US 246, 248–49 (1919).

60 250 US 246 (1919).

61 Id at 248–49, 254–55. See also *Fuentes v Shevin*, 407 US 67, 72 n 5, 91 n 23 (1972) (categorizing seizure and attachment as prejudgment remedies).

62 See *1919 SAA Hearings*, 66th Cong, 1st Sess at 7, 16 (cited in note 46) (statement of Brown); Schoenbaum, *Admiralty and Maritime Law* § 18-1 at 1040 n 26 (cited in note 36). See also *Marine Coatings*, 71 F3d at 1560.

63 SAA § 1, 41 Stat at 525, codified as amended at 46 USC § 30908 (exempting from seizure vessels and cargo owned by the United States).

64 SAA § 13, 41 Stat at 528. This provision never was codified, but still repeals inconsistent provisions of preceding acts. See, for example, *Johnson v U. S. Shipping Board Emergency Fleet Corp*, 280 US 320, 326 (1930).

65 See *Johnson*, 280 US at 325–26. In addition to repealing the Shipping Act's waiver of immunity, the SAA precluded suits from being brought under the Tucker Act's waiver of immunity in cases for which the SAA supplied a cause of action. See id at 327.

66 Shipping Act § 9, 39 Stat at 730–31 (stating that only government *vessels*—not the government as the owner or operator of the vessels—will be subject to the same liabilities as all other *vessels*).

> [I]n cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation.[67]

The SAA allowed in personam suits against merchant vessels in all cases in which the vessel could have been sued in personam had it been a privately owned vessel. The same rule applied to in rem actions, addressed in § 3:

> If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained.[68]

What is surprising about the SAA's text is that it permitted in rem claims in § 3, but it prohibited some of the traditional in rem remedies in § 1. For example, the combination of § 1 and § 3 allowed plaintiffs to recover damages but prohibited arrest and seizure of a vessel[69] despite the fact that these are all traditional in rem remedies.[70] Because § 3 waived immunity for in rem actions against merchant vessels, the SAA permitted tort, contract, and other uniquely maritime claims against merchant vessels.[71]

While the SAA's passage accomplished many congressional goals, such as preventing seizure of vessels owned by the government and channeling admiralty cases into a single forum (the federal district courts),[72] the SAA still did not permit suits against public vessels. Congress considered waiving immunity for suits against public vessels when it crafted the SAA but ultimately

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67 SAA § 2, 41 Stat at 525–26, codified as amended at 46 USC § 30903(a).

68 SAA § 3, 41 Stat at 526, codified as amended at 46 USC § 30907.

69 Compare text accompanying note 63, with text accompanying note 68.

70 See Schoenbaum, *Admiralty and Maritime Law* § 19-3 at 1070 (cited in note 36).

71 Vessels may be sued in rem for tort and contract remedies, but they also may be sued for traditional maritime claims that have no common law counterparts. See, for example, *Plesha v M/V Inspiration*, 419 F Supp 2d 67, 71 (D Puerto Rico 2006), citing Grant Gilmore and Charles L. Black Jr, *The Law of Admiralty* 286 (Foundation 2d ed 1975).

72 See SAA § 2, 41 Stat at 525–26, codified as amended at 46 USC § 30906. Consider note 150 and accompanying text.

decided against it[73] because members feared that this addition would unduly delay the SAA's passage and allow additional seizures of the government's merchant vessels in the interim.[74]

Nonetheless, it was not long before Congress provided a waiver for suits against public vessels. In 1925, five years after Congress enacted the SAA, Congress passed the PVA. The PVA, a shorter and more concise statute than the SAA, allowed plaintiffs to bring in personam admiralty claims against the US government so long as the claims met certain requirements. The PVA read,

> *[L]ibel* in personam in admiralty may be brought against the United States, or a petition impleading the United States, *for damages caused by a public vessel* of the United States, *and for compensation for towage and salvage* services, *including contract salvage, rendered to a public vessel* of the United States.[75]

Like the SAA, the PVA also specified that federal district court is the proper venue for all suits against government vessels.[76]

When Congress passed the PVA, it linked the PVA with the SAA by including a Default Provision, which stated, "[S]uits [under this Act] shall be subject to and proceed in accordance with the provisions of . . . [the SAA] or any amendment thereof, in so far as the same are not inconsistent herewith."[77] That is, unless the PVA's text was inconsistent with the SAA's text, all SAA provisions also applied to the PVA. The two Acts remained linked together, unchanged, for thirty-five years.

D. Amendments to Existing Admiralty Statutes

In 1960, Congress decided to change its waiver statutes in response to court rulings. Though Congress probably intended that the PVA and SAA together would cover *all* suits against government vessels in admiralty—suits against public vessels under the PVA and suits against US merchant vessels under the SAA[78]—the Supreme Court ruled that neither the PVA nor the

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73 See *1919 SAA Hearings*, 66th Cong, 1st Sess at 8 (cited in note 46).

74 See *1919 SAA Hearings*, 66th Cong, 1st Sess at 7, 37, 56 (cited in note 46); *Canadian Aviator v United States*, 324 US 215, 220–21 (1945).

75 PVA § 1, 43 Stat at 1112 (emphasis added), codified as amended at 46 USC § 31102.

76 See PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31104.

77 PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31103.

78 See *American Stevedores, Inc v Porello*, 330 US 446, 452 (1947).

SAA waived sovereign immunity for suits against certain vessels. This gap occurred when the defendant vessel qualified as neither a public vessel nor a merchant vessel.[79] At that time, if neither the SAA nor the PVA waived immunity for suit against a government vessel, a plaintiff would bring contractual claims under the Tucker Act[80] and tort claims under the Federal Tort Claims Act[81] (FTCA). This gap between the two Acts caused plaintiffs uncertainty as to which Act applied to a given suit, and uncertainty meant more work for the prudent plaintiff. The PVA and the SAA had two-year statutes of limitations, and both required that suit be filed in the district courts. Meanwhile, the FTCA and the Tucker Act had separate statutes of limitations[82] and required that suit be filed in the Court of Federal Claims.[83]

In an effort to simplify the process of suing a government vessel, Congress amended the SAA in 1960.[84] The 1960 SAA Amendment changed the SAA from an act that merely waived immunity for suits against merchant vessels into an act that waived immunity for *all* admiralty suits against *all* US vessels.[85] To accomplish this, Congress removed the text in the SAA that conditioned recovery on the merchant status of the government vessel.[86] After the 1960 SAA Amendment, the Act read,

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States.[87]

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79 See *Continental Tuna*, 425 US at 174–75.

80 Tucker Act § 1, 24 Stat at 505.

81 Legislative Reorganization Act of 1946, title IV, Pub L No 79-601, ch 753, 60 Stat 812, 842–47; FTCA § 410(a), 60 Stat at 843–44, codified as amended at 28 USC § 2674.

82 Compare FTCA § 420, 60 Stat at 845 and Tucker Act § 1, 24 Stat at 505, with SAA § 5, 41 Stat at 526–27, codified as amended at § 30905 and PVA § 2, 43 Stat at 1112, codified as amended at § 31103.

83 See, for example, FTCA § 412, 60 Stat at 844, codified as amended at 28 USC § 1346. See also note 53 and accompanying text.

84 Act of Sept 13, 1960 § 3 ("1960 SAA Amendment"), Pub L No 86-770, 74 Stat 912, 912, codified as amended at 46 USC § 30903(a).

85 1960 SAA Amendment, 74 Stat at 912, codified as amended at 46 USC § 30903(a).

86 1960 SAA Amendment, 74 Stat at 912, codified as amended at 46 USC § 30903(a).

87 1960 SAA Amendment, 74 Stat at 912, codified as amended at 46 USC § 30903(a).

