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Jefferson A. Holt

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## SALVAGING A CAPSIZED STATUTE: PUTTING THE PUBLIC VESSELS ACT BACK ON COURSE

Jefferson A. Holt\*

### INTRODUCTION

*“Originally, the words of the Public Vessels Act seemed to mean what they said.”<sup>1</sup>*

The Public Vessels Act (PVA) waives federal sovereign immunity for, among other things, “damages caused by a public vessel of the United States.”<sup>2</sup> At first sight, these words seem clear enough. But, under a deceptively calm surface awaits a riptide of uncertainty and tangled history. Since 1916,<sup>3</sup> Congress has enacted various statutes intended to waive sovereign immunity in the admiralty context.<sup>4</sup> As a result, there is significant and confusing overlap between the extant statutes.<sup>5</sup> On account of such overlap, the Maritime Law Association of the United States (MLAUS) in 1983 recommended that Congress repeal the PVA.<sup>6</sup> Despite such a credible call for reform, nearly thirty years later the statute remains.<sup>7</sup>

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\* J.D. Candidate, 2013, Georgia State University College of Law. With sincere gratitude to those who helped guide me and this project along the way; thank you for forcing me to think harder and write better every day. And with love to all of my family—especially my wife Lana and our son Tucker—for their inimitable patience, encouragement, and support.

1. *Marine Coatings of Ala. v. United States*, 71 F.3d 1558, 1562 (11th Cir. 1996).

2. 46 U.S.C. §§ 31101–31112 (2006).

3. Shipping Act of 1916, ch. 451, 39 Stat. 728 (repealed 1996 with select provisions currently codified in 46 U.S.C.).

4. *See generally* *United States v. United Cont’l Tuna Corp.*, 425 U.S. 164 (1976); THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 861–70 (2d ed. 1994); Fritz G. Faerber, *Admiralty Claims Against the United States*, 20 F. 122 (1985).

5. *See, e.g.*, *Tobar v. United States*, 639 F.3d 1191, 1199 (9th Cir. 2011) (finding claim alleging negligence of Coast Guard crew in interdiction, search, and towage of fishing vessel to fall within the scope of the PVA); *Uralde v. United States*, 614 F.3d 1282, 1288 (11th Cir. 2010) (holding claim alleging negligence of Coast Guard crew members in application of medical care during interdiction at sea to be governed by the Suits in Admiralty Act).

6. COMM. ON MAR. LEGISLATION OF THE MAR. LAW ASS’N OF THE U.S., DOCUMENT NO. 646, RECOMMENDATIONS FOR REPEAL OF THE PUBLIC VESSELS ACT AND AMENDMENT OF THE SUITS IN ADMIRALTY ACT (1983) [hereinafter REPEAL], available at <http://www.mlaus.org> (select “Library” hyperlink; then “Numbered MLA Historical Documents” hyperlink); *see also* Peter Child Nosek,

Today, the scope of the PVA's "damages caused by a public vessel" provision ("Damages Provision") is uncertain.<sup>8</sup> In particular, it is unclear whether the claimed damages must be a direct result of the negligent operation or navigation of the public vessel, or if the mere involvement of a public vessel is sufficient to trigger the PVA's waiver of sovereign immunity.<sup>9</sup> It is also unclear whether the PVA should be limited to those contract claims expressly enumerated within its provisions (i.e., towage and salvage claims),<sup>10</sup> or whether plaintiffs can also entertain general contract claims involving public vessels under the Damages Provision.<sup>11</sup> The Supreme Court on two occasions intimated that a generally broad construction of the PVA is proper.<sup>12</sup> However, the Court's decisions do not establish a clear and definitive standard.<sup>13</sup>

As a result of the Supreme Court's reticence, the circuit courts—led by the divergent views of the Ninth and Eleventh circuits—differ as to the scope of the Damages Provision.<sup>14</sup> The Ninth Circuit

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*Unifying Maritime Claims Against the United States: A Proposal to Repeal the Suits in Admiralty Act and the Public Vessels Act*, 30 J. MAR. L. & COM. 41 (1999).

7. See 46 U.S.C.A. § 31102 (West, Westlaw current through P.L. 112-42 (excluding P.L. 112-40, 112-41)). Admittedly, the arguments in favor of repealing the PVA are convincing. However, this Note presumes the statute will retain its force and does not seek to renew the calls for reform.

8. See SCHOENBAUM, *supra* note 4, at 869 (recognizing that "difficult and unique questions arise when it comes to applying the standard of due care to certain governmental functions," while identifying a discretionary function exception in the PVA). *But see* Taghadomi v. United States, 401 F.3d 1080, 1088 (9th Cir. 2005) (holding a claim alleging negligent search by the crew of a Coast Guard vessel falls within scope of the PVA). For a summary of the factual background and reasoning in *Taghadomi*, see *infra* note 103.

9. Compare *Tobar*, 639 F.3d at 1198–99 (merely involved), with *Uralde*, 614 F.3d at 1288 (in the operation of).

10. 46 U.S.C. § 31102(a)(2) (2006).

11. Compare *Marine Coatings of Ala. v. United States*, 71 F.3d 1558 (11th Cir. 1996) (no general contract suits), with *Thomason v. United States*, 184 F.2d 105 (9th Cir. 1950) (opposite).

12. See *Am. Stevedores, Inc. v. Porello*, 330 U.S. 446, 454 (1947) (extending the PVA to claims for personal injuries caused by a public vessel when a ship's beam fell into the hold and struck a longshoreman); *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 223–24 (1945) (extending the PVA to noncollision cases when the negligence of Naval personnel in operation of a vessel as a tow caused a private vessel to strike a submerged wreck); see also discussion *infra* Part II.C.

13. See, e.g., *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 180–81 & n.21 (1976) (intimating no view as to whether contract claims not enumerated in the PVA may be brought under the act); *Calmar S.S. Corp. v. United States*, 345 U.S. 446, 456 n.8 (1953) (suggesting it should not be assumed that all contract claims may be brought under the PVA).

14. See *Tobar*, 639 F.3d at 1199 n.3 ("We recognize that the Eleventh Circuit has disagreed with our broad reading of the [PVA]."); *Marine Coatings*, 71 F.3d at 1563–64 (identifying the Ninth Circuit's interpretation as "by far the broadest reading any court has given the PVA").

construes the PVA broadly and permits suit for all damages, sounding in contract or tort, which arise out of the operation of a public vessel.<sup>15</sup> In contrast, the Eleventh Circuit construes the statute strictly: a contract claim must be of the type enumerated in the PVA,<sup>16</sup> and a tort claim must involve damages caused by the operation or navigation of a public vessel or by the public vessel itself.<sup>17</sup> A recent Ninth Circuit opinion<sup>18</sup> brings this split of authority to the fore and invites a resolution to establish reliability and consistency across the circuits.

This Note considers the waiver of federal sovereign immunity in the admiralty context and attempts to define the proper and intended scope of the PVA. Part I briefly introduces sovereign immunity and admiralty law generally, reviews the history of the United States' waiver of sovereign immunity in the admiralty context, and analyzes the decisions creating the circuit split.<sup>19</sup> Part II considers the statute in context, applies rules of statutory interpretation, reconsiders relevant Supreme Court precedent and the legislative record, and briefly considers important policy implications of the alternative interpretations.<sup>20</sup> Part III proposes a solution that, rather than advocating repeal of the PVA, employs a strict interpretation of its terms and promotes coherent application in harmony with the Suits in Admiralty Act (SAA).<sup>21</sup>

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15. *Tobar*, 639 F.3d at 1198–99 (negligent search and towage of fishing vessel by Coast Guard); *Thomason*, 184 F.2d at 107–08 (wage claims of seamen working aboard public vessel).

16. Only towage and salvage claims are expressly enumerated in the PVA waiver. 46 U.S.C. § 31102(a)(2) (2006).

17. *Uralde v. United States*, 614 F.3d 1282, 1286–87 (11th Cir. 2010) (alleged negligence of Coast Guard crew while aboard interdicted private vessel not justiciable under PVA); *Marine Coatings*, 71 F.3d at 1563–64 (maritime lien claim outside scope of PVA).

18. *Tobar*, 639 F.3d 1191.

19. See discussion *infra* Part I.

20. See discussion *infra* Part II.

21. 46 U.S.C. §§ 30901–30918 (2006); see discussion *infra* Part III. For a similar but more narrowly defined discussion of the PVA published shortly before this Note went to print, see generally Kenneth P. Raley III, Comment, *The Public Vessels Act and Maritime Injustice: Provi[di]ng Redress to Deserving Foreign Admiralty Tort Victims*, 10 LOY. MAR. L.J. 429 (2012) (analyzing only the Damages Provision of the PVA and proposing a strict construction in situations where government agents cause injury to foreign individuals or their property while aboard a private vessel).

## I. FIRST PRINCIPLES: SOVEREIGN IMMUNITY AND ADMIRALTY LAW

A. *Sovereign Immunity: American As Apple Pie?*

Sovereign immunity is based in the English common law maxim “the king himself can do no wrong.”<sup>22</sup> Despite the lack of any direct reference to federal sovereign immunity in the Constitution,<sup>23</sup> it is hornbook law that the United States cannot be sued without its consent.<sup>24</sup> Chief Justice Marshall recognized: “[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States.”<sup>25</sup> The Supreme Court has since refined this opinion to reflect the principle that “the United States cannot be lawfully sued without its consent in any case.”<sup>26</sup> Thus, explicit waiver of sovereign immunity is a prerequisite to federal jurisdiction in suits against the government.<sup>27</sup> Despite its entrenchment in modern law, the doctrine is not without critics.<sup>28</sup> Some scholars argue sovereign immunity is irreconcilable with American ideals and is thus unconstitutional.<sup>29</sup> Others find support for the doctrine in the

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22. 1 WILLIAM BLACKSTONE, COMMENTARIES \*244. Justice Holmes explained sovereign immunity in terms his post-enlightenment audience would better appreciate: “[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.” *Kawananakoa v. Polyblank*, 205 U.S. 349, 352 (1907).

23. However, the notion of sovereign immunity was not lost on the Founders; Alexander Hamilton wrote: “it is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind . . .” THE FEDERALIST NO. 81, at 450 (Alexander Hamilton) (George Stade ed., 2006).

24. See *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (“It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.” (internal quotation marks omitted)); *Roberts v. United States*, 498 F.2d 520, 525 (9th Cir. 1974) (“It is axiomatic that Congressional waiver of sovereign immunity is a prerequisite to any suit brought against the United States . . .”).

25. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821).

26. *United States v. Lee*, 106 U.S. 196, 204 (1882).

27. *Mitchell*, 445 U.S. at 538.

28. Indeed, some commentators contest the original premise as vague. Does “the King can do no wrong” mean that the king is infallible and thus someone else must be guilty, or that a remedy must exist because it would be wrong for the King to allow injury to pass without some form of recompense to the victim? Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 & n.1 (2001).

29. *Id.* at 1201–02 (insisting that “the entire doctrine should be eliminated from American law” because it conflicts with American rejection of monarchical prerogatives, undermines commitment to the rule of law, and denies recovery to deserving plaintiffs); James E. Pfander, *Sovereign Immunity and*

Supremacy Clause.<sup>30</sup> Either way, even its detractors admit sovereign immunity is here to stay.<sup>31</sup>

Also, scholars and judges alike disagree about how to construe waivers of sovereign immunity.<sup>32</sup> Traditionally, courts strictly construed such waivers,<sup>33</sup> but some modern courts employ a more liberal approach.<sup>34</sup> Recent Supreme Court decisions seem to favor a strict construction limiting government liability.<sup>35</sup> In the end, an understanding of basic sovereign immunity principles only begins the inquiry; the peculiar nature of admiralty law must also inform any court's consideration of the proper scope of the PVA.

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*the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 990 (1997) (recognizing “the Petition Clause [of the Constitution] as an affirmation of the Blackstonian right to seek judicial redress from government wrongdoing” and concluding that “[s]overeign immunity has no place in such a body of law”); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).

30. *See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 776–77 & n.27; *see also* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949) (“There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.”).

31. Chemerinsky, *supra* note 28, at 1203 (“I do not foresee the Supreme Court eliminating sovereign immunity any time soon. The trend, unquestionably, is in the opposite direction.”).

32. *See* Nagle, *supra* note 30, at 778–80 (discussing in detail the two distinct and conflicting lines of Supreme Court cases addressing interpretation of sovereign immunity waivers).

33. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996) (stating that a waiver of sovereign immunity “will be strictly construed, in terms of its scope, in favor of the sovereign”); *Soriano v. United States*, 352 U.S. 270, 276–77 (1957) (“[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.”); *Blevins v. United States*, 769 F.2d 175, 181 (4th Cir. 1985) (“A waiver of sovereign immunity by implication is not favored; ‘it must be express, and it must be strictly construed.’” (quoting *Arvin v. United States*, 742 F.2d 1301, 1302 (11th Cir. 1984))).

34. *United Cont’l Tuna Corp. v. United States*, 499 F.2d 774, 778 (9th Cir. 1974) (noting the “modern view which liberally construes waivers of governmental immunity”), *rev’d*, 425 U.S. 164 (1976); *see also* *Larson*, 337 U.S. at 723 (suggesting that in the post-New Deal era sovereign immunity is disfavored); *Anderson v. John L. Hayes Constr. Co.*, 153 N.E. 28, 29–30 (N.Y. 1926) (finding enough hardship where consent to suit is withheld and suggesting such hardship should not be compounded to by an unduly strict construction of any granted waiver).

35. Nagle, *supra* note 30, at 774 (noting five Supreme Court cases from the 1990s finding against waiver and establishing a rule that “purpose, the legislative history, or a plausible reading of an ambiguous statute carries no weight in the sovereign immunity inquiry if the text of a statute does not plainly waive federal sovereign immunity from the claim presented in the case”).