> Such suits shall be brought in the district court of the United States.[88]

Because Congress used the word "vessel" without qualifying it as merchant or public, the 1960 SAA Amendment's text is broad enough to waive claims for all vessels, public and merchant alike. If courts had read the 1960 SAA Amendment in this way, then the 1960 SAA Amendment would have repealed the PVA since the PVA would have been unnecessary—the new SAA Amendment would have waived immunity for suits against any government vessel. But when the Supreme Court considered this very question—whether the 1960 SAA Amendment repealed the PVA—it held that the 1960 SAA Amendment did not repeal the PVA because it contained no *express* language to that effect.[89] Instead, the Court read the 1960 SAA Amendment as supplementary to the PVA. The PVA retained exclusive jurisdiction for any claims it previously allowed (certain claims against public vessels), and the new SAA encompassed any admiralty suit against a government vessel that did not fall under the PVA. Thus, as interpreted by the Court, the 1960 SAA Amendment created a catchall provision in the SAA, but the PVA's jurisdictional scope remained unchanged.[90] Since the 1960 SAA Amendment, neither the PVA nor the SAA has materially changed. The rule regarding exclusive PVA jurisdiction remains in place: So long as a plaintiff brings suit for "damages caused by a public vessel," that suit may be brought only under the PVA.[91] Any admiralty claim against a government vessel that cannot be brought under the PVA may be brought under the SAA.[92]

II. THE CIRCUIT SPLIT: HOW COURTS HAVE DECIDED THE ISSUE

A question remains about which claims fall under the PVA. It is clear that some tort claims fall under the PVA's "damages caused by a public vessel" provision, but it is unclear whether *damages* also includes *damages for breach of contract*. This issue is important because the PVA places stricter limitations on suits than the SAA does. That is, the more claims that fall under the

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88 SAA § 2, 41 Stat at 525–26, codified as amended at § 30903(a).

89 *Continental Tuna*, 425 US at 181.

90 See id.

91 Id.

92 See 46 USC § 30101(c)(1) ("In a civil action against the United States for injury or damage done or consummated on land by a vessel on navigable waters, [the SAA] or [the PVA], as appropriate, provides the exclusive remedy.").

PVA, the more restrictive the government's waiver of sovereign immunity. If *damages* in the PVA only means *tort damages*, then all contract claims, including those "caused by a public vessel," fall under the SAA's waiver of immunity. Because the SAA's waiver of immunity is more plaintiff friendly, more plaintiffs will be able to recover contractual damages against the government, and in greater amounts, if the SAA governs contract damages.

Courts are divided on two questions regarding contracts and the PVA. First, courts disagree about whether a plaintiff may *ever* bring a contractual claim under the PVA for "damages caused by a public vessel." Second, if the PVA does allow contractual claims for damages, must the PVA allow all contractual claims that could be brought in admiralty jurisdiction or only some of those contractual claims? The Supreme Court has recognized the disagreement among courts, but it has declined to resolve it.[93]

Some courts construe the waiver of sovereign immunity narrowly, as waiving immunity for tort claims but not for contractual claims. These courts come to their conclusion by using canons of statutory construction and focusing on the PVA's purpose. Other courts hold that the word "damages" in the PVA should be interpreted broadly, allowing recovery for both contract and tort damages. These courts rely largely on prior Supreme Court holdings about the PVA's scope. Regardless of the outcome, all judicial opinions addressing these questions share a common trait, framing the issue as a "claims question": Does the PVA waive sovereign immunity for contract *claims*? This Comment frames the question differently, as a "remedies question": Under the PVA, are contractual *damages* a permissible *remedy*?

A. Reading Damages Narrowly

There are three courts that hold that contractual claims are *not* permitted under the PVA. These courts include the Eleventh Circuit,[94] the Court of Federal Claims,[95] and the First Circuit.[96] This Section proceeds by discussing each of these courts in turn.

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93 See note 27 and accompanying text.

94 *Marine Coatings of Alabama v United States*, 71 F3d 1558 (11th Cir 1996).

95 *Continental Casualty Co v United States*, 156 F Supp 942 (Ct Cl 1957).

96 *Eastern S. S. Lines, Inc v United States*, 187 F2d 956 (1st Cir 1951).

1. The Eleventh Circuit.

The Eleventh Circuit case, *Marine Coatings of Alabama v United States*,[97] is the most recent case to discuss the issue. Marine Coatings brought suit against the United States for the cost of repair work it had done as a subcontractor on three naval vessels.[98] After Marine Coatings won the suit, the district court awarded prejudgment interest per the SAA's provisions. The Government appealed, claiming that Marine Coatings could not recover prejudgment interest because sovereign immunity in the suit could have been waived only by the PVA, and the PVA does not provide prejudgment interest.[99] Since naval vessels are public vessels, the court only needed to determine whether contractual claims could be brought under the PVA to decide the question.[100] The Eleventh Circuit held that the word "damages" in the PVA included only tort damages, not contract damages. Distinguishing Supreme Court precedent on factual grounds, the Eleventh Circuit based its conclusion on the PVA's text and legislative history.[101]

The Eleventh Circuit began its analysis with the text of the PVA, finding that it expressly allowed only two kinds of contractual claims: towage and salvage.[102] Relying on the *expressio unius* canon, the court concluded that only "salvage contracts" and "towage" (which is typically a contract-based suit) could be brought under the PVA. Other contractual claims should not be read into the statute simply because contract cases sometimes result in a damages remedy.[103] If all contracts had already been included through a broad damages provision in the first part of the statute, the court reasoned, then it would be superfluous to expressly mention specific contract claims in the second part of the statute (which Congress did when it included salvage and towage).

On its face, this reasoning seems consistent with the legal requirement that waivers of sovereign immunity be construed narrowly.[104] The Eleventh Circuit decided that the PVA's express

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97 71 F3d 1558 (11th Cir 1996).

98 Id at 1559.

99 PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31107.

100 *Marine Coatings*, 71 F3d at 1559–60.

101 See id at 1564 & n 8.

102 Id at 1563–64.

103 Id at 1564.

104 See notes 49–51 and accompanying text.

waiver of two types of contractual claims in the second part of the statute (salvage and towage claims) suggested that Congress had not unequivocally waived its immunity for suits based on other contractual claims.[105]

In a second textual line of reasoning, the Eleventh Circuit suggested that allowing contract damages under the PVA would lead to an absurd result. The facts of *Marine Coatings* described a case in which the government breached a contract to pay for repairs done on three of its vessels. The court believed that an interpretation that implied that a vessel, rather than a person, breached a contract is absurd. The court reasoned that people, not vessels, breach contracts—and even if vessels *could* breach contracts, the vessel could not have "caused" the damages in the case at hand. Since the breach occurred when the government did not pay the contractor for the vessels' repair, the damages caused by the government did not arise from "any negligent act by a ship or its crew."[106] Rather, this was a case in which the government caused damages by failing to pay for repairs.[107]

The Eleventh Circuit also looked to legislative history to determine the purpose of the PVA. The court stated that the PVA's main purpose was to provide recovery for collision damages.[108] Collision damages are tort claims, not contract claims. The Eleventh Circuit then pointed to the Congressional Record, which stated, "The chief purpose of [the PVA] is to grant private owners of vessels and of merchandise a right of action *when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel*."[109]

After reasoning that awarding contract damages would violate the PVA's "chief purpose," the Eleventh Circuit distinguished two Supreme Court cases that had already deviated from the PVA's chief purpose by providing remedies to plaintiffs injured aboard vessels in noncollision cases.[110] The first Supreme Court case to allow noncollision damages under the PVA was

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105 See note 49 and accompanying text.

106 *Marine Coatings*, 71 F3d at 1563.

107 Id.

108 Although it is impermissible to use legislative history to provide a waiver of sovereign immunity that does not appear in the text, see *Lane v Pena*, 518 US 187, 192 (1996), there appears to be no similar canon disallowing consideration of legislative history to prove that waiver was *not* intended.

109 *Marine Coatings*, 71 F3d at 1562, quoting *Authorizing Suits against the United State in Admiralty*, S Rep No 68-941, 68th Cong, 2d Sess 1 (1925) and *Authorizing Suits against the United States in Admiralty*, HR Rep No 68-913, 68th Cong, 1st Sess 1 (1924).

110 *Marine Coatings*, 71 F3d at 1562–64.

Canadian Aviator, Ltd v United States,[111] a case in which a naval patrol boat operator's negligent guidance caused a collision between a steamship and a submerged wreck in Delaware Bay.[112] The difficulty in this case arose from the fact that, though there had been a collision, the public vessel that caused the collision (the patrol boat) had not collided with anything. Instead the patrol boat's negligence caused *another vessel* to collide with a submerged wreck. The Supreme Court held that "damages caused by a public vessel" applied to more than mere collision cases.[113] Specifically, the Court held that the word "damages" also included damages caused by the negligence of personnel aboard a government vessel.[114]

The Eleventh Circuit also distinguished *American Stevedores, Inc v Porello*,[115] which broadened the "damages caused by" interpretation further than *Canadian Aviator*. In *American Stevedores*, a negligently secured beam in the hold of the USS Thomas Stone struck a longshoreman.[116] Despite a lack of any vessel collision, the Supreme Court held that the tort damages in *American Stevedores* were "damages caused by a public vessel" because Congress intended that the PVA provide the same relief as the SAA.[117] Thus, the Supreme Court held that the PVA allowed both collision damages and personal injury damages caused by public vessels.[118]

The Eleventh Circuit acknowledged these two broad Supreme Court holdings, but it cabined their breadth by creating a tort/contract distinction. Damages, the court said, referred to all tort damages, but the court found that reading the PVA to allow

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111 324 US 215 (1945).

112 Id at 216–18.

113 Id at 223–25.

114 Id at 224–25.

115 330 US 446 (1947).

116 Id at 449. Along with *American Stevedores*, the Supreme Court heard a companion case in which the respondent claimed wrongful death due to negligent conditions aboard a government vessel. See *United States v Lauro*, 330 US 446, 458 n 24 (1947). The Court reached the same outcome in *Lauro*—it allowed suit under the PVA. Id at 460.

117 *American Stevedores*, 330 US at 452–54, quoting Harlan F. Stone, Attorney General, Letter to Hon. George W. Edmonds, Chairman Committee on Claims, House of Representatives, reprinted in S Rep No 68-941 at 11–13 (cited in note 109):

> The chief purpose of this bill is to grant private owners . . . a private right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel . . . without requiring an application to Congress in each particular instance for the passage of a special enabling act.

118 *American Stevedores*, 330 US at 458.

contract claims was too much of a "stretch" because contract law was not the main reason that the Act was passed.[119] The Eleventh Circuit held that *American Stevedores* and *Canadian Aviator* had expanded tort claims beyond collision cases only so that the PVA would not "unnatural[ly]" limit damages to property damages and exclude personal injury damages, for which plaintiffs equally deserved recovery.[120] The Eleventh Circuit suggested that allowing recovery for property damages, but not for personal injuries, was not Congress's intent.

As a parting shot, the Eleventh Circuit also noted that stretching the PVA's language to allow contract damages was no longer necessary to accomplish Congress's intent of providing a waiver of immunity in admiralty cases.[121] That is, since the 1960 SAA Amendment allows any claim that does not fit under the PVA to be brought under the SAA,[122] it is no longer necessary to *force* contract damages into the PVA through a broad reading of "damages."

2. The Court of Federal Claims.

Like the Eleventh Circuit, the Court of Federal Claims also limited the scope of "damages" to tort damages. But unlike the Eleventh Circuit in *Marine Coatings*, the Court of Federal Claims addressed the question before the passage of the 1960 SAA Amendment. In *Continental Casualty Co v United States*,[123] Continental was a surety for a contract between the government and Pennsylvania Drydock to repair several government ships.[124] When Pennsylvania Drydock failed to pay its laborers and materialmen, Continental, as surety, paid the compensation for two of the vessels.[125] Continental then sued the United States for the amount it paid in compensation.[126] In reaching its decision that the PVA allowed only tort damages, the Court of Federal Claims relied on the PVA's plain meaning and two canons of statutory construction: the canons against superfluity and against implied repeals.

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119 *Marine Coatings*, 71 F3d at 1564.

120 Id.

121 Id at 1564 n 8.

122 1960 SAA Amendment, 74 Stat at 912, codified as amended at 46 USC § 30903; *Continental Tuna*, 425 US at 181.

123 156 F Supp 942 (Ct Cl 1957).

124 Id at 942.

125 Id.

126 Id.

In terms of the text's plain meaning, the Court of Federal Claims noted that the Act's language "brings to mind" a collision,[127] perhaps because vessels most obviously cause damages when they collide with things. To support its reasoning about the PVA's plain meaning, the court used a superfluity canon similar to (but not quite the same as) the Eleventh Circuit's: since the PVA expressly allows "contract salvage," salvage is the only contract claim the PVA allows.[128] If "damages" really included contract damages, it would be unnecessary to include any express contract claims since they would be waived already. The court also suggested that allowing contract damages under the PVA would be the equivalent of an implied repeal of the Tucker Act. That is, at the time the PVA was passed, the PVA was only "*necessary* to authorize a suit in tort" since the Tucker Act already allowed contract-based admiralty suits.[129] Thus, the court opined that the ambiguous term "damages" should not be read to have impliedly repealed the Tucker Act's provisions[130] because implied repeals are disfavored.[131]

3. The First Circuit.

The First Circuit case, *Eastern S. S. Lines, Inc v United States*,[132] is cited as a case in which a court held that the PVA did not apply to a contract claim,[133] but it is not clear if this reading of the case is correct. The case could have been resolved based on two different rationales. It is unclear whether the First Circuit determined that the PVA disallowed contract claims or if the court decided that the specific contractual breach at issue could not be considered "damages caused by a public vessel."[134]

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127 *Continental Casualty*, 156 F Supp at 943.

128 Id at 943–44. This should be distinguished from *Marine Coatings*, in which the court found that two contract claims were expressly allowed, including towage as well as salvage. See text accompanying note 102. The Court of Federal Claims noted that towage is not really a contractual claim because it is based on the "law of the sea, requiring all vessels in the vicinity to go to the aid of a vessel in distress, in which case the law creates a claim against the distressed vessel and its cargo in favor of the vessel which renders the towage or salvage services." *Continental Casualty*, 156 F Supp at 944.

129 *Continental Casualty*, 156 F Supp at 944–45.

130 Id at 944.

131 See, for example, id at 943–46; *National Association of Home Builders v Defenders of Wildlife*, 551 US 644, 662 (2007).

132 187 F2d 956 (1st Cir 1951).

133 See, for example, *Calmar Steamship Corp v United States*, 345 US 446, 456 n 8 (1953).

134 PVA § 1, 43 Stat at 1112, codified as amended at 46 USC § 31102.

In *Eastern*, Eastern Steamship Lines claimed that the United States breached a bareboat charter contract.[135] The charter contract stated that the government would either restore the SS Acadia to the condition it was in prior to the bareboat charter or pay Eastern the cost of restoring the boat to its former condition.[136] Since it was clear that the SS Acadia had been a public vessel,[137] the only issue decided on appeal was whether the claim could be brought under the SAA. The First Circuit took for granted that the PVA did not apply, coming to this conclusion in the course of one sentence:

> The Public Vessels Act . . . gives jurisdiction to the district courts only over libels brought "for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States"; it thus has no applicability to a contract claim such as that advanced in the case at bar.[138]

The court did not include its reasoning, but it could have meant one of two things. It could have been referring to the superfluity rationale that the only contractual claims allowed are those claims the PVA expressly includes in its text. But the holding also could have been that the PVA allows contract claims, but *not in this case* because the damages were not "damages *caused by* a public vessel."

A glance back at the facts of the case demonstrates why this second meaning could make sense.[139] A boat was chartered to the government, and the government was supposed to return the boat in a certain condition. The government gave the boat back, but the boat was not in the condition that the government promised. At the time of the suit, the government no longer held any interest in the boat; the original owner possessed it. To bring an in rem suit against this vessel would be useless: The owner would be suing the vessel he owned. This would be like suing oneself instead of the party responsible. Thus, the owner's only recovery option was to sue the government in personam because

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[135] A "bareboat charter" contract is one in which the charterer takes complete physical and legal control of the vessel. Schoenbaum, *Admiralty and Maritime Law* § 9-1 at 670–71 & n 6 (cited in note 36).