### B. A Primer: Admiralty Law Generally

Admiralty law is steeped in tradition and custom.<sup>36</sup> The ship itself is often personified by the law<sup>37</sup> and, at times, represents both the source and the limit of liability.<sup>38</sup> Aware of both the peculiar nature of admiralty law and the importance of maritime commerce to the nascent American Experiment, the Founders integrated the centuries-old body of traditional maritime law into their new government.<sup>39</sup> The Constitution provides that “[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.”<sup>40</sup> The Judiciary Act of 1789 granted original jurisdiction to the district courts and today is codified at 28 U.S.C. § 1333.<sup>41</sup> The original

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36. “Maritime law is as old as maritime commerce.” STEVEN L. SNELL, COURTS OF ADMIRALTY AND THE COMMON LAW: ORIGINS OF THE AMERICAN EXPERIMENT IN CONCURRENT JURISDICTION 50 (2007). The first known codification dates from the eighteenth century B.C.E. in the Code of Hammurabi. *Id.* As far as it can be traced, maritime law reveals customs of ancient mariners, common practices with regard to the transportation of cargo by sea, and the important role for merchants and masters in interpreting and applying the law to provide remedies for injured parties. GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 37 (1997); *see also* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 551 (1960) (Frankfurter, J., dissenting) (“Our law of the sea has an ancient history. While it has not been static, the needs and interests of the interrelated world-wide seaborne trade which it reflects are very deeply rooted in the past. . . . In the law of the sea, the continuity and persistence of a doctrine . . . has special significance.”). For more on admiralty law across the centuries, see MANGONE, *supra*, at 1–39.

37. Justice Holmes wrote: “A ship is the most living of inanimate things. . . . [it is only by treating a ship] as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical.” OLIVER WENDELL HOLMES, JR., THE COMMON LAW 26–27 (Dover Publ’ns, Inc. 1991) (1881). Chief Justice Marshall, considering whether a ship could be forfeited for the actions of its master, opined: “It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew . . . . The vessel acts and speaks by the master.” United States v. The Little Charles, 26 F. Cas. 979 (Marshall, Circuit Justice, C.C.D. Va. 1818) (No. 15,612).

38. HOLMES, *supra* note 37, at 30. A suit against a ship owner is brought in personam, meaning it seeks to adjudicate the rights of individuals rather than property. MANGONE, *supra* note 36, at 57; BLACK’S LAW DICTIONARY 862 (9th ed. 2009). On the other hand, a claim against the vessel itself is brought in rem. MANGONE, *supra* note 36, at 57. Ships are often far from their owners, and when they cause damage the *res* (or “thing”) itself may be the only remedy for an injured party. *Id.* In such a case, an action in rem may be used to attach a maritime lien to the vessel until the judgment is paid. *Id.* In some cases, a vessel may be arrested, its owner notified, and—if the claim remains unsatisfied—the ship will be condemned and sold. *Id.*

39. SNELL, *supra* note 36, at 13–25; MANGONE, *supra* note 36, at 38.

40. U.S. CONST. art. III, § 2, cl. 1. This apparent tautology is not redundancy without reason. The Founders intended the admiralty jurisdiction in the United States to expand beyond its traditional scope, and thus employed use of both “admiralty” and “maritime” to convey the broad scope of intended jurisdiction. MANGONE, *supra* note 36, at 32.

41. The district courts have exclusive original jurisdiction of: “Any civil case of admiralty or

purpose of admiralty jurisdiction in the United States was the “protection and the promotion of the maritime shipping industry.”<sup>42</sup> Additionally, the Founders urged a uniform body of national laws to regulate maritime activities because disputes with foreigners were likely to occur in the admiralty context.<sup>43</sup> Despite its somewhat complex jurisdictional and procedural requirements,<sup>44</sup> a reliance on ancient customs and convenient legal fictions,<sup>45</sup> and some very basic anti-democratic tendencies,<sup>46</sup> admiralty law purports to provide reliability and efficiency in the management of conflicts arising off the *terra firma*. Unfortunately, these reliability and efficiency goals are often frustrated when a plaintiff sues the government in admiralty.

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maritime jurisdiction.” 28 U.S.C. § 1333 (2006). Concurrent jurisdiction exists with state courts “to the extent that distinctive admiralty remedies are not involved and if not prohibited by statute.” SCHOENBAUM, *supra* note 4, at 7.

42. *Adams v. Mont. Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975).

43. See MANGONE, *supra* note 36, at 33 (summarizing admiralty debates at the Constitutional Convention); THE FEDERALIST NO. 80, at 441 (Alexander Hamilton) (George Stade ed., 2006) (“The most bigoted idolizers of state authority [would not] deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations . . . relative to the public peace.”).

44. For example, to bring a cognizable tort claim in a federal court under the admiralty jurisdiction, a plaintiff must satisfy the locality and nexus requirements. *Tobar v. United States*, 639 F.3d 1191, 1197 (9th Cir. 2011). The locality requirement is satisfied when the tort occurs on or over navigable waters. *Id.* Navigable waters “are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). The necessary nexus is satisfied when “the actions giving rise to the tort claim . . . bear a significant relationship to traditional maritime activity” and have a potentially disruptive impact on maritime commerce. *Tobar*, 639 F.3d at 1197 (quoting *Taghadomi v. United States*, 401 F.3d 1080, 1084 (9th Cir. 2005)) (internal quotation marks omitted). Six special problems often are encountered in admiralty practice: (1) joinder of claims and parties, especially when non-admiralty claims are involved; (2) a liberal application of venue provisions due to the “worldwide sphere” of admiralty jurisdiction; (3) special provisions for appeals; (4) special provisions for removal from state court; (5) the unsure footing of equity—which was traditionally unavailable—in modern admiralty courts; and (6) “special statutes and rules . . . in the area of sovereign immunity.” SCHOENBAUM, *supra* note 4, at 8–10.

45. See *supra* notes 36–38.

46. See *Crawford v. Washington*, 541 U.S. 36, 47–48 (2004) (discussing American colonists’ negative reaction to the assignment of Stamp Act jurisdiction to the admiralty courts, where private judicial examination often bypassed basic confrontation rights); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). (“No area of federal law is judge-made at its source to such an extent as is the law of admiralty.”); SCHOENBAUM, *supra* note 4, at 925–30 (identifying four occasions upon which a jury trial might be afforded an admiralty litigant, while noting a general rule that the Seventh Amendment right to a trial by jury is not guaranteed in admiralty).



### C. Sovereign Immunity In The Admiralty Context

The United States waived its general tort immunity in 1946 with the Federal Tort Claims Act (FTCA).<sup>47</sup> Other statutes, including the Tucker Act,<sup>48</sup> combine with the FTCA to offer plaintiffs injured by the government access to the courts.<sup>49</sup> Though some confusion remains, the FTCA and other land-based waivers do not extend to claims once admiralty jurisdiction is established.<sup>50</sup> Once admiralty jurisdiction is invoked, either the PVA or the SAA applies.<sup>51</sup> But, it can be difficult to determine which of the two statutes applies. Here, past is indeed prologue; the present statutory scheme is more an accident of history than a carefully considered and comprehensive plan for waiving sovereign immunity.<sup>52</sup>

A formal waiver of sovereign immunity in the admiralty context first appeared in the early twentieth century.<sup>53</sup> Before then, injured plaintiffs either petitioned Congress for private bills or brought suit against government officers in their personal capacities.<sup>54</sup> When sued directly, officers could then seek indemnification by presenting a private bill in Congress.<sup>55</sup> This approach maintained the legal fiction

47. 28 U.S.C. §§ 1346(b), 2671–2680 (2006); MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 251 (8th ed. 2006).

48. Act of March 3, 1887, 24 Stat. 505. Provisions of the Tucker Act are presently codified at 28 U.S.C. §§ 1346(a)(2), 1491 (2006), including a grant of original jurisdiction to the Court of Federal Claims for, among other things, certain non-tort civil actions founded in express or implied contracts with the United States. 28 U.S.C. § 1346(a)(2) (2006).

49. See generally Brian R. Levey, *Tortious Government Conduct and the Government Contract: Tort, Breach of Contract, or Both?*, 22 PUB. CONT. L.J. 706, 712–19 (1993); Allyson Cook, Comment, *The Suits in Admiralty Act and the Federal Tort Claims Act: Bridging the Gap Between Congressional Intent and Judicial Interpretation*, 16 U.S.F. MAR. L.J. 119 (2004).

50. See SCHOENBAUM, *supra* note 4, at 862 n.8 (discussing interplay of the various waivers).

51. *Id.* Though there are some exceptions, such as when another statute provides an exclusive remedy for federal employees. See *infra* notes 134–35.

52. For more discussion of the interplay among the waivers of sovereign immunity within the admiralty context, see generally, Faerber, *supra* note 4, and George Rutherglen, *Sovereign Immunity*, 31 J. MAR. L. & COM. 317 (2000).

53. *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 170 (1976) (“Prior to 1916, the doctrine of sovereign immunity barred any suit by a private owner whose vessel was damaged by a vessel owned or operated by the United States.”).

54. Nosek, *supra* note 6, at 42; James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1872–76 (2010).

55. Pfander & Hunt, *supra* note 54, at 1872–76. Two notable indemnification cases arose during the Quasi War with France. See generally *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64

of sovereign immunity and preserved separation of powers, while also protecting officers from catastrophic liability and ensuring compensation for victims.<sup>56</sup> Leaders of the early Republic easily managed this practice,<sup>57</sup> but as the United States and its fleet grew, the number of requests for indemnification quickly became unmanageable.<sup>58</sup>

In response, Congress passed the Shipping Act of 1916.<sup>59</sup> The Act exposed the government to liability when a merchant vessel owned or operated by the government allegedly caused injury to a plaintiff if a private party would be liable under similar circumstances.<sup>60</sup> Though Congress did not intend a literal interpretation,<sup>61</sup> the Supreme Court

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(1804); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). Despite the proper motives and good faith of the captains, the plaintiffs received sizable judgments in both cases. *Charming Betsy*, 6 U.S. at 125–26; *Little*, 6 U.S. at 175, 179. Thereafter, both captains obtained private bills to cover their liability. See Act for Relief of Alexander Murray, ch. 12, 6 Stat. 56 (1805); Act for the Relief of George Little, ch. 4, 6 Stat. 63 (1807). For detailed discussion of these and other early petitions for private bills, see Pfander & Hunt, *supra* note 54, at 1872–76.

56. See Pfander & Hunt, *supra* note 54, at 1872–76. The private bill indemnification process was an important administrative mechanism in the early Republic used to address both admiralty and non-admiralty claims against the government and its officials. *Id.* at 1862, 1904, 1929–31. Though a return to the practice is unlikely, the lessons of the system with regard to risk allocation and compensation for harm caused by the government remain relevant today. *Id.* at 1930.

57. A study of Congressional records between 1789 and 1860 found fifty-seven petitions for indemnification filed by government officers. *Id.* at 1904.

58. In 1925, the Senate Claims Committee recognized some eighty claims and more than 450 collisions involving government-owned vessels in private service over a three-year period. REPEAL, *supra* note 6, at 7642 (citing S. REP. NO. 68-941, at 3, 9, 10, 14, 17–23 (1925)).

59. *Marine Coatings of Ala. v. United States*, 71 F.3d 1558, 1559 (11th Cir. 1996) (citing World War I as stimulus for a growing federal fleet and the Shipping Act as Congress’s response to the increasing volume of private claims).

60. The Shipping Act of 1916, ch. 451, 39 Stat. 728 (repealed 1996 with select provisions currently codified in 46 U.S.C.) (“Every vessel purchased, chartered, or leased from [the United States] . . . 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.”); Nosek, *supra* note 6, at 42–43. Today, the important distinction is whether a vessel is a public vessel. See discussion *infra* Part II.C.3 (discussing the 1960 amendments to the SAA). A public vessel is one “owned and operated by the United States . . . unless it is engaged in transporting cargo for hire for private shippers.” *Blevins v. United States*, 769 F.2d 175, 180 (4th Cir. 1985) (quoting *In re Oskar Tiedemann & Co.*, 236 F. Supp. 895, 911 (D. Del. 1964)) (internal quotation marks omitted); see also 46 U.S.C. § 2101(24)(A)–(B) (2006) (defining “public vessel” as one that is “owned, or demise chartered, and operated by the United States Government or a government of a foreign country; and is not engaged in commercial service”). Public vessels include “warships and coast guard rescue craft.” SCHOENBAUM, *supra* note 4, at 868 n.29. But a vessel owned by a private party and time chartered to the United States for the carriage of cargo would not be considered a public vessel. *Williams v. Cent. Gulf Lines*, 874 F.2d 1058, 1060 (5th Cir. 1989).

61. Nosek, *supra* note 6, at 43.

in 1919 authorized actions in rem (as permitted under the laws governing private vessels) against government ships operating as merchant vessels.<sup>62</sup> Cognizant of the cost and inefficiency of exposing government ships to seizure in proceedings in rem, Congress again decided to act.<sup>63</sup>

The SAA, enacted in 1920,<sup>64</sup> permitted suits in both tort and contract but did not waive sovereign immunity for damages caused by a public vessel operating outside the merchant trade.<sup>65</sup> Before its enactment, MLAUS suggested that the SAA also waive immunity for damages caused by government-owned public vessels.<sup>66</sup> Congress rejected such a broad waiver as a “radical change” that might “materially delay passage.”<sup>67</sup> The SAA as originally passed thus prohibited proceedings in rem against government vessels and authorized suits in personam against government ships subject to suit as merchant vessels.<sup>68</sup> Five years later, Congress passed the PVA, waiving sovereign immunity for “damages caused by a public vessel” and certain enumerated contract claims.<sup>69</sup>

Congress eventually amended the SAA in 1960 to cure jurisdictional problems faced by plaintiffs with admiralty claims

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62. *The Lake Monroe*, 250 U.S. 246, 249 (1919) (stating that “because at the time of the collision she [the *Lake Monroe*, a government steam vessel] was employed solely as a merchant vessel . . . she was subject to arrest on process in rem to answer for the collision”). *Cf.* *The Western Maid*, 257 U.S. 419, 430–33 (1922) (holding that a ship manned by Navy crew and delivering foodstuffs to Europe after World War I was a public vessel and thus exempt from suit).

63. *United States v. United Cont’l Tuna Corp.*, 425 U.S. 164, 170 (1976). The Supreme Court decided *The Lake Monroe* on June 2, 1919. Congress took up the issue with uncharacteristic speed and, on September 27, 1919, the Committee on Commerce stated its objections to the result in *The Lake Monroe*:

The result of [The *Lake Monroe*] is to subject the United States to unnecessary expense and its vessels to great delays. . . . The principal object of suits in rem is to insure the collection of the claim by subjecting the vessel to it. It is not necessary in the case of the United States . . . .