[136] *Eastern*, 187 F2d at 958–59.

[137] Id at 961.

[138] Id at 959, quoting PVA § 1, 43 Stat at 1112, codified as amended at 46 USC § 31102.

[139] See *Eastern*, 187 F2d at 958–59.

damages were not caused by the vessel. The vessel was the thing damaged by the government's breach: it did not come back properly repaired. Thus, even if the PVA did allow contract damages, *this particular claim* would have fallen under the Tucker Act.

Though it is unclear which holding the First Circuit endorsed, this case does clarify an important distinction. Even if the PVA does allow recovery for contract damages, some contracts that fall under admiralty jurisdiction could nonetheless fall outside the PVA's waiver of immunity.

B. Reading Damages Broadly

Some courts hold that the PVA accommodates contractual claims. On this side of the circuit split, the Ninth Circuit and the Court of Federal Claims[140] take the position that the PVA allows claims for contractual damages.

1. The Ninth Circuit.

The Ninth Circuit first addressed the question in *Thomason v United States*,[141] a case decided before the 1960 SAA Amendment. In *Thomason*, plaintiffs previously employed by the United States as tugboat seamen alleged that the United States owed them overtime compensation and bonuses.[142] Citing the Supreme Court case *Canadian Aviator*, the *Thomason* court held that "damages caused by a public vessel" could include those contract damages for which a private ship would be held "legally responsible as a juristic person under the customary legal terminology of the admiralty law."[143] This included contract damages "aris[ing] out of the *possession or operation* of [a] ship."[144] In coming to this conclusion, the Ninth Circuit relied on the two purposes of the PVA that the Supreme Court has recognized. The court also asserted that vessels *can* cause contract damages for two reasons: First, "damages" is a term commonly used in both tort and contract law.[145] Second, though breaches of

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[140] The Court of Federal Claims has ruled on this issue twice. The second case was *Continental Casualty*, discussed in Part II.A.2, in which the court expressly disavowed its earlier view.

[141] 184 F2d 105 (9th Cir 1950).

[142] Id at 106.

[143] Id at 107–08.

[144] Id (emphasis added).

[145] *Thomason*, 184 F2d at 107.

contract *literally* are caused by persons, admiralty law personifies vessels to allow in rem contract claims against vessels themselves.[146] Since in rem claims for tort or contract damages do not ordinarily require a ship to have physically caused damage,[147] the PVA should be read in a way that recognizes that vessels can legally contract and therefore *cause* damages by breaching those contracts.[148]

After addressing and rejecting this argument, the Ninth Circuit noted the PVA's two purposes (other than providing a remedy for collision damages) recognized by the Supreme Court in *American Stevedores* and *Canadian Aviator*. In *Canadian Aviator*, the Court stated that the PVA intended "to impose on the United States the same liability (apart from seizure or arrest under a libel in rem) as is imposed by the admiralty law on the private shipowner."[149] The Ninth Circuit similarly cited *American Stevedores* for the proposition that Congress intended the PVA and SAA to be "complementary jurisdictional statutes" that would provide a uniform forum for admiralty claims against both merchant and public vessels.[150] The Ninth Circuit reasoned that excluding contract damages from the PVA would violate both of these purposes. It would violate public-private equality by holding the government to a different standard than private shipowners and providing different fora for suits against merchant vessels than public vessels.[151]

The Ninth Circuit recently reiterated its *Thomason* holding in *Tobar v United States*:[152] "[D]amages caused by a public vessel" means "*all* tort and contract claims 'aris[ing] out of the possession or operation of [a government-owned] ship.'"[153] Though the second part of this statement was unnecessary to decide the case, this dicta suggests that the Ninth Circuit, unlike the Eleventh Circuit, does not believe that the 1960 SAA Amendment changed the PVA's scope.

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146 *Canadian Aviator*, 324 US at 224.

147 See *Thomason*, 184 F2d at 107.

148 See, for example, *Oxford Paper Co v The Nidarholm*, 282 US 681, 684 (1931); 46 USC § 30505(a) ("[T]he liability of the owner of a vessel for any claim, debt, or liability . . . shall not exceed the value of the vessel and pending freight.").

149 *Thomason*, 184 F2d at 107, quoting *Canadian Aviator*, 324 US at 228.

150 *Thomason*, 184 F2d at 107, citing *American Stevedores*, 330 US at 453. See also notes 89–92 and accompanying text.

151 *Thomason*, 184 F2d at 107.

152 639 F3d 1191 (9th Cir 2011).

153 Id at 1198, quoting PVA § 1, 43 Stat at 1112, codified as amended at 46 USC § 31102 and *Thomason*, 184 F2d at 107.

2. The Court of Federal Claims.

One Court of Federal Claims decision (later disavowed by the same court[154]), echoes the Ninth Circuit's outcome. In *Sinclair Refining Co v United States*,[155] the owner of a tanker claimed that the United States breached its bareboat charter contract by failing to pay for war risk insurance policies, charter hire, wages, and subsistence.[156] The court held that the PVA's scope should include contract damages because the causation language refers to the ship as a juristic person and because Congress intended the SAA and PVA to provide the same relief.[157]

The Court of Federal Claims also quoted the Supreme Court's *Canadian Aviator* decision as support for the proposition that "caused by a public vessel" is an example of traditional admiralty terminology, which personifies vessels. The court suggested that the statute's text did not rule out vessels from the category of "juristic person[s]" capable of causing harm.[158] But it still found that the term "damages" was ambiguous because it could refer to torts, contracts, or both. The court resolved the ambiguity by looking to the PVA's purpose, as determined by the Supreme Court. The Court of Federal Claims cited *Calmar Steamship Corp v United States*[159]—the Supreme Court case explaining that Congress enacted the PVA and the SAA to ensure that all government vessels were treated as similarly as possible.[160] *Calmar* held that the SAA applied equally to government-owned merchant vessels and government-chartered merchant vessels because seizure of any government vessel is likely to be equally inconvenient for the government.[161] Though *Calmar* was a case about the scope of the SAA (not the PVA),[162] the Court of Federal Claims in *Sinclair* was nonetheless convinced that Congress passed the PVA to provide the same relief against public

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154 See *Continental Casualty*, 156 F Supp at 946. Though *Sinclair*'s holding was disavowed by the same court at a later date, its reasoning still stands. Nevertheless, the arguments put forth in this Comment do not rely on *Sinclair* for their validity.

155 124 F Supp 628 (Ct Cl 1954).

156 Id at 630.

157 See id at 633–34.

158 Id at 631–32.

159 345 US 446 (1953).

160 See id at 455–56. The Court rejected the "cargo test" of jurisdiction, which would have dictated that claims against US-owned vessels be heard in district courts but US-chartered vessels be heard in the Court of Federal Claims. Id at 451–52.

161 See id at 454–56.

162 See id at 456.

vessels and US merchant vessels.[163] The *Sinclair* court read the "equivocal [damages] language . . . so as to secure the most harmonious results."[164] Since the SAA indisputably allowed contract claims against government vessels to be brought in district courts, the court said, the PVA should allow them as well.[165]

But though the Ninth Circuit and some other courts have read "damages" broadly for policy or historical reasons, no court has articulated a textual basis for why an ambiguity in a waiver of sovereign immunity ought to be read so broadly. This Comment supplies a textual basis to justify the PVA interpretation endorsed by the Ninth Circuit and a prior panel of the Court of Federal Claims.

III. THE REMEDIES FRAMEWORK: ADMIRALTY JURISDICTION AND PRIOR WAIVERS OF SOVEREIGN IMMUNITY

Perhaps the most forgotten but also the most important provision in the PVA is its Default Provision. The PVA's Default Provision requires that the PVA adopt the provisions of the SAA unless those provisions are *inconsistent with* the PVA.[166] The current version of the Default Provision states, "A civil action under this chapter is subject to the provisions of [the SAA] except to the extent inconsistent with this chapter."[167] Because of the Default Provision, the Supreme Court has always held that claims allowed by the SAA should also be allowed under the PVA unless the PVA's text cannot support such a reading.[168] Because the Default Provision has been treated as controlling in most cases, any attempt to resolve an ambiguity in the PVA ought to begin by asking whether the PVA's provision would

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163 *Sinclair*, 124 F Supp at 632.