S. REP. NO. 66-223, at 3 (1919).

64. Suits in Admiralty Act, Pub. L. No. 66-156, 41 Stat. 525 (1920) (amended 1960).

65. *E.S.S. Lines, Inc. v. United States*, 187 F.2d 956, 960 (1st Cir. 1951).

66. MAR. LAW ASS’N OF THE U.S., DOCUMENT NO. 84, at 3–6 (Dec. 6, 1918), available at <http://www.mlaus.org> (select “Library” hyperlink; then “Numbered MLA Historical Documents” hyperlink).

67. H.R. REP. No. 66-497, at 4 (1919).

68. § 2, 41 Stat. at 525–26.

69. 46 U.S.C. § 31102 (2006).

against the government.<sup>70</sup> First, in an attempt to consolidate all claims cognizable in admiralty against the United States outside the scope of the PVA under the SAA, Congress broadened the SAA waiver to permit suit where a claim would lie “if a private person or property were involved.”<sup>71</sup> This language replaced the confusing provision previously permitting waiver only when suits would be maintainable if the vessel or cargo were privately owned, operated or possessed.<sup>72</sup> Second, and most importantly, Congress eliminated the requirement that a government vessel be “employed as a merchant vessel” (“Merchant Vessel Proviso”), deleting these words from the SAA.<sup>73</sup> After the amendment, if admiralty jurisdiction is established and the PVA does not apply, suit must be brought under the SAA.<sup>74</sup>

#### *D. PVA Or SAA: Does It Make Any Difference?*

Both the PVA and SAA authorize proceedings in personam against the United States in admiralty.<sup>75</sup> Under either statute, a vessel or cargo of the United States may not be arrested or seized.<sup>76</sup> Neither permits a jury trial.<sup>77</sup> Under both statutes, a two-year statute of limitations applies.<sup>78</sup> Venue is similar, though the SAA requires plaintiffs to bring suit in a district court where “any plaintiff resides or has its principal place of business; or [where] the vessel or cargo is found,”<sup>79</sup> while the PVA allows for venue in any district where “any

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70. See Suits in Admiralty Act, Pub. L. 86-770, 74 Stat. 912 (1960). For example, courts required plaintiffs with contract claims sounding in admiralty to bring suit in the Court of Claims under the Tucker Act in certain circumstances. *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 172–73 (1976). Because of uncertainty as to the scope of the SAA and the Tucker Act, however, the choice of a proper forum under one act or the other was difficult. *Id.* at 172–78. To further complicate things, cases could not be filed concurrently in the Court of Claims and the district court or transferred from one to the other, and discovery of an unwise choice of forum often came too late for a new action to be filed. *Id.* at 173.

71. § 3, 74 Stat. at 912.

72. § 2, 41 Stat. at 525–26.

73. Compare § 2, 41 Stat. at 525–26, with § 3, 74 Stat. 912; see also *infra* Table 1 (detailing some of the key differences between the PVA and the SAA in table format).

74. *United Cont'l Tuna*, 425 U.S. at 178–81; SCHOENBAUM, *supra* note 4, at 862, 867.

75. 46 U.S.C. §§ 30905, 31102(a) (2006).

76. §§ 30908, 31103.

77. §§ 30903(b), 31103.

78. §§ 30905, 31103.

79. § 30906. But where does venue lie for a nonresident with no local office when the vessel or

plaintiff resides or has an office . . . ; or if no plaintiff [is a resident] . . . the action may be brought in . . . any district.”<sup>80</sup>

Despite many similarities, including a discretionary function exception,<sup>81</sup> the PVA and the SAA vary in significant ways. The statutes are at odds regarding interest: the SAA allows costs and post-filing, pre-judgment interest,<sup>82</sup> while the PVA does not permit pre-judgment interest unless provided for by contract.<sup>83</sup> The PVA prohibits subpoena of a public vessel officer or crewmember without the consent of, among others, the “master or commanding officer of the vessel.”<sup>84</sup> Most significantly, the PVA includes a reciprocity requirement; the SAA does not.<sup>85</sup> For a noncitizen to bring suit under the PVA, the noncitizen’s native government must also allow suit by American citizens under similar circumstances.<sup>86</sup>

Which statute applies is a matter of significant consequence. In short, when an admiralty claim involves a public vessel and damages

cargo cannot be found in any district? *See Kulukundis v. United States*, 132 F. Supp. 477, 478 (Ct. Cl. 1955) (holding that the SAA was not intended to deny jurisdiction to nonresident though venue may prove uncertain).

80. § 31104. That a nonresident plaintiff may bring suit in any district under the PVA is but another reason a consistent interpretation is necessary. *See* discussion *infra* Part II.E.

81. Most courts apply a discretionary function exception in the admiralty context. *See, e.g.,* *Limar Shipping Ltd. v. United States*, 324 F.3d 1, 6–7 & n.3 (1st Cir. 2003) (SAA); *United States Fire Ins. Co. v. United States*, 806 F.2d 1529, 1534–35 (11th Cir. 1986) (PVA); *see also* SCHOENBAUM, *supra* note 4, at 869. The discretionary function exception seeks to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). *Cf. Donald S. Ingraham, Note, The Suits in Admiralty Act and the Implied Discretionary Function*, 1982 DUKE L.J. 146 (1982).

82. § 30911.

83. § 31107. Under § 31107, a private party found jointly liable with the United States may be liable for interest while the government is not, even though the same standard of care applies. SCHOENBAUM, *supra* note 4, at 869.

84. § 31110.

85. *See* § 31111; SCHOENBAUM, *supra* note 4, at 868.

86. § 31111. It is uncertain whether plaintiffs bear the burden of proof in establishing reciprocity. In any event, it appears the courts have discretion to inquire into the content of foreign law in considering the reciprocity element. *See, e.g., Tobar v. United States*, 639 F.3d 1191, 1200 (9th Cir. 2011). The reciprocity provision of the PVA is strictly applied and often results in dismissal of cases governed by its terms. *See* SCHOENBAUM, *supra* note 4, at 868. In *United Continental Tuna*, after remand from the Supreme Court, the Ninth Circuit determined a foreign corporation was not an American shipowner, despite the fact that United States citizens owned ninety-nine percent of its stock. *United Cont’l Tuna Corp. v. United States*, 550 F.2d 569, 572–75 (9th Cir. 1977). The court held the action could not stand because there was no evidence that Philippine law would allow suit by an American citizen under similar circumstances. *Id.*

fall within the PVA, the PVA and select provisions of the SAA apply.<sup>87</sup> Inconsistencies resolve in favor of the PVA.<sup>88</sup> When a public vessel is not involved or the damages fall outside the scope of the PVA, the SAA governs exclusively.<sup>89</sup> But more difficult than sorting through *how* the two statutes are applied is determining *when* one or the other is triggered. Decisions of the Ninth and Eleventh circuits demonstrate this difficulty.<sup>90</sup>

### *E. The Circuit Split: A Matter Of Interpretation*

Several cases provide paradigmatic examples of the varying interpretations of the PVA's Damages Provision. The Ninth Circuit in *Tobar v. United States* applied a broad interpretation when it considered a case involving a Coast Guard interdiction at sea.<sup>91</sup> The Eleventh Circuit faced similar facts in *Uralde v. United States* but reached a markedly different result.<sup>92</sup> Additionally, *Marine Coatings of Alabama v. United States* provides another useful glimpse into the Eleventh Circuit's more plausible strict construction of the PVA.<sup>93</sup>

#### *1. The Ninth Circuit: Tobar v. United States (2011)*<sup>94</sup>

On October 5, 2005, a United States Coast Guard crew encountered an Ecuadorian fishing vessel in international waters near the Galapagos Islands.<sup>95</sup> Suspicious that the fishermen were trafficking in illegal narcotics, the Coast Guard crew boarded the fishing vessel and, after contacting officials in Ecuador, towed the

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87. § 31103. Aside from the immunity waiver, provisions of the SAA that are not inconsistent with the PVA are said to be "incorporated" into the PVA. *See infra* note 123.

88. § 31103.

89. *See* SCHOENBAUM, *supra* note 4, at 862.

90. *See, e.g., Tobar*, 639 F.3d 1191; *Uralde v. United States*, 614 F.3d 1282 (11th Cir. 2010); *Marine Coatings of Ala. v. United States*, 71 F.3d 1558 (11th Cir. 1996).

91. *See generally Tobar*, 639 F.3d 1191.

92. *See generally Uralde*, 614 F.3d 1282.

93. *See generally Marine Coatings*, 71 F.3d 1558.

94. *See also Thomason v. United States*, 184 F.2d 105 (9th Cir. 1950) (considering a wage suit under the PVA). *Thomason* is discussed *infra* text accompanying notes 168–69 and provides useful contrast alongside the Eleventh Circuit's decision in *Marine Coatings*.

95. *Tobar*, 639 F.3d at 1194.

vessel back to Ecuador.<sup>96</sup> No illegal narcotics were discovered and no criminal charges were filed.<sup>97</sup> The fishermen later filed suit against the United States, claiming roughly \$5 million in damages for “unlawful imprisonment, humiliation, pain and suffering, destruction of personal property, loss of their catch, loss of the use of the vessel, and public ridicule.”<sup>98</sup> The district court dismissed the action because, in part,<sup>99</sup> the plaintiffs failed to establish reciprocity by showing that Ecuador would permit similar suits by U.S. citizens.<sup>100</sup>

On appeal, the Ninth Circuit concluded the plaintiffs’ claims were damages caused by a public vessel so that the PVA, and not the SAA, should apply.<sup>101</sup> In the end, the court remanded the case to the district court to re-examine whether reciprocity exists under Ecuadorian law.<sup>102</sup> Citing the Supreme Court’s broad interpretation of the PVA and its own recent holding in *Taghadomi v. United States*,<sup>103</sup> the

96. *Id.* For an interesting discussion of interdiction and illicit drugs on the high seas, see Juliana Gonzalez-Pinto, *Interdiction of Narcotics in International Waters*, 15 U. MIAMI INT’L & COMP. L. REV. 443, 448–57 (2008) (identifying the Constitution, a variety of statutes, and bilateral agreements with other countries as sources of authority for interdiction at sea).

97. *Tobar*, 639 F.3d at 1194.

98. *Id.*

99. The court also rejected other proffered grounds for finding a waiver of sovereign immunity: the SAA (discretionary function triggered), the United Nations Convention on the Law of the Sea (not ratified by United States), the Alien Tort Claims Act (no waiver on its face), a treaty between Ecuador and the United States (same), and the International Covenant on Civil and Political Rights (not self-executing and no implementing legislation). *See Tobar v. United States*, No. 07CV817 WQH (WMC), 2008 WL 4350539, at \*4–8 (S.D. Cal. Sept. 19, 2008).

100. *Id.* at \*5.

101. *Tobar*, 639 F.3d at 1198–99.

102. *Id.* at 1200.

103. In *Taghadomi*, a husband and wife honeymooning on Maui set out upon the ocean in a kayak. *Taghadomi v. United States*, 401 F.3d 1080, 1082 (9th Cir. 2005). Rough waters threw the wife into the ocean. *Id.* A shark attacked her and she later died; meanwhile, her husband washed ashore and was stranded on an island for three days. *Id.* A bystander called the Coast Guard to report the incident. *Id.* A search ensued, but the Coast Guard crew quickly abandoned its efforts. *Id.* The plaintiffs—the husband, his wife’s estate, and her parents—sued the United States claiming wrongful death and emotional distress, alleging that the Coast Guard was negligent in failing to execute the rescue. *Id.* The district court determined the claims fell within admiralty but dismissed the actions, filed more than two years after the incident, as time-barred under the PVA and SAA. *Taghadomi v. Extreme Sports Maui*, 257 F. Supp. 2d 1262, 1271–73 (D. Haw. 2002). The claims were also barred because of lacking reciprocity; the wife and her parents were Iranian citizens and stipulated that Iran does not permit PVA-like claims. *Id.* at 1272. The Ninth Circuit affirmed summary judgment in favor of the United States. *Taghadomi*, 401 F.3d at 1090. Although the claims were ultimately barred by time or lacking reciprocity, the Ninth Circuit noted the “negligent-search claim thus falls within the scope of the PVA.” *Id.* at 1088. The value of this case as precedent for a broad construction of the PVA is questionable. The court itself states: “We need not limn the precise contours of the PVA, however, because the claims will turn out to be

Ninth Circuit stated “the relevant operation of the vessel here is not simply the movements of the public vessel itself; the relevant operation is the Coast Guard’s search and seizure of Plaintiffs’ vessel on the high seas.”<sup>104</sup> Noting the Eleventh Circuit’s disagreement with its expansive construction, the three-judge panel, saying nothing of reason or plain meaning, concluded precedent bound it to a broad interpretation of the PVA.<sup>105</sup>

## 2. Eleventh Circuit Decisions

### a. *Uralde v. United States (2010)*

In *Uralde*, a husband and wife aboard a speedboat with several other Cuban nationals attempted to enter the United States illegally.<sup>106</sup> The Coast Guard dispatched a vessel to interdict the speedboat, and a Coast Guard crewmember shot the engine of the speedboat twice.<sup>107</sup> As the rounds hit the engine, the vessel jolted and the wife’s head struck the speedboat.<sup>108</sup> When the crew came aboard, the wife was bleeding and unconscious.<sup>109</sup> Thereafter, the Coast Guard crewmembers requested permission to airlift the wife for medical assistance, but land-based Coast Guard officers denied the request.<sup>110</sup> Eventually, medical assistance arrived and transported the wife on an inflatable raft toward land, but she died while in transit.<sup>111</sup> The husband sued, alleging the Coast Guard made negligent decisions regarding medical treatment and transportation and claiming jurisdiction should be grounded in the FTCA or, alternatively, the SAA.<sup>112</sup> In response to the United States’ motion to dismiss, the district court held the claim “fell under the PVA, rather

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barred whether they arise under the PVA or not.” *Id.* at 1088 n.9.

104. *Tobar*, 639 F.3d at 1199.

105. *Id.* at 1199 n.3.

106. *Uralde v. United States*, 614 F.3d 1282, 1284 (11th Cir. 2010).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Uralde*, 614 F.3d at 1284.



than the SAA.”<sup>113</sup> Unsatisfied Cuba would allow suit under similar circumstances, the court ultimately found reciprocity lacking.<sup>114</sup>

The Eleventh Circuit reversed, finding the claims to be outside the scope of the PVA and governed instead by the SAA.<sup>115</sup> The court reasoned that because no crewmembers were negligent in the operation of the public vessel, and the claim was one “simply involving public vessels,” the PVA did not apply.<sup>116</sup> The medical decisions of Coast Guard crewmembers, though made during an interdiction on the high seas made possible by use of a public vessel, were not damages caused by a public vessel.<sup>117</sup> More than a decade earlier, the Eleventh Circuit identified a similar distinction in a maritime lien claim filed against the United States.<sup>118</sup>

*b. Marine Coatings of Alabama v. United States (1996)*

After ten years of prior proceedings,<sup>119</sup> *Marine Coatings* returned to the Eleventh Circuit in 1996 following judgment in favor of a plaintiff–subcontractor alleging nonpayment by the government for work completed on three Navy vessels.<sup>120</sup> The judgment included attorney’s fees and pre-judgment interest, and the United States sought to avoid the pre-judgment interest by arguing the PVA (and its “no interest” proviso) should apply.<sup>121</sup> In its analysis, the Eleventh Circuit focused on the PVA’s scope and “the nature of [the] claim.”<sup>122</sup> Despite the government’s insistence that any claim brought on in rem liability principles was incorporated into the PVA,<sup>123</sup> the

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113. *Id.* at 1283–84.

114. *Id.* at 1284–85.

115. *Id.* at 1286.

116. *Id.* at 1286–88 (quoting *Marine Coatings of Ala. v. United States*, 71 F.3d 1558, 1562 n.5 (11th Cir.1996)) (internal quotation marks omitted).

117. *Id.* at 1287.

118. See discussion *infra* Part I.E.2.b.

119. See, e.g., *Marine Coatings*, 71 F.3d at 1558, *aff’g in part and rev’g in part* *Marine Coatings of Ala. v. United States*, 932 F.2d 1370 (11th Cir. 1991), *rev’g* *Marine Coatings of Ala. v. United States (Marine Coatings I)*, 674 F. Supp. 819 (S.D. Ala. 1987), *on remand from* *Marine Coatings of Ala. v. United States*, 792 F.2d 1565 (11th Cir. 1986).

120. *Id.* at 1559.

121. *Id.* at 1560.

122. *Id.* at 1561.

123. On initial remand the district court accepted this argument and held that the PVA applied to in

court found that the “[PVA] does not . . . apply to all maritime claims involving a public vessel.”<sup>124</sup> Distinguishing the cause of damages here—nonpayment—from those intended to be allowed under the PVA, the court concluded a reading that would allow such claims “finds no support in the text . . . or in the purpose of the Act—even as that purpose has been broadly read by the Supreme Court.”<sup>125</sup> Significantly, the court identified the inclusion of certain contract claims (i.e., towage and salvage) in the PVA as excluding other garden-variety contract claims under the statute.<sup>126</sup> Noting that the plaintiffs could rely on the SAA for relief if the PVA denied them recovery, the court stated “it would be a stretch to hold . . . the [PVA] . . . cover[s] all maritime claims, whether sounding in contract or in tort.”<sup>127</sup> Although these conflicting perspectives are just the tip of the iceberg, the forthcoming analysis confirms that only the Eleventh Circuit’s analysis should survive to sail another day.

## II. MAKING SENSE OF THE PUBLIC VESSELS ACT

As demonstrated by the current split of authority, the precise contours of the PVA are elusive. In fairly construing the statute, courts often consider many factors: the larger statutory scheme of sovereign immunity; canons of statutory interpretation; relevant Supreme Court precedent; the legislative history; policy implications;

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personam proceedings based on in rem principles merely involving a public vessel. *Marine Coatings I*, 674 F. Supp. at 823–24. Thus, the court held suit could be brought under *either* the PVA or the SAA and also suggested that “all actions against public vessels would be brought under the [PVA], subject to its special limitations,” seemingly without regard to the nature of the claim. *Id.* If a public vessel was involved, the PVA and incorporated provisions of the SAA should apply. If a public vessel was not involved, the SAA alone should apply. But, this simple syllogism oversimplifies the district court’s rationale. In sum, the court stated that the Supreme Court’s decision in *Canadian Aviator v. United States* incorporated “[§ 30907 of the SAA] into the [PVA], permitting in rem theories of liability to be asserted under the latter Act.” *Id.* The court continued, reasoning that § 30903, the SAA general waiver of liability, “should also be incorporated into the [PVA]” through § 31103 of the PVA because it is no more inconsistent than § 30907 of the SAA. *Id.* Such incorporation would, if the Eleventh Circuit had agreed, bring all admiralty claims involving public vessels, regardless of their nature (i.e., tort or contract, in the operation of the vessel or otherwise), under the PVA. *See id.*

124. *Marine Coatings*, 71 F.3d at 1561.

125. *Id.* at 1563–64; *see also* discussion *infra* Part II.C.

126. *Marine Coatings*, 71 F.3d at 1564.

127. *Id.* at 1564 & n.8.

and persuasive precedent from domestic and international jurisdictions.<sup>128</sup> Careful analysis of these common factors reveals that a broad construction of the PVA is, if not improper, at least unnecessary.<sup>129</sup> The better approach lies in a strict construction—applying the PVA in the shadow of the more general SAA—to promote consistency and restore reliability across American jurisdictions.<sup>130</sup>

#### *A. Overall Statutory Scheme: One Or The Other!*

Because the PVA does not stand alone as the sole waiver of sovereign immunity in the admiralty context, it must be considered alongside its “sister statute,” the SAA.<sup>131</sup> In opening the courthouse doors to suits in admiralty against the government, Congress—wisely or unwisely—passed several statutes.<sup>132</sup> In construing this scheme, a court must intelligently and fairly work the PVA “into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.”<sup>133</sup> In *Johansen v. United States*, the Supreme Court denied jurisdiction under the PVA to civilian seamen serving aboard public vessels seeking compensation for damages sustained during employment.<sup>134</sup> The Court reasoned that, despite the occurrence of a personal injury aboard a public vessel, the Federal Employees Compensation Act (FECA)<sup>135</sup>

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128. See, e.g., *Tobar v. United States*, 639 F.3d 1191 (9th Cir. 2011) (considering many of these factors); *Marine Coatings*, 71 F.3d 1558 (same).

129. See discussion *infra* Part II.A–E.

130. See discussion *infra* Part III.

131. *Calmar S.S. Corp. v. United States*, 345 U.S. 446, 451 (1953).

132. See, e.g., *Public Vessels Act*, 46 U.S.C. §§ 31101–31112 (2006); *Suits in Admiralty Act*, *id.* §§ 30901–30918.

133. *Johansen v. United States*, 343 U.S. 427, 432 (1952) (citation omitted).

134. *Id.* at 428–29; see also *Amell v. United States*, 384 U.S. 158, 160–61 (1966) (rejecting a worker’s compensation claim under both the SAA and the PVA when exclusive statutory remedy was available).

135. *Federal Employees Compensation Act*, ch. 458, 39 Stat. 742 (1916) (repealed and codified with provisions in scattered sections of 5 U.S.C., ch. 81 (2006)). The current FECA, as amended in Pub. L. No. 89-488, 80 Stat. 252 (1966), is found at 5 U.S.C. § 8101 (2006). This version of the Act contains an exclusivity provision, establishing that its remedy “is exclusive and instead of all other liability . . . to the employee . . . [or] any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death . . . in admiralty, or . . . under a Federal tort liability statute.” 5 U.S.C. § 8116(c) (2006).

provided the exclusive remedy. Had Congress intended to provide federal employees relief under the PVA in addition to or exclusive of other benefits available to them under FECA, the Court continued, surely it would have said so.<sup>136</sup>

Similarly, the PVA and SAA are “manifestations of a single larger purpose, jointly forming a rational system free of random omissions and exceptions.”<sup>137</sup> Although this characterization may overstate the efficacy of the dual-statute system, it rightly rejects a belt-and-suspenders interpretation of the PVA and SAA waivers: one works to the exclusion of the other, and the beginning of one statute’s jurisdictional territory marks the end of the other.<sup>138</sup> As deletion of the Merchant Vessel Proviso from the SAA in 1960 arguably made clear, any admiralty claim against the government involving public vessels that is beyond the scope of the PVA is subject to the exclusive terms of the SAA.<sup>139</sup> Should jurisdiction of all contract or tort claims in admiralty merely *involving* public vessels be subject to the terms of the PVA, a relatively small class of claims remains for the much broader waiver contained in the SAA.<sup>140</sup> In determining whether the specific statute should swallow its more general counterpart, Congress’s chosen words provide an important point of comparison.

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136. *Johansen*, 343 U.S. at 428–29. *But see id.* at 432 (Black, J., dissenting) (insisting Congress intended to allow plaintiffs to take their pick between available methods for compensation, while attacking the majority’s reasoning as unreasonably formalistic and contrary to established precedent). *See also Feres v. United States*, 340 U.S. 135, 146 (1950) (holding that the government is not liable under the FTCA “for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service”). Courts typically extend the *Feres* Doctrine to claims alleged under the PVA. *See, e.g., Charland v. United States*, 615 F.2d 508, 509 (9th Cir. 1980) (dismissing wrongful death claim for Navy seaman killed during training).

137. *Calmar S.S. Corp. v. United States*, 345 U.S. 446, 451 (1953).

138. *See Blanco v. United States*, 775 F.2d 53, 57 (2d Cir. 1985) (recognizing overlap between the PVA and the SAA, while stating that “actions involving public vessels are not cognizable under the [SAA] but must be brought solely under the PVA”).

139. *See United States v. United Cont’l Tuna Corp.*, 425 U.S. 164, 180–81 (1976).

140. This is particularly so given that wage claims by Federal employees working aboard government vessels are governed by the Tucker Act. *See, e.g., Amell v. United States*, 384 U.S. 158 (1966); *see also supra* note 135 (discussing FECA as exclusive remedy for federal employee claims resulting from personal injuries, even in admiralty).

### B. Statutory Interpretation And The PVA

In contrast to the PVA, the SAA provides a broad waiver of sovereign immunity, permitting civil actions in personam in admiralty against the government in cases where an action would lie if the vessel were privately owned or operated.<sup>141</sup> This grant purports on its face to open the entire universe of admiralty claims against the government in a manner coextensive with rights enforceable against private defendants.<sup>142</sup> At the same time, the PVA operates to remove certain enumerated claims from the SAA, permitting civil actions in personam in admiralty under only two circumstances: for “damages caused by a public vessel of the United States,” or for “compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.”<sup>143</sup> Traditional canons of statutory interpretation are useful tools in construing these statutes, so long as they are deployed with appropriate restraint.<sup>144</sup> Three commonly used canons prove helpful here.<sup>145</sup> Particularly, the preference for strictly construing waivers of sovereign immunity, the

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141. 46 U.S.C. § 30903(a) (2006).

142. *United Cont'l Tuna*, 425 U.S. at 180–81, 184 (Stevens, J., dissenting) (“The plain language of the [SAA] authorizes anyone to sue the United States for damages caused by any United States vessel.”). Thus, assuming for a moment Congress never enacted the PVA, claims such as those in *Taghadomi* and *Tobar* would unquestionably fall within the grasp of the SAA.

143. § 31102(a).

144. See generally Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 652–55 (1992); Arthur W. Murphy, *Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts*, 75 COLUM. L. REV. 1299 (1975); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992). Although useful, the canons are most dangerous when used to justify a pre-determined result or to maintain the status quo. See THE FEDERALIST NO. 78, at 431–32 (Alexander Hamilton) (George Stade ed., 2006) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”); Shapiro, *supra*, at 921–26.

145. This is not to say there are not others. The disfavored maxim that statutes in derogation of the common law should be strictly construed invites a narrow reading of both the PVA and the SAA because they waive sovereign immunity—a concept deeply rooted in common law traditions. Shapiro, *supra* note 144, at 936–40; *supra* note 22 and accompanying text. Also, the presumption against implied repeal supports the continued distinction between the PVA and the SAA following removal of the Merchant Vessel Proviso. Without a presumption against implied repeal—and in the absence of an actual repeal—the PVA would founder in the rising tide of an SAA no longer limited by the Merchant Vessel Proviso. See *United Cont'l Tuna*, 425 U.S. at 168–69 (“[R]epeals by implication are not favored. The principle carries special weight when we are urged to find that a specific statute has been repealed by a more general one.” (citations omitted)).

maxim *inclusio unius est exclusio alterius* (the inclusion of one excludes all others), and the plain meaning doctrine all suggest Congress intended a limited scope for the PVA.

First, prior Supreme Court jurisprudence establishes that waivers of sovereign immunity must be strictly construed.<sup>146</sup> Courts should apply the traditional principles favoring a strict construction,<sup>147</sup> and must not enlarge any waiver “beyond what the language requires.”<sup>148</sup> Though in some cases—such as interpretation of the broad waiver of general tort liability contained in the FTCA—this principle may be abandoned, it should only be ignored when an unnecessarily strict interpretation frustrates the central purpose of a statute or regulatory scheme that is presented in “sweeping language.”<sup>149</sup> The precise and limited language of the PVA is a far cry from the broad FTCA waiver (waiving immunity for “any claim against the government” sounding in tort).<sup>150</sup> When viewed alongside the SAA’s broad waiver, the PVA’s specific language fails to qualify for the exception to the rule of strict construction.<sup>151</sup> Accordingly, the waiver should be strictly construed and must not be enlarged beyond what its language permits.

Second, the maxim *inclusio unius est exclusio alterius* is helpful in considering subpart (2) of 46 U.S.C. § 31102(a), the PVA waiver of sovereign immunity for towage and salvage claims.<sup>152</sup> Though perhaps the most criticized of the ancient maxims,<sup>153</sup> *inclusio unius*

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146. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Henderson v. United States*, 517 U.S. 654, 673 (1996) (Thomas, J., dissenting); *see also Nagle, supra* note 30, at 836 (“And while it is not difficult to determine whether a statutory provision waives sovereign immunity generally, the *scope* of a statutory waiver as applied to particular claims presents a much harder question. The answer lies in the Court’s general approach to determining Congress’s intent, aided by a presumption against a waiver . . .”). *But see Tobar v. United States*, 639 F.3d 1191 (9th Cir. 2011) (broad interpretation); *Thomason v. United States*, 184 F.2d 105 (9th Cir. 1950) (same).