164 Id at 633, quoting *Calmar*, 345 US at 456 n 8.

165 *Sinclair*, 124 F Supp at 633–34.

166 PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31103.

167 PVA Recodification, 120 Stat at 1521, codified at 46 USC § 31103.

168 The strongest case supporting this proposition is *Canadian Aviator*, in which the Supreme Court found that the PVA allowed in rem suits against public vessels even though the PVA never once mentions in rem suits—only in personam ones. See *Canadian Aviator*, 324 US at 226–27.

The Supreme Court's treatment of the Default Provision is so strong that it overcomes the canons that traditionally apply to waivers of sovereign immunity. See Part I.B. Usually, waivers are construed narrowly when their scope is in question. See notes 48–51. But here, the Court has read in rem suits into an act that never unequivocally allows them and never even *mentions* them. The only way to explain this broad reading of the PVA is to conclude that the Court held that the PVA and the SAA are two parts of the same act. This argument is further pursued in notes 180–95 and accompanying text.

allow the SAA's provisions and scope to apply. Though this is indisputably the case, no circuit court addressing the question of contract damages under the PVA has so much as mentioned the Default Provision as part of its reasoning. This Part argues that the PVA's Default Provision *requires* the PVA to recognize contract damages because the SAA allows them and because no PVA provision is inconsistent with this reading.

To demonstrate that the Default Provision should apply, Part III.A.1 explains that the PVA ought to be read as a waiver for all admiralty *claims*. Part III.A.2 notes how the PVA then restricts which admiralty claims can be heard by specifying the types of remedies available. Part III.A.3 explains that vessels may be held liable for both torts and breaches of contract and, thus, treated as "causing" these damages. Then, in Part III.A.4, this Comment addresses how the canons of construction that are applicable to waivers of sovereign immunity do not conflict with reading "damages" to include contract damages. Part III.A.5 responds to arguments put forth by some courts that reading "damages" broadly is internally inconsistent or externally prohibited. And, to bring things up to date, Part III.A.6 describes why the PVA should be read the same way today as it was before the 1960 SAA Amendment.

Turning from the micro to the macro, Part III.B explains how this Comment's solution is true to original congressional intent and consistent with the nature of admiralty law. Part III.B suggests that reading contract damages into the PVA comports with the historical events that spurred the passage of the two Acts. On a more abstract level, it addresses the unique character of admiralty jurisdiction in American law and rationalizes Congress's choice to limit remedies rather than claims.

Part III.C delves into the practical details of the solution, explaining that the PVA only allows some, not all, contractual admiralty claims. This Comment's solution sharpens the Ninth Circuit's conclusion by defining which contracts are "caused by public vessels" and by providing a textual basis for such a broad reading in a waiver of sovereign immunity.

A. Text and Structure of the Public Vessels Act

In determining the scope of the waiver, this Section begins by determining whether the PVA would have allowed contractual claims at the time of its passage. It then discusses whether

the PVA continues to allow contractual claims.[169] The 1925 PVA waiver stated,

> [A] libel in personam in admiralty may be brought against the United States . . .
>
> [(1)] for damages caused by a public vessel of the United States, and
>
> [(2)] for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.[170]

1. Claims allowed: All admiralty causes of action brought in personam.

The waiver's plain meaning can be understood by breaking down each of the statute's parts and explaining their meaning under admiralty law. These parts are: (1) libel, (2) in personam, and (3) in admiralty.

First, a libel is simply a cause of action. It could refer to a tort or contract claim, but it need not be limited to those causes of action. In the current version of the PVA, the word "libel" has been changed to "[a] civil action."[171] But the statute's meaning is unchanged despite the text's modernization.

Second, in personam actions cannot be brought against vessels—they must be brought against persons. In personam claims allow a plaintiff to sue for and recover his entire loss. Contrast this with in rem actions, in which recovery is limited to the value of the vessel that caused the harm. In this way, the PVA provides for suits against the government in personam but not against the government's vessels in rem.

Last, admiralty jurisdiction permits some common law claims, such as tort and contract claims, but it also includes causes of action unique to admiralty, such as maintenance and cure, salvage, and towage.

Thus, the PVA's waiver for "libel in personam in admiralty" allows any and all causes of action cognizable in admiralty court to be brought against the federal government in personam. This Comment refers to this as a broad waiver of sovereign immunity

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169 Consider *Lamie v United States Trustee*, 540 US 526, 534 (2004).

170 PVA § 1, 43 Stat at 1112, codified as amended at 46 USC § 31102.

171 PVA Recodification, 120 Stat at 1521, codified at 46 USC § 31102(a).

in admiralty, but it also includes some textual limits to the PVA's waiver.

2. Remedies allowed: "Damages caused by" and "compensation for."

The PVA limits the government's liability by enumerating what types of remedies are permitted. Its text allows only two types of remedies: damages and other "compensation."[172]

The difference between damages and compensation lies in the distinction between legal and equitable remedies. Damages is a legal remedy that is available in tort and breach of contract cases.[173] In comparison, "compensation" in the PVA refers to equitable monetary remedies for salvage and towage claims.[174] The PVA states that damages are available but immediately limits damages to those that are "caused by a public vessel."[175] This language limits certain claims based on the party responsible for the damages.

The circuit split that this Comment describes partially stems from competing interpretations of what types of damages vessels are capable of causing. Must the vessel be the physical cause of the damages or merely legally responsible for the damages? This Comment argues the latter. The "caused by" language refers to vessels being legally responsible for the damages in question. Whether the vessel is legally responsible ultimately hinges on whether, if the vessel were privately owned, the injured party could have brought a suit against the vessel in rem.

3. Vessel "causation" as legal responsibility.

In the context of the PVA, damages can be "caused by" a public vessel without being physically caused by the vessel. This is because, in admiralty, vessels are legal persons. Vessels, like

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172 PVA Recodification, 120 Stat at 1521, codified at 46 USC § 31102(a)(1)–(2).

173 See, for example, *Mertens v Hewitt Associates*, 508 US 248, 256 (1993) (noting that damages is a legal remedy that cannot fall under the provision for "equitable relief" in the text of the Employee Retirement Income Security Act).

174 A monetary remedy that is not damages is typically an equitable remedy. See *Bowen v Massachusetts*, 487 US 879, 894–95 (1988), quoting *Maryland Department of Human Resources v Department of Health and Human Services*, 763 F2d 1441, 1446 (DC Cir 1985), quoting Dan B. Dobbs, *Handbook on the Law of Remedies* 135 (West 1973). See also *Chauffeurs, Teamsters and Helpers Local No. 391 v Terry*, 494 US 558, 570–71 (1990). For a discussion of the equity relief available for salvage and towage, see text accompanying notes 209–21.

175 PVA Recodification, 120 Stat at 1521, codified at 46 USC § 31102(a)(1).

corporations, are liable for their actions.[176] Vessels may be sued in tort not only for collisions they cause but also for the negligent acts of their crew.[177] Similarly, the law allows vessels to contract, and when a vessel breaches its contract, it faces liability for damages caused by its breach.[178]

In all of these cases, the ship can be the legal cause of the damage, irrespective of whether the damage is caused by the physical ship, its crew, or its owner, and whether the damage caused is physical or monetary.

Since the PVA allows all admiralty claims,[179] plaintiffs should be able to sue for any damages that a vessel "causes." A vessel causes those damages for which it could be liable in rem if it were a private vessel, regardless of whether the claim is in tort or contract.