147. *United States v. Sherwood*, 312 U.S. 584, 590 (1941). Interestingly, a strict construction of the PVA leads to broader remedies under the SAA. *See discussion infra* Part II.E.

148. *E. Transp. Co. v. United States*, 272 U.S. 675, 686 (1927).

149. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491–92 (2006).

150. 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

151. *See Jefferson v. United States*, 74 F. Supp. 209, 213 (D. Md. 1947) (“The wording of the Tort Claims Act is more analogous to the [SAA] than to the [PVA].”).

152. 46 U.S.C. § 31102(a).

153. *See REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES* 235 (1975) (explaining the maxim as “at best a description, after the fact, of what the court has discovered from

*est exclusio alterius* suggests that the inclusion of certain, enumerated items or rights operates to the exclusion of other items or rights that might be fairly considered in the same context.<sup>154</sup> In deciding that maritime lien claims fall outside the PVA in *Marine Coatings*, the Eleventh Circuit correctly applied this maxim.<sup>155</sup> Recognizing that the PVA waives sovereign immunity not only for damages caused by public vessels, but also for towage and salvage claims, the court noted it would have been meaningless for Congress to enumerate such claims if the Damages Provision incorporated all other maritime contract claims.<sup>156</sup>

On the other hand, in a 1950 decision regarding civil service seamen seeking to recover unpaid wages, the Ninth Circuit ignored *inclusio unius est exclusio alterius* and held that wage claims do fall within the Damages Provision and thus the PVA and the SAA apply.<sup>157</sup> Interestingly, nowhere in the three-page decision is the enumeration of contract claims even mentioned.<sup>158</sup> Instead, the court cited Supreme Court precedent extending the PVA to noncollision property damage cases<sup>159</sup> and personal injury cases<sup>160</sup> in support of its proposition that the PVA should also cover wage suits.<sup>161</sup> This

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context”); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 282 (1985) (criticizing the canon as opportunistic and wrongly based in assumption that the legislature deliberately excluded all omissions not explicitly enumerated in a statute).

154. BLACK’S LAW DICTIONARY, *supra* note 38, at 661, 831. The maxim is most helpful when considering the negative implications of positive language when no generalizing terms also appear. *Id.* at 661–62 (citing DICKERSON, *supra* note 153, at 234–35). Another maxim, *ejusdem generis* (of the same kind or class), provides that a generalizing word or phrase following a list suggests the statute should be interpreted to include items or rights similar to those listed, even if not explicitly provided for. *Id.* at 594. There are no generalizing terms in the PVA waiver. *See* § 31102.

155. *Marine Coatings of Ala. v. United States*, 71 F.3d 1558 (11th Cir. 1996).

156. *Id.* at 1564 (“The specific inclusion of particular contract claims would be meaningless if the ‘damages’ provision extended to maritime contract claims in general.”).

157. *Thomason v. United States*, 184 F.2d 105, 107 (1950) (emphasis added). Technically, it is incorrect to say that both acts apply. The PVA and the SAA contain their own distinct waivers of sovereign immunity. If triggered, the PVA incorporates SAA provisions that are not inconsistent with its own terms. *Marine Coatings*, 71 F.3d at 1561 n.3 (“lifting of the Government’s sovereign immunity . . . is governed exclusively by the provisions in the [PVA]; the [SAA], in and of itself, simply does not apply.”); *see* discussion *supra* notes 87, 123.

158. *See Thomason*, 184 F.2d at 106–08.

159. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215 (1945).

160. *Am. Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947).

161. *Thomason*, 184 F.2d at 107. The court also cited a similar case, *Jentry v. United States*, 73 F. Supp. 899 (S.D. Cal. 1947), in support of its holding. *Id.*

interpretation not only makes presumptive use of loosely related precedent, but it also ignores the specific enumeration of only certain contract claims and results in an unnatural construction that the PVA's plain language simply cannot bear.<sup>162</sup>

Third, the plain meaning of the PVA does not support a broad interpretation. Unsurprisingly, the plain meaning doctrine suggests the words of a statute should be interpreted according to their plain meaning and assumes that a rational legislature communicates by using words in their ordinary and commonly accepted sense.<sup>163</sup> Rejected by some as a tautology that ignores the necessary context of any communication, the plain meaning rule recently has gained favor—especially among the justices of the Supreme Court.<sup>164</sup> When the words of a statute are clear, the inquiry ends<sup>165</sup> unless the plain meaning would require an unintended or absurd result, in which case a court may seek an alternative interpretation.<sup>166</sup>

The plain meaning of the Damages Provision seems to require: (1) damages; (2) caused by; (3) a public vessel.<sup>167</sup> Relying on the traditional personification of the ship as a juristic person, the Ninth Circuit in *Thomason v. United States* concluded that damages stemming from unpaid wages were caused by the vessel itself and thus triggered the PVA.<sup>168</sup> This is so, the court reasoned, because a public vessel is a juristic person and, as such, is responsible for the actions of its crewmembers related to the vessel's possession or

162. See *Marine Coatings*, 71 F.3d at 1564.

163. Shapiro, *supra* note 144, at 931–34; BLACK'S LAW DICTIONARY, *supra* note 38, at 1267.

164. See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”); Shapiro, *supra* note 144, at 931–34.

165. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). Justice Scalia suggests this approach:

[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.

*Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

166. *Pub. Citizen*, 491 U.S. at 470–71 (Kennedy, J., concurring).

167. 46 U.S.C. § 31102(a)(1) (2006).

168. See *Thomason v. United States*, 184 F.2d 105, 107–08 (1950).



operation.<sup>169</sup> However, Justice Reed suggested in *Canadian Aviator v. United States* that the personification doctrine cuts both ways:

The use of the [phrase] ‘caused by a public vessel’ constitutes an adoption by Congress of the customary legal terminology of the admiralty law which refers to the vessel as causing the harm *although the actual cause is the negligence of the personnel in the operation of the ship*. Such [personification] of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court.<sup>170</sup>

With this in mind, is it enough for a vessel simply to be involved? Or must the vessel, as a result of the acts or omissions of its personnel, be the actual cause of the claimed damages? In *Thomason*, the Ninth Circuit suggested that the personification of a vessel makes her a sort of unknowing co-conspirator, and that all claims merely involving her trigger the PVA.<sup>171</sup> Even when the vessel is at best an indirect cause of the injury or merely facilitates the injury, she must answer; and because she must answer, the PVA applies.<sup>172</sup> But, it is one thing to say that a ship is responsible for the actions of her crew in directing her movements. It is quite another—and contrary to the plain meaning of the PVA—to say that because of this imputed

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169. *See id.*

170. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 224 (1945) (emphasis added); *see also* George K. Walker, *The Personification of the Vessel in United States Civil In Rem Actions and the International Law Context*, 15 TUL. MAR. L.J. 177 (1991). The personification doctrine traces its roots to forfeiture law and is most commonly used as a justification for in rem proceedings against a ship. *Id.* at 189. Thus, despite its romantic and curious nature the doctrine should be employed cautiously as a justification for expanding the PVA. *See id.*

171. *See Thomason*, 184 F.2d at 107–08; *see also* *Tobar v. United States*, 639 F.3d 1191, 1199 (9th Cir. 2011) (“Although the public vessel itself played a direct role only in some of the actions . . . the public vessel’s role in all of the actions of the crew is unmistakable.”).

172. *See Thomason*, 184 F.2d at 107–08. The *Tobar* court refers to its holding in *Thomason*: “We held, for instance, that ‘unpaid compensation for seamen’s services’ were ‘damages caused by a public vessel.’” *Tobar*, 639 F.3d at 1198 (quoting *Thomason*, 184 F.2d at 108).

responsibility a ship thus causes any and all damages even remotely relating to her existence.<sup>173</sup>

The Eleventh Circuit correctly interprets the PVA in a more ordinary and limited sense, where personification of the vessel suggests the vessel must be *the* cause of claimed damages.<sup>174</sup> Taking the language of the Damages Provision at face value and as ordinarily understood, the Eleventh Circuit recognized a close causal nexus between the public vessel and the resulting damages, however the term damages may be defined.<sup>175</sup> Though animated by her crewmembers, a vessel is a juristic person capable of inflicting damages of her own.<sup>176</sup> In this sense, it is simple to distinguish injuries merely involving a ship and those resulting from a ship's "actions."<sup>177</sup> But, with or without the personification analysis, the statute's language is clear on its face: the public vessel itself must cause the claimed damages and, at first glance, not merely act as a proxy for the independent actions of its crew unrelated to navigation or operation of the vessel.<sup>178</sup> As *Marine Coatings* and *Uralde* suggest, construing the statute strictly does not lead to patently

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173. *Marine Coatings of Ala. v. United States*, 71 F.3d 1558, 1563–64 (11th Cir. 1996). *But see* *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 169 (2d Cir. 1968) ("It is no strain whatever on the language to say that a public vessel has 'caused' any tort damage for which she is legally responsible." (citing *Thomason*, 184 F.2d 105)).

174. *Marine Coatings*, 71 F.3d at 1564.

175. *See id.* at 1563 (stating that damages there resulted from the government's failure to pay for repair work, not from any negligent act by a ship or its crew). "Damages" typically means "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." BLACK'S LAW DICTIONARY, *supra* note 38, at 445. "Damage" typically means "[l]oss or injury to person or property." *Id.* The Supreme Court noted this distinction, suggesting "damages" (plural) refers to that which a plaintiff is awarded as a result of a successful claim, while "damage" (singular) refers to the injury suffered on account of another party's unlawful act. *See* *Am. Stevedores, Inc. v. Porello*, 330 U.S. 446, 450 n.6 (1947). Use of the plural "damages" in the PVA supports extension of the act to personal injury claims, but its effect on clarifying the required causal nexus between vessel and damages is unclear. *See id.* Surely a vessel can be the cause of damages resulting from injury to property or person, or even the remedy in a breach of contract action (based on traditional in rem principles); but can she ever be said to be the *cause* of damages resulting from a breach of contract? *See supra* text accompanying notes 171–73.

176. *See generally* *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 133–38 (1873) (discussing in rem liability of vessel); *The China*, 74 U.S. (7 Wall.) 53 (1868) (same).

177. *Cf. Canadian Aviator, Ltd. v. United States*, 324 U.S. 215 (1945) (public vessel acting as tow led another vessel into a submerged wreck); *Uralde v. United States*, 614 F.3d 1282 (11th Cir. 2010) (crewmembers arrive on public vessel and board private vessel during rescue).

178. *See Marine Coatings*, 71 F.3d at 1564.

absurd results that are clearly outside Congress's intentions.<sup>179</sup> Thus, the plain meaning of the statute must inform interpretation of the PVA.<sup>180</sup> Despite a modest expansion of the PVA in the cases discussed below, the Supreme Court has reasonably adhered to the statute's plain meaning.

### C. The Supreme Court: A "Broad" Interpretation?

In addition to providing general rules for interpreting statutory waivers of sovereign immunity, the Supreme Court has on several occasions addressed the PVA's contours.<sup>181</sup> The Ninth Circuit generally relies on three cases—*Canadian Aviator v. United States*,<sup>182</sup> *American Stevedores v. Porello*,<sup>183</sup> and *United States v. United Continental Tuna Corporation*<sup>184</sup>—in support of its broad interpretation of the PVA.<sup>185</sup> In doing so, the court goes too far.<sup>186</sup> While these cases broadened the scope of the PVA beyond collision cases involving damage to property, they do not support the generally broad interpretation articulated by the Ninth Circuit.<sup>187</sup> Instead, two of these cases—decided before the 1960 amendments to the SAA—exhibit decided caution in applying the PVA waiver under reasonable and limited circumstances.<sup>188</sup> And, importantly, they did so at a time before any claim not cognizable under the PVA would nonetheless be covered by the SAA.<sup>189</sup> Taken together, these cases complement the

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179. See *Uralde*, 614 F.3d at 1284; *Marine Coatings*, 71 F.3d at 1564.

180. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

181. See generally *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164 (1976); *Am. Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947); *Canadian Aviator*, 324 U.S. 215.

182. *Canadian Aviator*, 324 U.S. 215.

183. *Am. Stevedores*, 330 U.S. 446.

184. *United Cont'l Tuna*, 425 U.S. 164.

185. See, e.g., *Tobar v. United States*, 639 F.3d 1191, 1199–1200 (9th Cir. 2011); *Thomason v. United States*, 184 F.2d 105, 107–08 (9th Cir. 1950).

186. *Marine Coatings*, 71 F.3d at 1563–64 (criticizing the Ninth Circuit view as overly broad).

187. See *Marine Coatings*, 71 F.3d at 1564 (“*Canadian Aviator* and *American Stevedores*, while not collision cases of the type described in the legislative history, are nonetheless cases involving torts committed by . . . public vessels that caused damage to person or property. It would be a stretch to hold that these cases support the extension of the [PVA] to cover all maritime claims . . . in contract or in tort.”); see also discussion *infra* Part II.C.1–3.

188. See discussion *infra* Part II.C.1–3; see also *supra* note 187.

189. *Marine Coatings*, 71 F.3d at 1564 n.8 (“*Canadian Aviator*, *American Stevedores*, and *Thomason* were decided at a time when an expansive reading of the ‘damages’ provision served to enlarge the

conclusion drawn from the preceding plain meaning analysis: a strict but reasonable interpretation of the PVA is most appropriate.

### I. *Canadian Aviator v. United States (1945)*

In *Canadian Aviator*, a ship known as the *Cavelier* entered Delaware Bay, where Naval authorities ordered the boat to follow directly astern a Navy patrol boat.<sup>190</sup> While following as directed, the *Cavelier* allided with a submerged wreck.<sup>191</sup> The district court dismissed the action because the Navy vessel was not the “efficient cause” of the accident;<sup>192</sup> instead, the “personal and independent negligence” of the crew caused the *Cavelier* to strike the wreck.<sup>193</sup> The Supreme Court reversed, holding that the PVA “extends to cases where the negligence of the personnel of a public vessel *in the operation of the vessel* causes damage to other ships, their cargoes, and personnel, regardless of physical contact between the two ships.”<sup>194</sup>

After announcing its rule, the Court stated it found no reason to allow recovery in collision cases, while refusing recovery “for damages caused by *other movements* of the offending vessel.”<sup>195</sup> The Court also stated that the “broad statutory language authorizing suit” should not be “thwarted by an unduly restrictive interpretation.”<sup>196</sup>

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coverage of the [PVA].”).

190. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 216–17 (1945).

191. *Id.*

192. *Id.* at 217–18. The Navy vessel was not the “noxious instrument” causing the harm. *Id.* at 218.

193. *Id.*

194. *Id.* at 224–25 (emphasis added).

195. *Id.* at 225 (emphasis added).

196. *Canadian Aviator*, 324 U.S. at 222 (“[A] narrow interpretation of the Act is not justifiable. While the general history of the Act as outlined above does not establish that the statute necessarily extends to the noncollision cases in view of the rule of strict construction of statutory waiver of sovereign immunity, we think Congressional adoption of broad statutory language authorizing suit was deliberate . . . .” (citation omitted)). This language can be misleading out of context. An original version of the PVA contained a waiver for damages resulting only from collisions with public vessels; however, Congress removed this requirement from the final bill. See discussion *infra* Part II.B. Thus, a PVA without the word “collision” is properly characterized as broader than one with the word. But, given the sweeping language of the SAA in its present state, it is difficult to consider the PVA as a similarly broad waiver. See *Marine Coatings of Ala. v. United States*, 71 F.3d 1558, 1564 (11th Cir. 1996) (“[W]e do not read the Supreme Court’s decisions as an effort to stretch the meaning of the ‘damages’ provision as far as it will go, but rather as an effort not to limit the phrase in an unnatural manner, in light of the congressional purpose [of the PVA].”). Compare 46 U.S.C. § 31102(a) (2006) (limited waiver), with

The Ninth Circuit seized on this language in several cases to support an even broader interpretation.<sup>197</sup> But, *Canadian Aviator* stands only for the unremarkable proposition that a collision is not necessary to trigger the PVA: negligence on behalf of the crew in the operation and movement of a public vessel that directly causes damage to another vessel, its cargo, or personnel is sufficient.<sup>198</sup> *Canadian Aviator* expanded the scope of the PVA beyond collision cases, but the requirement of a close causal nexus between the operation or movement of the ship and resulting damage clearly survived.<sup>199</sup>

The Supreme Court's characterization of the PVA's waiver as broad is interesting for two reasons. First, the Court highlighted the importance of a House Resolution<sup>200</sup> introduced before the PVA became law.<sup>201</sup> This bill would have authorized suit against the government for "damages caused *by collision* by a public vessel."<sup>202</sup> The Court correctly reasoned that removal of "by collision" from the final bill indicated Congress's intention to also allow suit in noncollision cases.<sup>203</sup> Second, in 1945 it was easier to characterize the PVA's waiver as broad—or at least to justify doing so—in light of the restrictive nature of the pre-1960 SAA.<sup>204</sup> Because the SAA at the time only allowed claims involving public vessels employed as merchant vessels, a strict reading of the PVA would leave deserving plaintiffs injured by non-merchant public vessels without relief.<sup>205</sup> A generally broad scope is unnecessary today because the amended SAA "affords an open berth in the district courts, provided the claims are of a maritime nature."<sup>206</sup>

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§ 30903(a) (broad waiver).

197. See *Tobar v. United States*, 639 F.3d 1191, 1198–99 (9th Cir. 2011) ("For decades, we—and the Supreme Court—have interpreted [the PVA] broadly."); *Taghadomi v. United States*, 401 F.3d 1080, 1088 (9th Cir. 2005) (citing *Canadian Aviator* in support of allowing a negligent search claim under the PVA).

198. *Canadian Aviator*, 324 U.S. at 224–25.

199. *Id.*

200. H.R. 6989, 68th Cong. (1924).

201. *Canadian Aviator*, 324 U.S. at 223.

202. *Id.* (emphasis added) (citing H.R. 6989).

203. *Canadian Aviator*, 324 U.S. at 223; see discussion *supra* Part II.D.

204. See *supra* note 189.

205. See discussion *supra* Part I.C.

206. *Amell v. United States*, 384 U.S. 158, 160 (1966); see also *Marine Coatings of Ala. v. United*

2. *American Stevedores v. Porello (1947)*

*American Stevedores* extended the PVA to damages for personal injury.<sup>207</sup> In *American Stevedores*, a beam resting across a hatch fell into the hold and struck a longshoreman working aboard the ship.<sup>208</sup> The Court held that, because damages traditionally are awarded for injury to both property and person, the longshoreman should be permitted to maintain suit against the government.<sup>209</sup> The majority thought that Congress could have limited the scope of the bill to only property damages simply by saying so.<sup>210</sup> Further, at least according to the Court, the legislative record suggested Congress intended the scope of the PVA to be similar to that of its sister statute, the SAA, but applied to public vessels.<sup>211</sup> The dissent disagreed; Justice Frankfurter wrote that Congress never expressly stated the bill extended to personal injury suits.<sup>212</sup> He also insisted the waiver must be construed as a whole, reading “damages caused by a public vessel” together and spontaneously, rather than considering “damages” in isolation.<sup>213</sup> This reading suggests the injury must be “inflicted by a public vessel rather than . . . incurred in connection with its operation.”<sup>214</sup> Revisiting *Canadian Aviator* just two years later, Justice Frankfurter suggested its holding only established that personnel are considered part of the public vessel for purposes of causing damage to other vessels.<sup>215</sup> Perhaps the dissent goes too far as well,<sup>216</sup> but inclusion of personal injury damages within the PVA

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States, 71 F.3d 1558, 1564 n.8 (11th Cir. 1996) (“Since 1960 . . . any claim not covered by the [PVA] is covered by the [SAA].”).

207. *Am. Stevedores, Inc. v. Porello*, 330 U.S. 446, 453–54 (1947).

208. *Id.* at 449.

209. *Id.* at 450.

210. *Id.*

211. *Id.* at 452–53. But this conclusion treads thin ice, given the general tenor of the legislative record. See discussion *infra* Part II.D.

212. *Am. Stevedores*, 330 U.S. at 460–63.

213. *Id.* at 460–61.

214. *Id.*

215. *Id.*

216. For example, is there any good reason to allow claims for property damage and not damage to a person when both result from the same collision with a public vessel? Either way, there is some support in the legislative history for the dissent’s view. See 66 CONG. REC. 2087–88 (1925). In a hearing, Representative MacLafferty asked the bill’s proponent, Representative Underhill: Is it “provided that the suits can only be taken into the admiralty court where the blame has been laid on the Government[?]”

supports a generally broad interpretation of its terms no more than does the incorporation of noncollision cases in *Canadian Aviator*.<sup>217</sup>

### 3. United States v. United Continental Tuna Corporation (1976)

In *United Continental Tuna* the Supreme Court reversed a Ninth Circuit determination that, following the 1960 amendments to the SAA, suits involving collisions with public vessels were also cognizable under the SAA.<sup>218</sup> The plaintiff in the original action, a Philippine corporation, alleged a naval destroyer collided with one of its fishing vessels and caused it to sink.<sup>219</sup> To avoid the PVA's reciprocity requirement, the plaintiffs alleged jurisdiction under the SAA.<sup>220</sup> Acknowledging the claim as falling indisputably within the scope of the PVA, the Court considered exactly what Congress wrought by removing the Merchant Vessel Proviso from the SAA.<sup>221</sup> Highlighting the history and legislative records of the two acts,<sup>222</sup> the Court found Congress had no intention to "render nugatory" the provisions of the PVA.<sup>223</sup> Nor was Congress concerned with determining which claims fell within one act or the other; instead, the SAA covered "whatever category of claims involving public vessels was beyond the scope of the [PVA]."<sup>224</sup> Importantly, the Court

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*Id.* at 2088. Mr. Underhill responded: "Not entirely; where a man's *property* is damaged, he can bring a suit." *Id.* (emphasis added).

217. The Ninth Circuit quotes *American Stevedores* in *Tobar* as "recognizing 'the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage.'" *Tobar v. United States*, 639 F.3d 1191, 1198 (9th Cir. 2011) (quoting *Am. Stevedores*, 330 U.S. at 453). In doing so, the Ninth Circuit presents the language incompletely and out of context. In *American Stevedores*, the Court suggested the SAA, the PVA, and the FTCA, *taken together*, support a general premise that suits against the government should be permitted in more cases than traditionally thought. *See Am. Stevedores*, 330 U.S. at 453. It does not follow that the PVA, *on its own* and as applied in *American Stevedores*, should be read broadly and in a way that conflicts with its plain meaning.

218. *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 167 (1976). The Ninth Circuit reached this determination despite recognizing its holding permitted plaintiffs to circumvent the restrictive reciprocity provision contained in the PVA in a manner likely not intended by Congress. *United Cont'l Tuna Corp. v. United States*, 499 F.2d 774, 778 (9th Cir. 1974), *rev'd*, 425 U.S. 164 (1976).

219. *United Cont'l Tuna*, 425 U.S. at 166.

220. *Id.* at 165.

221. *Id.* at 170–78.

222. *Id.*; *see* discussion *infra* Part II.D.

223. *United Cont'l Tuna*, 425 U.S. at 178.

224. *Id.* at 178, 180–81.

recognized that collision claims did not factor into Congress's decision to amend the SAA in 1960.<sup>225</sup> Claims once subject to the PVA remained subject to its terms following the amendments.<sup>226</sup> But, other claims outside the scope of the PVA and SAA—previously cognizable on the law side of the courts—now fell under the SAA.<sup>227</sup>

Despite some confusion,<sup>228</sup> the result in this case is fairly straightforward: claims originally subject to the terms of the PVA remain subject to the PVA after the 1960 amendments to the SAA, and certain maritime claims previously excluded from both the PVA and SAA are now cognizable under the SAA.<sup>229</sup> In the end, the Supreme Court's decision in *United Continental Tuna* did nothing to alter the scope of claims originally cognizable under the PVA.<sup>230</sup> After all, the Court merely held that a collision case involving a public vessel must be brought under the PVA and not the SAA.<sup>231</sup> Luckily, the legislative record provides a useful glimpse into what the PVA's progenitors thought about its original scope.

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225. *Id.* at 181 (“[C]laims like the instant one, that fell within the [PVA], presented none of the problems with which Congress was concerned in 1960, and there is therefore no reason to infer that Congress intended to affect them.”).

226. *Id.*

227. *See id.* at 172–81 (“Maritime tort claims deemed beyond the reach of both Acts could be brought only on the law side of the district courts . . . . More importantly for our purposes, contract claims not encompassed by either Act fell within the Tucker Act, which lodged exclusive jurisdiction in the Court of Claims for claims exceeding \$10,000. . . . Congress’[s] deletion of the [Merchant Vessel Proviso] was clearly intended to remove such uncertainty as to the proper forum by bringing within the [SAA] whatever category of claims involving public vessels was beyond the scope of the [PVA].” (citations omitted)).

228. *See id.* at 183–84 (Stewart, J., dissenting) (stating that the SAA’s plain meaning should permit any suit involving public vessels, while failing to consider the maxim *lex specialis derogat generali* (specific overrides general)); *Taghadomi v. United States*, 401 F.3d 1080, 1089 (9th Cir. 2005) (citing *United Continental Tuna* for the proposition that the PVA should not be interpreted along textualist lines and that the plain meaning of the PVA and the SAA would have permitted the plaintiffs to avoid the reciprocity requirement). On the contrary, the plain meaning of the PVA *did* subject the plaintiffs in *United Continental Tuna* (who were suing for collision damages) to reciprocity. *See United Cont’l Tuna*, 425 U.S. at 178–81. The plain meaning of the SAA, in a world without the PVA, would permit suit against public vessels without regard to reciprocity. But for those claims that trigger the PVA, its more restrictive provisions apply. *Id.*

229. *United Cont’l Tuna*, 425 U.S. at 180–81.

230. *Id.* at 181 (“Claims within the scope of the [PVA] remain subject to its terms after the 1960 amendment to the [SAA]. . . . [T]here is no dispute that respondent’s claim falls within the embrace of the [PVA] . . . .”).

231. *Id.*



*D. The Legislative Record: Collisions And The Like, Or Something More?*

The legislative history of the PVA suggests its proponents intended a strict interpretation of its terms. Like other tools of statutory interpretation, legislative histories must be used with care.<sup>232</sup> Generally, when a statute is clear on its face, a court need not delve into the legislative record.<sup>233</sup> But, when a statute is ambiguous, a court may consult the legislative record to help illuminate its construction.<sup>234</sup> Here, the plain meaning of the PVA's waiver is clear. Ultimately, it is thus unnecessary to resort to the legislative record. But, given the confusion among the circuits, it is nevertheless appropriate—*arguendo*—to consider the legislative history.<sup>235</sup>

Several proposed laws preceded the bill that would eventually become the PVA,<sup>236</sup> House Bill 9535.<sup>237</sup> However, only those bills pending during the 68th Congress—when the PVA became law—are appropriate to consider.<sup>238</sup> The first bill proposed waiving sovereign immunity “for damages caused *by collision* by a public vessel.”<sup>239</sup>

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232. See generally Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

233. *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 871 (9th Cir. 1981). However, there is no per se rule forbidding use of the record when the legislature's intent is clearly expressed in the statute. *Train v. Colo. Pub. Interest Research Grp.*, 426 U.S. 1, 9 (1976).

234. *Heppner*, 665 F.2d at 871. One exception establishes that a court must not ignore clear and credible statutory language that demands a result contrary to that which the court seeks to reach on plain language alone. See *Train*, 426 U.S. at 9–10.

235. Because the 1960 amendments to the SAA did not affect the scope of the PVA, but instead merely brought new claims under the SAA, the legislative history related to that statutory change does little to shed light on the proper scope of the PVA. See discussion *supra* Part II.C. It suffices to note that the legislative histories related to passage of the PVA pre-date the 1960 amendments to the SAA, and any public vessel carve-out created by the PVA resulted in an exclusive waiver of sovereign immunity for damages caused by a public vessel. See discussion *supra* Part II.C.

236. See *Am. Stevedores, Inc. v. Porello*, 330 U.S. 446, 450 n.7 (1947) (citing H.R. 9075, 68th Cong. (1924); H.R. 6989, 68th Cong. (1924); H.R. 15977, 66th Cong. (1921); H.R. 6256, 67th Cong. (1921)).