4. The Default Provision: The SAA's scope controls unless inconsistent with the PVA.

Though it is possible to read the PVA's provision allowing "damages" broadly,[180] the text on its own does not require this reading. One could easily understand "damages caused by a public vessel" to mean *physical* damages.[181] Both the broad and narrow readings of damages are consistent with the text in the waiver of immunity. "Damages," by itself, is ambiguous. But canons of statutory construction applicable to waivers of immunity assist with the interpretation of this term. As noted earlier,

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176 See Schoenbaum, *Admiralty and Maritime Law* § 19-3 at 1069 (cited in note 36). See also *Canadian Aviator*, 324 US at 224.

177 See, for example, *American Stevedores*, 330 US at 449.

178 See, for example, *Bulkley v Naumkeag Steam Cotton Co*, 65 US (24 How) 386, 392 (1860) ("The Edwin") (describing the requirements for a vessel to contract and be liable under that contract). For a vessel to be liable for its contract, the contract must "be[] made by the master in the course of the usual employment of the vessel, and [be made] in respect to [that] which [the master] is the general agent of the owner." Id. The vessel is liable for damages in the case of breach because "the settled principles of admiralty law [ ] bind[] the vessel to the cargo, and the cargo to the vessel, for the performance of the undertaking [such] that the ship . . . is liable for the loss of . . . any [ ] portion of the cargo." Id.

179 See Part III.A.1.

180 See Part II.B.

181 Of course, there are problems with the narrow reading as well. One of these problems concerns the use of the word "damages" instead of "damage." If Congress meant to grant plaintiffs the right to sue only in cases for which there are physical damages, why did Congress not write "*damage* caused by a public vessel" instead of "*damages* caused by a public vessel." Vessels cause damage. The remedy for the damage a vessel causes is damages.

these canons of construction require that waivers of immunity be unequivocal[182] and that ambiguous waivers be construed narrowly against waiver.[183] On their face, and in the face of any ambiguity, these canons of construction seem to mandate a narrow reading of damages.[184]

At this juncture, it is important to recall that the PVA has more provisions than just the waiver of immunity. The Default Provision also applies. As noted earlier, the Default Provision requires that the PVA adhere to the provisions of the SAA so long as they are not inconsistent with the PVA. The original Default Provision stated, "[S]uits [under this act] shall be subject to and proceed in accordance with the provisions of . . . [the SAA] or any amendment thereof, in so far as the same are not inconsistent herewith."[185] Since the beginning, the Supreme Court has treated most SAA provisions as "consistent" with the PVA, effectively restricting the canon of construction that provides immunity waivers cannot be read into a statute when they do not unequivocally appear in the statute's text.[186] This Comment does not accuse the Court of violating its own canons. Instead, this Comment argues that the Default Provision adds the text of the SAA to the PVA. The PVA contains all of its own provisions plus every SAA provision unless the SAA contradicts a term in the PVA.[187] These SAA provisions even include claims that appear under the SAA but that the PVA never discusses.

Canadian Aviator is perhaps the strongest example of the Default Provision's expansion of PVA coverage. *Canadian Aviator* is a tort case in which the Supreme Court held that the PVA allowed in rem suits against public vessels even though the PVA's text says nothing about in rem suits.[188] The PVA mentions only in personam suits. Nonetheless, the Court held that the PVA granted in rem jurisdiction for suits against public vessels because the SAA had granted in rem jurisdiction for suits against merchant vessels.[189] The Default Provision explains this outcome, but the Court does not acknowledge the Default Provision as the source of its decision. Because the Default Provision's

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182 See *United States v Nordic Village, Inc*, 503 US 30, 33–34 (1992).

183 See id.

184 See, for example, *Lane v Pena*, 518 US 187, 192 (1996).

185 PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31103.

186 See *Nordic Village*, 503 US at 33–34.

187 See PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31103.

188 *Canadian Aviator*, 324 US at 227.

189 Id at 226–27.

text requires the adoption of SAA terms unless they are inconsistent with preexisting PVA terms,[190] the *Canadian Aviator* holding comports with the unequivocal canon for waivers of sovereign immunity.[191] Presumably, the *Canadian Aviator* holding also permits other claims that the SAA allows to be entertained under the PVA, even when the PVA is ambiguous or silent on that particular topic.

Canadian Aviator also used the Default Provision to provide remedies in a greater number of cases by reading "damages" broadly when the term itself was ambiguous. The narrowest reading of "damages caused by a public vessel" would have been "damages caused by a collision with a public vessel." But the *Canadian Aviator* Court held that a vessel operator's negligence in guiding another ship counted as "damages caused by a public vessel" under the PVA.[192] Here the operator caused the damage when he misguided the second vessel, causing it to run into a submerged wreck; the two boats never collided. Thus, the Court held that public vessels could be liable for a broad category of damages, even those caused by a crewmember. Similarly, in *American Stevedores*, a public vessel was held liable for noncollision damages when a longshoreman sued for personal injuries caused by a negligently secured beam. Again, the cause was vessel personnel, not the vessel. In coming to the conclusion that the PVA allowed these types of tort damages, the Court noted Congress's intent to make the PVA and the SAA "complementary jurisdictional statutes" that provided a uniform forum for cases against both government merchant vessels and public vessels.[193]

Both *Canadian Aviator* and *American Stevedores* indicate that the Default Provision extends to both ambiguous remedies (like the term "damages") and silence as to claims (such as allowing in rem libels).[194] The Court has consistently held that the scope of the SAA controls the PVA so long as it does not contradict an existing PVA term. Thus, unless an inconsistency can be shown, the PVA must allow contract damages since the SAA does.[195] The following Subsection entertains and rebuts

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190 PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31103.

191 See, for example, *Ali v Federal Bureau of Prisons*, 552 US 214, 218–19 (2008) (reading a waiver of immunity more broadly when that makes more sense with the statute's text).

192 *Canadian Aviator*, 324 US at 218.

193 *Thomason*, 184 F2d at 107, citing *American Stevedores*, 330 US at 452–53, quoting S Rep No 68-941 at 1 (cited in note 109) and HR Rep No 68-913 at 1 (cited in note 109).

194 See *Canadian Aviator*, 324 US at 227; *American Stevedores*, 330 US at 452–53.

195 See, for example, *Sinclair*, 124 F Supp 634.

the argument that a broad reading of "damages caused by" is inconsistent with express PVA terms.

On a practical note, reading PVA "damages" broadly actually serves the government's interest in narrowly construing waivers of immunity. It is in the government's interest because the PVA restricts the amount of damages for which the US government is liable since PVA remedies are limited in more ways than the SAA's remedies.[196] If more cases fall under the PVA, the government has to pay less in damages in any given case and fewer suits may be brought against the government (because of the Reciprocity Provision). Therefore, even though it might seem as though a broad reading of the waiver of immunity would be contrary to the government's interest, it is actually in the government's interest to read the PVA waiver broadly because the PVA (in comparison to the SAA) limits the government's liability.

5. No inconsistencies: Rebutting superfluity and other objections.

Two courts have concluded that allowing contract damages under the PVA is inconsistent with its text because such an interpretation of the word "damages" would cause superfluity in the statute.[197] Their reasoning amounts to the following: because the statute already specifically allows certain contract claims, a reading of "damages" that includes contractual damages would make the specific grants (salvage and towage) unnecessary. This Comment argues the opposite. The better reading of the statute is as a waiver of all admiralty claims that is subject to limited remedies. When read this way, allowing all contract damages caused by a public vessel is neither internally superfluous (within the PVA itself) nor externally superfluous (with other waivers of sovereign immunity).

With regard to the PVA's language, two types of monetary remedies are available for in personam suits: damages and compensation. Under the PVA, damages—a legal remedy—are available when the public vessel caused them and, therefore, would be liable. The PVA limits "compensation" remedies to any equitable remedy available under a claim for salvage or towage. The statute sensibly separates salvage and towage from "damages" and categorizes them under "compensation" because

196 For the limitations to recovery in the PVA, see notes 17–20 and accompanying text.

197 See notes 102–10, 128 and accompanying text.

salvage claims never result in a damages remedy, and towage claims *need not* result in a damages remedy.

A claim for salvage arises in admiralty when a plaintiff becomes "a salvor of imperiled property on navigable waters[, thus] gain[ing] a right of compensation from the owner."[198] For example, if a ship is in danger and another ship helps save the imperiled ship's property, the act of saving imperiled property gives rise to a "right to a reward."[199] Unlike contracts, no prior agreement is necessary for a salvage reward. The remedy is equitable.[200] In order to receive an award for "pure" salvage,[201] the "aiding" ship must prove, "1. A marine peril. 2. Service voluntarily rendered when not required as an existing duty or from a special contract. 3. Success in whole or in part, or that the service rendered contributed to such success."[202]

The amount rewarded is determined by a host of factors, including: the time, labor, skill, and energy expended in saving the property; the value of the property saved and the property risked by the salvor; and the gravity of the danger from which the property was saved.[203] Awards are even granted in cases of contract salvage, which occurs when parties agree ahead of time for a salvor to use best efforts to save property.[204] In the case of contract salvage, predetermined amounts that are paid are still considered an award.[205] Since contractual salvage never gives rise to a damages remedy, the PVA's drafters had to include it under the "compensation" provision to allow such suits at all.[206]

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198 Schoenbaum, *Admiralty and Maritime Law* § 14-1 at 831 (cited in note 36).

199 Id at § 14-1 at 832.

200 See *B.V. Bureau Wijsmuller v United States*, 702 F2d 333, 337 (2d Cir 1983); *The "Sabine,"* 101 US 384, 386 (1879); *Columbus–America Discovery Group v Atlantic Mutual Ins Co*, 974 F2d 450, 468 (4th Cir 1992). See also Schoenbaum, *Admiralty and Maritime Law* § 14-1 at 832–33 (cited in note 36); Mark R. Baumgartner, Note, *Federal Jurisdiction over State Claims to Shipwrecks: Should the Eleventh Amendment Go Down with the Ship?*, 8 Wm & Mary Bill Rts J 469, 473 (2000).

201 Schoenbaum, *Admiralty and Maritime Law* § 14-1 at 833 (cited in note 36).

202 *The "Sabine,"* 101 US at 384. See also *Faneuil Advisors, Inc v O/S Sea Hawk, (O.N. 559409)*, 50 F3d 88, 92 (1st Cir 1995).

203 See Schoenbaum, *Admiralty and Maritime Law* § 14-5 at 839–40 (cited in note 36).

204 See id at § 14-6 at 843.

205 So long as the contract was fairly bargained for, courts will enforce the agreed-upon reward. Id.

206 If the PVA had merely used "salvage" and not included "contract salvage," courts likely would have read the word "salvage" to mean pure salvage, which is its meaning under maritime law. Consider id at § 14-1 at 831–33. This is especially the case here, since waivers are construed narrowly.

Like salvage, a claim for towage can give rise to equitable remedies. Unlike salvage, however, towage might also give rise to legal remedies. A towage claim arises when one vessel aids another in moving from place to place.[207] Towage is often referred to as a "near miss" for salvage claims. That is, if a vessel aided by a salvor vessel was not in "marine peril" at the time of the aid, the aiding vessel is not entitled to a salvage award.[208] But the aiding ship may recover, albeit less, by bringing a towage claim. When towage occurs without a contract, the towage claimant recovers in quantum meruit,[209] which is equitable. A towage claim that results in quantum meruit compensation would not be considered damages. But some towage claims would qualify for a damages remedy under the PVA, such as when the towage occurred as a result of a prior contract.[210] Since damages for breach of contract are always legal, expressly allowing compensation for towage does not cause a superfluity. A claim for breach of towage *contract* fits under the damages provision. A claim in quantum meruit when no prior towage contract existed fits under compensation. In order to avoid the uneven result that a remedy for salvage would exist, but not for towage if there were no preexisting contract, Congress included (noncontract) towage in the second part of the statute. Since the remedies for the two types of towage do not overlap, there is no danger of superfluity by allowing contractual damages under the PVA.

Other provisions in the PVA also support the conclusion that this interpretation of the statute is internally consistent. For example, the compensation provision mentions "contract salvage" but does not specify what kind of towage may be compensated; it just says "towage" without other description. Because salvage remedies, contractual or otherwise, are always

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[207] See Schoenbaum, *Admiralty and Maritime Law* § 10-1 at 717 (cited in note 36); *Stevens v The White City*, 285 US 195, 200 (1932).

[208] See Schoenbaum, *Admiralty and Maritime Law* § 10-1 at 720 (cited in note 36). See, for example, *American Home Assurance Co v L & L Marine Service, Inc*, 875 F2d 1351, 1355 (8th Cir 1989) (finding that what both parties had believed to be salvage was actually a towage operation because the marine peril had subsided).

[209] See, for example, *The Blackwall*, 77 US (10 Wall) 1, 6 (1869); *United States v Metzger Towing, Inc*, 910 F2d 775, 781 (11th Cir 1990) (noting that, although quasi-contractual recovery for unjust enrichment is available for towage, the circumstances of this case did not merit this remedy).

[210] For an example of a contract for towage, see *Metzger Towing*, 910 F2d at 776–78; *Bisso v Inland Waterways Corp*, 349 US 85 (1955); Schoenbaum, *Admiralty and Maritime Law* § 10-2 at 720–21 (cited in note 36).

equitable, mentioning "contract salvage" under the "compensation" provision makes intuitive sense. The omission of "contract towage" under the compensation portion demonstrates Congress's realization that the remedy for breach of a towage contract is damages.

But some courts maintain that, even if the PVA is not internally superfluous, allowing contract damages under the PVA would be externally superfluous because immunity had already been waived by the Tucker Act. These courts claim that this interpretation violates the rule that implied repeals are disfavored.[211] Though it is true that the PVA does not purport to repeal any earlier acts, the SAA expressly does.[212] At the end of the SAA, it repeals "the provisions of all other Acts inconsistent herewith."[213] The Court has interpreted this language broadly. In 1930, for example, the Court held that the SAA repealed not only the Shipping Act[214] but also any Tucker Act provisions for which the SAA supplied a remedy.[215] The Court already treats the two Acts as "complementary jurisdictional statutes" as often as possible, and the Default Provision converts the SAA's repeal into an addendum to the PVA.[216] Since the PVA incorporates the SAA's repeal, the fact that the Tucker Act previously allowed contractual damages does not prevent the PVA from doing so.

6. Unchanged: The 1960 SAA Amendment did not change the PVA's scope.

Of course, even if there had been PVA jurisdiction over contract claims for damages when the PVA was passed in 1925, this does not necessarily mean that the PVA continues to allow them. Statutes can be amended; jurisdiction can be modified. In the PVA's case, this is doubly concerning because of the Default

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211 See note 131 and accompanying text.

212 The SAA "repeals all inconsistent provisions of other Acts," *Johnson v U. S. Shipping Board Emergency Fleet Corp*, 280 US 320, 326 (1930), quoting *United States Shipping Board Emergency Fleet Corp v Rosenberg Brothers & Co*, 276 US 202, 213 (1928), citing SAA § 13, 41 Stat at 528, even though the SAA does not expressly repeal any statute by name. Consider *Miccosukee Tribe of Indians of Florida v United States Army Corps of Engineers*, 619 F3d 1289, 1297 (11th Cir 2010) ("To effect an explicit repeal, a statute must identify the repealed statute. If it does not, a statute may still sometimes effect a repeal through the use of a 'general repealing clause.' One example of such a clause is '[n]otwithstanding any other Federal law.'") (citations omitted).

213 SAA § 13, 41 Stat at 528.

214 See *Johnson*, 280 US at 325–26.

215 See id at 327.

216 *Thomason*, 184 F2d at 107, citing *American Stevedores*, 330 US at 453.

Provision. The Default Provision states that the PVA not only adopts the terms of the original SAA but also "any amendment thereof."[217] Since the SAA underwent an important structural amendment in 1960,[218] it is important to explain why this amendment leaves the PVA's scope unchanged.