237. See *id.* at 451 (citing H.R. 9535, 68th Cong. (1924)).

238. *Id.* at 450. The earlier reports are still helpful even though they replicate much of the information contained in the reports attached to the final bill. See, e.g., H.R. REP. NO. 66-1301 (1921). Interestingly, one congressional report lists fifteen special acts passed between 1900 and 1917. *Id.* at 4. Each entry provides the name of the vessel and the date the “[a]ccident occurred.” *Id.* Two acts, filed near the end of the Civil War, passed after 1900. *Id.* The others, on average, became law two to three years after the initial petition for relief. See *id.*

239. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 223 (1945) (emphasis added) (citing H.R.

The second would have amended the SAA to remove the Merchant Vessel Proviso and include damages caused by public vessels under its terms.<sup>240</sup> Proponents of the ultimately successful bill introduced it as “a substitute for H.R. 6989” (the bill requiring collision) and identified its chief purpose as “grant[ing] 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.”<sup>241</sup>

Unfortunately, Congress did not explain why it removed the collision provision.<sup>242</sup> To add to the complication, one statement suggests the bill could be construed to cover a wide variety of claims.<sup>243</sup> But, given the consistent focus throughout the record on the exclusive application of the bill’s waiver to collision cases, it is difficult to conclude Congress intended a generally broad waiver.<sup>244</sup> In fact, the House Report accompanying the PVA includes responses from high-level government officials detailing the public vessels involved in collisions during the preceding four years.<sup>245</sup> The House and Senate reports (“Reports”) each span twenty-three nearly identical pages; the final seven pages log the frequency and cost of collisions involving public vessels since January 1, 1920.<sup>246</sup> By no means dispositive—but certainly suggestive of general focus—the word “collision” is used at least fifty-three times in the Reports.<sup>247</sup>

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6989, 68th Cong. (1924)).

240. *Am. Stevedores*, 330 U.S. at 45–51 (citing H.R. 9075, 68th Cong. (1924)). Unfortunately, this bill never reached the floor of Congress. *Id.* Although the 68th Congress conducted its business without the luxury of hindsight, successful enactment of this bill might have prevented the jurisdictional confusion that has persisted for nearly a century. *See* Nosek, *supra* note 6, at 45–48.

241. S. REP. NO. 68-941, at 1 (1925); H.R. REP. NO. 68-913, at 1 (1924). The House Report and Senate Report are, with a few minor and immaterial exceptions, identical. Because the bill originated in the House, subsequent citations will include only the House Report.

242. *Am. Stevedores*, 330 U.S. at 461–62 (Frankfurter, J., dissenting) (quoting government brief).

243. *See, e.g.*, 66 CONG. REC. 2087 (1925) (statement of Rep. Charles Lee Underhill) (“The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents.”).

244. *See generally* H.R. REP. NO. 68-913; 66 CONG. REC. 3560 (1925); 66 CONG. REC. 2087.

245. The secretaries of Treasury, War, Commerce, and the Navy all fulfilled such requests. *See* H.R. REP. NO. 68-913, at 9–16.

246. *See id.* at 17–23.

247. *See id.* at 1–23. For another interesting discussion of the PVA, see generally *Suspending the Provisions of the Public Vessels Act of 1925 Until Twelve Months after the Termination of the War: Hearing on S. 1173 Before the S. Comm. on Naval Affairs*, 78th Cong. (1943). During the course of yet

Defining the PVA's purpose, the Reports proposed discarding the "long established" private bill practice and replacing it with an efficient remedy for "[s]hipowners, whose vessels have suffered a collision with any Government-owned ship in the public service."<sup>248</sup> Summarizing existing law, the Reports recognized availability of Tucker Act jurisdiction for contract claims, while noting the absence of any forum for shipowners injured by the "negligent navigation of a public vessel."<sup>249</sup> Also, the Reports made reference to "the Act of December 28, 1922"<sup>250</sup> as the "only general legislation covering the subject matter of the pending bill," but found the limited remedy provided there "wholly inadequate, since the damages in collision cases are usually very large in amount."<sup>251</sup> In short, this Act allowed the Secretary of the Navy to award up to \$3,000 for damages "occasioned by collisions or damage incident to the operation of vessels for which collisions or other damage vessels of the Navy or vessels in the Naval Service shall be found to be responsible."<sup>252</sup> With such a limited class of claims comprising the "subject matter of the pending [PVA]," it blinds the truth to suggest that the PVA's proponents intended a broad waiver of immunity in the Damages Provision.<sup>253</sup>

Finally, the letter of Attorney General Harlan Stone that Congress attached to its Reports reveals some indication of the intended scope of the law.<sup>254</sup> The Supreme Court in *American Stevedores* supported

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another conversation heavily focused on collisions, MLAUS president John Griffin stated: "[MLAUS] was one of the active proponents of the [SAA] in 1920 and of the [PVA] in 1925. Up to that time—the time of those acts—the maxim that the king could do no wrong . . . had been applied to these cases of maritime collisions." *Id.* at 29. An MLAUS memorandum in opposition to the bill is attached to the hearing record. *Id.* at 69–75. It contends the proposed bill suspending the PVA "would not forbid the United States to sue private owners for such collisions and, in this respect, it would be entirely 'one way' legislation." *Id.* at 71. The proposed bill became law in 1944. *See* Act of July 3, 1944, Pub. L. No. 78-417, 58 Stat. 723.

248. H.R. REP. NO. 68-913, at 1.

249. *Id.* at 2.

250. Act of Dec. 28, 1922, ch. 16, 42 Stat. 1066. The act is introduced as "An Act [t]o amend the Act authorizing the Secretary of the Navy to settle claims for damages to private property arising from collisions with naval vessels." *Id.*

251. H.R. REP. NO. 68-913, at 5 (emphasis added).

252. 42 Stat. at 1066.

253. H.R. REP. NO. 68-913, at 5.

254. *See generally id.* at 11–13 (letter of Att'y Gen. Harlan Stone); *see also* Blanco v. United States,

its expansion of the PVA to personal injury cases by quoting Mr. Stone's letter as follows: "The proposed bill intends to give the same relief against the Government for damages . . . caused by its public vessels . . . as is now given against the United States in the operation of its merchant vessels, as provided by the [SAA]." <sup>255</sup> The Court did so disingenuously. <sup>256</sup> Mr. Stone's actual words indicated his understanding that the bill covered "damages caused *by collision*" with a public vessel—a distinction not without significance. <sup>257</sup> Though the letter was a response to H.R. 6989 (the bill including the "collision by" requirement), Congress attached Mr. Stone's letter—in its original form—to the PVA as enacted by H.R. 9535. <sup>258</sup> Perhaps Mr. Stone did, after removal of the *word* collision from the bill, change his mind about the necessity of collision as a *precondition* to jurisdiction. The record, however, reflects otherwise. <sup>259</sup> Despite the Supreme Court's conclusion, Mr. Stone's analysis suggests he saw the PVA as a limited waiver for a small category of claims. <sup>260</sup> Congress's incorporation of his analysis into the Reports attached to the PVA suggests it agreed with him. <sup>261</sup>

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775 F.2d 53, 57 n.5 (2d Cir. 1985) ("The Supreme Court has given weight to this letter as an indication of the intended effect of the PVA.").

255. *Am. Stevedores, Inc. v. Porello*, 330 U.S. 446, 452 (1947).

256. *Compare Am. Stevedores*, 330 U.S. at 452–53 (without the word collision), with H.R. REP. NO. 68-913, at 11 (letter of Att'y Gen. Harlan Stone) (with the word collision). Mere removal of a word from a final bill, without more, does not justify judicial abscission of the word from a part of the legislative record Congress deemed important enough to include in its entirety.

257. H.R. REP. NO. 68-913, at 11–13 (letter of Att'y Gen. Harlan Stone).

258. *Id.*

259. *See supra* text accompanying notes 256–58.

260. *See* H.R. REP. NO. 68-913, at 11–13 (letter of Att'y Gen. Harlan Stone). During his examination, Mr. Stone also observed that "the present act grants relief for salvage and towage claims in addition to collision torts." *Id.* at 12. Mr. Stone continued, summarizing the bill:

The proposed legislation is a departure from the rule heretofore strictly adhered to that the Government will not be liable for the torts of its officers . . . . If the rule or principle is modified so as to grant relief for collision damages inflicted by public vessels, like legislation granting relief for the ordinary torts on land, such as damages caused by collision with Army trucks or Post Office mail wagons, may be urged. Suggestions which have come to my notice favoring the bill include the view that the practice of admiralty and international law and procedure place such torts separate and apart from the ordinary torts committed on land, as the vessel is defined the offender rather than the owner of the vessel.

*Id.* at 11.

261. *See also id.* at 3 (suggesting that the maxim "*sic utere tuo ut alienum non laedas* (so use your own as not to injure another's property)" supported Congress's continued recognition that the

*E. Policy and Persuasive Authority: A Little Direction, Please?*

The policy arguments are counterintuitive: a strict interpretation of the PVA results in broader access to the courts and enlarged remedies under the SAA.<sup>262</sup> In short, the PVA requires reciprocity and prohibits interest, while the SAA does neither.<sup>263</sup> One conceivable advantage to bringing suit under the PVA lies in its more liberal venue provision.<sup>264</sup> But this creates yet another problem. Because foreign plaintiffs may bring suit where the offending vessel is found under the SAA (compared to any district court under the PVA), a broad reading of the PVA incorporating contract claims and torts merely involving public vessels frustrates specific policy judgments of Congress as to venue allocation and invites forum shopping.<sup>265</sup> A foreign plaintiff with a contract claim who lacks reciprocity might very well wait until the public vessel involved arrives in a strict-construction jurisdiction. In the Eleventh Circuit, for example, this plaintiff would not have to prove reciprocity and, if successful, would be entitled to pre-judgment interest under the SAA.<sup>266</sup> In the Ninth Circuit, however, the very same plaintiff would be required to prove reciprocity and, if successful in doing so, would also be denied interest under the PVA.<sup>267</sup>

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government is obligated to remedy injuries occasioned by maritime collisions); 66 CONG. REC. 3560 (1925) (statement of Sen. Thomas Francis Bayard, Jr.) (stating the PVA would replace the private bill practice and “give a person aggrieved because of an accident by reason of the shortcomings of a United States ship the right to go in to a district court and prosecute his action”); 66 CONG. REC. 2087 (1925) (statement of Rep. Fiorello Henry La Guardia) (“[Mr. Underhill], you provide for collisions at sea between vessels.”); *id.* at 2089 (statement of Rep. Thomas Lindsay Blanton) (“In every bill of this kind . . . it is usual to put in a provision that all matters of dispute with respect to that transaction, to wit, a collision at sea, shall be adjudicated by the court . . .”); *id.* (insisting the PVA should explicitly permit the government to file a cross action and “have a judgment against the one who files the libel, if he has caused the collision”).

262. *See, e.g.,* *Marine Coatings of Ala. v. United States*, 71 F.3d 1558, 1564 n.8 (11th Cir. 1996) (identifying that strict interpretation of damages provision in PVA results in enlarged remedy under SAA, which provides interest).

263. *See* discussion *supra* Part I.D.

264. *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 n.2 (1976).

265. *Compare* 46 U.S.C. § 30906(a) (2006) (limited venue), *with* § 31104 (expanded venue).

266. *See Marine Coatings*, 71 F.3d at 1564 n.8.

267. *See Taghadomi v. United States*, 401 F.3d 1080, 1088 (9th Cir. 2005) (rejecting noncitizen’s suit under PVA partly because of lacking reciprocity); *Thomason v. United States*, 184 F.2d 105, 107–08 (9th Cir. 1950) (holding wage claim cognizable under PVA).

Another advantage to a broad reading of the PVA is that it results in wider application of the PVA prohibition against subpoenaing crewmembers without the permission of the commanding officer.<sup>268</sup> That crewmembers are subject to direct subpoena under the SAA causes more concern with interdiction claims like those in *Tobar* and *Uralde*, where crew testimony could prove useful.<sup>269</sup> But with contract claims like those in *Marine Coatings* or *Thomason*, it is difficult to see why crewmember testimony would be helpful in the first place.<sup>270</sup> Either way, courts should resist expanding the PVA beyond its intended bounds to provide substantive or procedural “protection” for claims covered by the SAA after removal of the Merchant Vessel Proviso.<sup>271</sup>

Additionally, circuit decisions are confused; outside the “easy” collision cases,<sup>272</sup> no clear organizing principles emerge from the cases.<sup>273</sup> Some courts speak of both acts applying; others properly distinguish between the PVA and SAA.<sup>274</sup> Several courts consider the mere involvement of a public vessel to be enough; others require a closer causal connection.<sup>275</sup> Generic contract claims involving public

268. See § 31110.

269. See discussion *supra* Part I.E.

270. See *Marine Coatings*, 71 F.3d at 1563 (recognizing no negligent act by ship or crew but instead only simple failure to pay a bill).

271. See *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 179 (1976) (“Congress did nothing to alter the distinction between the [SAA and PVA], or expand the one at the expense of the other.”).

272. It is not just the collision cases that make for easy decisions. In perhaps the most interesting attempt to expand the PVA, an inmate filed a pro se complaint alleging a civil rights violation and a libel claim under the PVA for injuries sustained while being “roughed up” by prison guards. See *Hernandez-Chavez v. Corrections Corp. of Am.*, No. 07-3198-SAC, 2009 WL 1689304, at \*1–3 (D. Kan. 2009). The court dismissed the inmate’s claims. *Id.* at \*2–3.

273. See *infra* notes 274–78.

274. See, e.g., *Adams v. United States*, 64 F. Supp. 2d 647, 649 (S.D. Tex. 1999) (stating that claims involving public vessels other than claims “for damages caused by a public vessel” are covered by the SAA and finding suit for personal injuries sustained aboard public vessel cognizable under PVA); *Parks v. United States*, 784 F.2d 20, 28–29 (1st Cir. 1986) (holding that a claim for injuries sustained on a public vessel fell under both the PVA and SAA).