As discussed in Part II, the SAA was amended in 1960, when it became the umbrella statute under which any admiralty suit could be brought against the government. The SAA no longer limited suits to those against merchant vessels. This Amendment created uncertainty about whether the SAA had repealed the PVA. The Court eventually considered whether the 1960 SAA Amendment repealed the PVA in *Continental Tuna*. The Court held that the 1960 SAA Amendment did not change the PVA's previous scope since any repeal would have been an implied one, and thus disfavored. Instead, the Court held that the PVA provided the exclusive waiver of immunity for any claim that would have previously fallen under the PVA's provisions.[219] Because of this holding, this Comment treats the 1960 SAA Amendment as a nonissue. If the PVA waived contractual damages in 1925, which this Comment argues it did, then it would continue to do so today.

B. The History of Admiralty Waivers

In retrospect, it should be unsurprising that Congress chose to pass a statute that limited remedies rather than types of claims (like torts or contracts). It is historically undisputed that Congress passed the SAA extremely quickly after the Supreme Court's 1919 decision in *The Lake Monroe*. That case held that the Shipping Act allowed "seizure, attachment, or arrest" of merchant vessels owned by the government.[220] In response to this holding, Congress passed the SAA the next year. And in the SAA's very first section, it provided that "no vessel owned by the United States . . . shall . . . be subject to arrest or seizure."[221] The SAA was understandably preoccupied with preventing one remedy, seizure, because it is unlawful to move seized vessels while a lien on the seized vessel exists. Seizure would be problematic

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217 PVA § 2, 43 Stat at 1112, codified as amended at 46 USC § 31103.

218 See 1960 SAA Amendment, 74 Stat at 912, codified as amended at 46 USC § 30903(a).

219 *Continental Tuna*, 425 US at 181.

220 *The Lake Monroe*, 250 US at 248–49, 254–55.

221 SAA § 1, 41 Stat at 525, codified as amended at 46 USC § 30908.

for a government at war, which the United States was during the 1910s. Even though the Shipping Act only allowed suits against the government's merchant vessels, the government had a strong interest in continuing to allow its ships to move goods about the world. Thus, the SAA's response was not to disallow any claim but to deny the attachment of government vessels. Through the Default Provision, the PVA adopted the SAA's singular purpose of preventing the seizure remedy.

On a macro level, it also made sense for Congress to waive sovereign immunity in a way that allowed all admiralty claims and restricted only remedies. This is because many of the traditional causes of action in admiralty law do not fit neatly into the categories of contracts or torts. It would have been difficult to enumerate all causes of action allowed. Recognizing this, Congress simplified the statute by allowing all claims and restricting only remedies. In this way, reading the PVA and SAA as restricting remedies is much more in tune with the realities of admiralty law.

C. Practical Consequences: Delimiting and Distinguishing the Solution

1. Limited by vessel liability in rem.

Even though "damages" includes contract damages, the PVA does not provide a remedy for the breach of *any* admiralty contract because the PVA still limits recovery to damages caused by public vessels. That is, a vessel itself must be liable before the PVA allows a suit against the government. In admiralty, vessels are only liable for claims that create a maritime lien.[222] Any suit based on a maritime lien may be brought in rem against the vessel because the vessel caused the damages. The "caused by" language in the PVA limits the damages remedy to suits that *could* be brought against a vessel in rem if that vessel were privately owned. These suits may only be brought against the government in personam, but they must be suits in which the vessel itself is liable.

The "caused by" restriction also excludes punitive damages. Punitive damages are not available for in rem suits because maritime liens can only be used to satisfy judgments for actual

[222] See Schoenbaum, *Admiralty and Maritime Law* § 19-3 at 1068–69 (cited in note 36).

damages.[223] Punitive damages are not actual damages because they do not reflect an injury's extent, only its reprehensibility.[224] Of course, in terms of contractual suits, a punitive damages bar makes little difference because punitive damages are seldom awarded for breach of contract,[225] but this remains an important restriction for tort damages under the PVA.

A second limitation is that the PVA does not allow damages for a breach of contract when the subject of the contract is the possession of the vessel itself. When the contract is for the possession of a vessel, the vessel is not a party to the contract. A vessel cannot contract for its own possession. An example of this is the First Circuit case, *Eastern*. In *Eastern*, the government chartered a vessel from a private party but failed to return the boat in the condition stipulated by the contract.[226] Since the vessel itself was not a party to the contract, it would have been impossible to bring suit against the United States for contractual "damages caused by a public vessel." The vessel did not cause the damages; the government did. Because the United States was not acting as the owner of the vessel when it made the contract, the vessel could not be liable in rem, and therefore any contractual damages caused by a breach of the bareboat charter could not have been caused by the vessel.

2. The definition of "caused by."

When the Ninth Circuit addressed the same question that this Comment does, it stated that the PVA should allow all tort or contract claims for which the vessel would be liable as a juristic person,[227] defining this as "*all* tort and contract claims 'aris[ing] out of the possession or operation of [a public vessel].'"[228] The Ninth Circuit's first assertion is correct. Its second is not. It cannot be the case that *all* claims that arise out of the possession or operation of a vessel count as "caused by" a public vessel. The *Eastern* case is, again, the best example. In *Eastern*, the government was in possession of a vessel, and this possession caused

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223 See *The William H. Bailey*, 103 F 799, 799–800 (D Conn 1900).

224 See id at 800; *Hunley v Ace Maritime Corp*, 927 F2d 493, 496 (9th Cir 1991), citing *The William H. Bailey*, 103 F at 800.

225 See Restatement (Second) of Contracts § 355 (1979). See also *Barnes v Gorman*, 536 US 181, 187–88 (2002).

226 *Eastern*, 187 F2d at 958–59.

227 *Thomason*, 184 F2d at 107–08.

228 *Tobar*, 639 F3d at 1198 (first alteration in original), quoting *Thomason*, 184 F2d at 107–08.

damages when the boat was returned in a condition that did not measure up to the original, agreed-upon condition.[229] But, as noted in Part III.C.1, the vessel could not be liable as a juristic person. A better way to rationalize the Ninth Circuit's conclusion is to say that the PVA allows the government to be sued in any case in which the vessel used by the government could have been liable in rem for damages if it had been a private vessel.

This Comment comes to the same conclusion as the Ninth Circuit, but it uses a different approach: the Default Provision. The term "damages" in the PVA should be read broadly to allow both tort and contract damages. To read "damages" as including contract damages is not superfluous because the other PVA provision discussing contracts concerns equitable relief, not legal relief. Neither is the broad reading a concern for the narrow construction required by statutes waiving sovereign immunity. Statutes that waive sovereign immunity are required to be read narrowly, but only as narrowly as their text allows. Because the Default Provision in the PVA requires the PVA to adopt all provisions of the SAA unless they are inconsistent with the PVA's text, the PVA adopts the 1920 SAA treatment of contractual claims, which allowed them. Adopting the SAA's treatment of contract claims is neither internally superfluous nor externally inconsistent with the canons of construction governing waivers of sovereign immunity. The PVA term "damages" refers to contract damages as well as tort damages, so long as the government vessel in question could be sued in rem if it were a private vessel.

CONCLUSION

Though waivers of sovereign immunity are normally construed narrowly, the waiver of sovereign immunity under the PVA should allow the same claims as the SAA so long as the SAA's provisions are not inconsistent with the PVA's. Because the SAA allows contract damages, the PVA also should allow contract damages because this interpretation does not contradict any PVA provision. The PVA's Default Provision transforms what would otherwise be a broad reading of the damages waiver into a waiver that is no broader than the PVA's text requires.

Reading the PVA's waiver broadly fits nicely into the way the two statutes work together today. Waivers of sovereign

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[229] *Eastern*, 187 F2d at 958.

immunity should be construed narrowly, in favor of the government. Under the current PVA and SAA, any claim against the government in admiralty that does not fit under the PVA can be brought under the SAA. Because the PVA subjects plaintiffs suing the government to tighter restrictions than the SAA does, the more broadly the waiver of sovereign immunity under the PVA, the more restrictive the government's waiver of sovereign immunity becomes. It creates the kind of narrow waiver that canons of statutory construction prefer.