275. Compare *Flohr v. United States*, 160 F. Supp. 745, 746 (N.D.N.Y. 1957) (“The [PVA] . . . permits the assertion of liability in admiralty against the United States where the negligence of its agents has caused personal injury.”), and *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1093 n.13 (D.C. Cir. 1980) (“The [PVA] . . . gives the district courts jurisdiction over tort claims involving public vessels.”), with *Uralde v. United States*, 614 F.3d 1282, 1285–86 (11th Cir. 2010) (stating that mere involvement of a public vessel is not enough to trigger the PVA), and *Hurd v. United States*, 134 F. Supp. 2d 745, 767 (D.S.C. 2001), *aff’d*, 34 F. App’x 77 (4th Cir. 2002) (deeming a failure to rescue claim against Coast Guard governed exclusively by SAA).

vessels are cognizable under the PVA in some circuits, while other circuits entertain such claims under the SAA.<sup>276</sup> Close cases are even treated dissimilarly within the same jurisdiction.<sup>277</sup> Finally, international practice at the time Congress adopted the PVA provides little direction.<sup>278</sup> Such confusion is hardly representative of the consistency the Founders sought to achieve by assigning admiralty jurisdiction to the federal courts,<sup>279</sup> particularly given the frequency with which PVA claims involve noncitizens.<sup>280</sup>

Fortunately, there is a way forward. Although Supreme Court decisions interpreting ambiguous statutes are well nigh final,<sup>281</sup> *Calmar, American Stevedores*, and *Continental Tuna* present no barriers to creating a workable, reliable standard.<sup>282</sup> Luckily, it is

276. Compare *Bethlehem Steel Corp. v. Avondale Shipyards, Inc.*, 951 F.2d 92, 93 (5th Cir. 1992) (“It is undisputed that contracts for the repair of United States government ships are governed by the provisions of the [SAA] . . .”), and *United States v. Loyola*, 161 F.2d 126, 127 (9th Cir. 1947) (finding breach of contract action by seaman for maintenance and cure governed by the provisions of the PVA), with *E.S.S. Lines, Inc. v. United States*, 187 F.2d 956, 959 (1st Cir. 1951) (finding PVA to have “no applicability to a contract claim” seeking payment of costs related to rehabilitating a private vessel after bareboat charter to government for use as warship).

277. See *Geertson v. United States*, 223 F.2d 68, 70–71 (3d Cir. 1955) (holding that the PVA applies when a Coast Guard crew is negligent in towage operation); *P. Dougherty Co. v. United States*, 207 F.2d 626, 634 (3d Cir. 1953) (finding a claim against the United States for crew’s negligence in rescue operation involving towage is not cognizable).

278. The House and Senate reports identify the influence of principal maritime nations, namely England, France, and Germany, on promulgation of the PVA. H.R. REP. NO. 68-913, at 15 (1924) (“[S]ince it is the established practice of the principal maritime nations, notably England, France, and Germany, to permit their nationals and foreigners to sue in their tribunals for damages caused by public vessels, this bill would bring American practice into conformity, substantially, with that of these countries.”). England permitted suit at the time for collision damages and would answer if shown that “the public vessel, through her navigators, was at fault.” *Id.* at 5. English practice regarding salvage claims is mentioned, but other claims involving contracts or crewmember negligence merely involving public vessels are not. See *id.* at 5, 15–16. As to French and German practice, contract and tort suits against the government were recognized, but jurisdiction of the separate claims fell to different courts within each country. *Id.* at 5–6, 16. The Reports highlight what appears to be a discretionary function distinction in France and Germany, where the government could not be held liable for injuries

caused by its agents in the collection of taxes, while it would be if a ship were injured by the negligence of the officers of one of its men-of-war. An example of the purely personal act of one of its agents for which the Government would not be responsible would be found in the case of theft by him.

*Id.* at 16.

279. See discussion *supra* Part I.B.

280. See, e.g., *Tobar v. United States*, 639 F.3d 1191, 1199 (9th Cir. 2011) (Ecuadorian plaintiffs); *Uralde v. United States*, 614 F.3d 1282, 1288 (11th Cir. 2010) (Cuban plaintiffs); *Taghadomi v. United States*, 401 F.3d 1080, 1088 (9th Cir. 2005) (Iranian plaintiffs).

281. *Grundfest & Pritchard*, *supra* note 232, at 630.

282. See discussion *infra* Part III.

unnecessary to create new PVA jurisprudence from whole cloth. Instead, common sense and the lessons of nearly a century of PVA-related developments in the law encourage a simple reaffirmation of existing principles. In the end, an across-the-board strict interpretation of the PVA will improve application of the federal waiver of sovereign immunity in the admiralty context, while also preserving its limited scope as intended by the 68th Congress.

### III. SALVAGING THE PUBLIC VESSELS ACT: CHARTING A NEW COURSE

Putting the PVA back on course requires a strict interpretation of its terms.<sup>283</sup> Properly applied, the PVA does not provide a waiver of sovereign immunity for claims merely involving public vessels.<sup>284</sup> Indeed, something more is required; though recent Eleventh Circuit decisions help identify exactly what this “something more” entails, an orderly and explicit analytical framework will prove useful to courts considering admiralty claims against the government.<sup>285</sup> This analytical framework would limit Supreme Court decisions to their specific holdings, promote the original legislative intent, and incorporate the logic of Eleventh Circuit decisions.<sup>286</sup> When facing a PVA claim, courts should primarily consider: (1) the nature of the

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283. See *Marine Coatings of Ala. v. United States*, 71 F.3d 1558, 1564 (11th Cir. 1996) (discussing need to strictly construe the PVA).

284. See *Uralde*, 614 F.3d at 1286 (identifying the PVA as the proper statute when damages are caused directly by a public vessel or negligent navigation thereof and the SAA as the proper statute when a public vessel is merely involved).

285. See generally *id.*; *Marine Coatings*, 71 F.3d 1558. Unlike the proposal found in *Raley*, *supra* note 21, and notwithstanding the Supreme Court’s refusal to do so when previously presented with the opportunity, this Note *does* seek to provide a framework that can be used to “expressly delineate what claims fall under the PVA.” See *Raley*, *supra* note 21, at 450 n.130.

286. Thus, under the proposed framework, *Canadian Aviator*, *American Stevedores*, *Continental Tuna*, *Marine Coatings*, and *Uralde* were correctly decided under the PVA. However, *Tobar*, *Taghadomi*, and *Thomason* were all incorrectly decided. *Tobar*, to the extent that the Coast Guard vessel towed a private vessel back to Ecuador and allegedly caused damage to live cargo, comes dangerously close to qualifying under the PVA. But, properly construed, “damages” under the PVA should directly result from physical contact with the public vessel, its appurtenances, or some other object (such as a submerged shipwreck). By limiting the term “in the operation of” to traditional navigation and maintenance functions, and limiting the term “damages” to include only those that arise from contact with another object, the PVA remains within the bounds originally intended by its proponents and later refined by the Supreme Court.



proceedings; (2) the character of the damages; and (3) the role of the vessel in causing the claimed damages.

In any PVA analysis, the threshold question must involve the nature of the proceedings. First, and quite obviously, there must be a suit against the United States.<sup>287</sup> If the United States is not named as a defendant, the PVA does not apply.<sup>288</sup> Second, the claim must invoke the admiralty jurisdiction.<sup>289</sup> Other land-based statutes, such as the FTCA and the Tucker Act, waive sovereign immunity for dry torts committed by the government.<sup>290</sup> Lastly, a public vessel of the United States must be involved,<sup>291</sup> or the PVA on its face does not apply.<sup>292</sup>

Next, a court should consider the nature of the claimed damages. Because other statutes offer exclusive remedies, a court must first ensure that some other statute, such as FECA, does not specifically address the class of alleged damages.<sup>293</sup> If the PVA is not preempted by another statute, a court should consider whether the damages sound in contract or tort.<sup>294</sup> If the damages sound in contract, the claim survives under the PVA only if expressly enumerated in § 31102(a)(2); in short, it must involve “compensation for towage and salvage services, including contract salvage.”<sup>295</sup> Other general claims sounding in contract, such as those involving maritime liens, fall squarely within the exclusive province of the SAA and must be brought pursuant to its terms.<sup>296</sup> Finally, if the damages sound in tort, the class of claims potentially cognizable under the PVA involves either personal injury<sup>297</sup> or property damage.<sup>298</sup> Though the

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287. 46 U.S.C. § 31102(a) (2006).

288. *Id.*

289. *Id.*; see also *supra* note 44 (detailing the admiralty jurisdiction analysis).

290. See *supra* notes 47–50.

291. § 31102(a)(1)–(2); see also *supra* note 60 (describing definition of “public vessel”).

292. § 31102(a)(1)–(2).

293. See discussion *supra* note 135. Similarly, a court must ensure the complaint is not barred by some other rule, such as the *Feres* Doctrine. See discussion *supra* note 136.

294. See, e.g., *Am. Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947) (suit for personal injury sounding in tort); *Marine Coatings of Ala. v. United States*, 71 F.3d 1558 (11th Cir. 1996) (suit for maritime lien sounding in contract).

295. *Marine Coatings*, 71 F.3d at 1564; see also discussion *supra* Part II.B.

296. *Marine Coatings*, 71 F.3d at 1564.

297. *Am. Stevedores*, 330 U.S. at 448 (personal injury).

distinction is legally insignificant after *American Stevedores* (both types of injury are cognizable under the PVA), it is analytically helpful to distinguish personal injury and property damage when identifying any causal nexus between a public vessel and claimed damages.

In the end, a court faces its most difficult question under the Damages Provision: whether the public vessel actually caused the claimed damages.<sup>299</sup> These claims tend to fall into one of two categories: collision<sup>300</sup> and noncollision<sup>301</sup> cases. The former category is ready-made for the PVA. When a public vessel strikes another vessel or person and causes personal injury or property damage, the PVA waiver of sovereign immunity is triggered—assuming some *prima facie* fault lies with the government.<sup>302</sup> Similarly, when the crew of a public vessel is negligent in the navigation or operation of a public vessel, and such negligence causes personal injury or property damage, the PVA should apply.<sup>303</sup> Here, the term “in the operation of” should be limited to the simple navigation and movement of the public vessel.<sup>304</sup> Finally, the PVA waiver of sovereign immunity should apply when an appurtenance or cargo of a public vessel falls or otherwise strikes and causes personal injury or property damage as a result of the negligence of a crewmember in navigation or physical maintenance of the vessel, its appurtenances, or cargo.<sup>305</sup>

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298. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 216–17 (1945) (property damage).

299. *See* 46 U.S.C. § 31102(a)(1) (2006).

300. *E.g.*, *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164 (1976).

301. *E.g.*, *Canadian Aviator*, 324 U.S. 215.

302. *United Cont'l Tuna*, 425 U.S. at 181 (reaffirming that collision cases fall under PVA).

303. *Canadian Aviator*, 324 U.S. at 224–25 (extending PVA to cases where “the negligence of the personnel of a public vessel in the operation of the vessel causes damage to other ships, their cargoes, and personnel, regardless of physical contact between the two ships”).

304. *See id.* (suggesting a direct link between the operation and movement of an offending vessel and claimed damages). *Cf. Tobar v. United States*, 639 F.3d 1191, 1199 (9th Cir. 2011) (stating that the relevant operation is not merely the movement of the public vessel itself but the crewmembers’ search and seizure of the plaintiff’s vessel on the high seas).

305. *See Am. Stevedores, Inc. v. Porello*, 330 U.S. 446, 453–54 (1947) (extending PVA to personal injury actions resulting from falling beam onboard public vessel).

Contrariwise, the PVA should not apply to claims merely involving public vessels.<sup>306</sup> The traditional personification doctrine supports holding the United States liable for damages directly caused by a public vessel as a result of negligent navigation or physical maintenance by crewmembers.<sup>307</sup> But, given the plain meaning of the statute and the legislative record, the mere involvement of a public vessel does not satisfy the required causal nexus when an independent actor causes damage—even though the actor may make use of a public vessel in doing so.<sup>308</sup> A claim merely involves a public vessel—and therefore should not be allowed under the PVA—when the claim does not otherwise qualify for jurisdiction under the PVA as outlined above and the claimed damages result from independent acts, decisions, or omissions on the part of the crew unrelated to traditional navigation, movement, or maintenance of a public vessel.<sup>309</sup>

Although circumstances vary, the PVA generally should not waive sovereign immunity for alleged noncollision damages when: (1) the offending vessel and all of its appurtenances were motionless;<sup>310</sup> (2) the crewmembers alleged to be responsible for the harm have

306. See, e.g., *Uralde v. United States*, 614 F.3d 1282, 1288 (11th Cir. 2010).

307. See discussion *supra* Part II.B.

308. See discussion *supra* Parts II.B, II.C.1. When considering the limits of the PVA, causation principles such as direct and proximate cause are somewhat helpful. See generally SCHOENBAUM, *supra* note 4, at 105–11. But, traditional causation doctrine focuses on ordinary legal persons as actors, and the language becomes hopelessly confused when applied in the PVA context. See *id.* For example, proximate cause requires foreseeability: “the injury or damage must be a reasonably probable consequence of the defendant’s act or omission.” *Id.* at 107. But, are all injuries and damages merely involving a public vessel foreseeable? Surely this offends the limiting principle embodied in the theory of proximate cause. See *id.* at 107–08. And what acts or omissions should a court consider? Those of the public vessel or her operators? Both?

309. See *Uralde*, 614 F.3d at 1286 (stating that when crewmembers of a public vessel are “negligent in performing functions other than those ‘in the operation of’ public vessels, the claims arising from those acts fall under the SAA, rather than the PVA”); *Marine Coatings of Ala. v. United States*, 71 F.3d 1558, 1563–64 (11th Cir. 1996) (rejecting a sweeping waiver based on the mere involvement of a public vessel); *supra* note 303 (presenting “in the operation of” rule as defined in *Canadian Aviator*). The term “maintenance,” for example, would include mechanical upkeep or the placement and movement of items aboard the vessel. A claim for personal injury or property damage caused by an explosion aboard a public vessel due to negligent maintenance would involve “damages caused by a public vessel.” See, e.g., *Gibbs v. United States*, 94 F. Supp. 586 (N.D. Cal. 1950) (explosion).

310. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 225 (1945) (emphasis added) (“There seems no logical reason for allowing recovery for collision and refusing recovery for damages caused by *other movements* of the offending vessel.”).

disembarked or otherwise departed the public vessel;<sup>311</sup> (3) the claimed damages resulted from an omission unrelated to the simple navigation and movement or physical maintenance of the public vessel;<sup>312</sup> (4) the claimed damages resulted from willful or reckless conduct of a crewmember unrelated to the simple navigation and movement or physical maintenance of the public vessel;<sup>313</sup> or (5) the aggrieved vessel did not physically strike anything and the offending public vessel or its appurtenances did not cause, as a result of direct physical contact, any personal injury or property damage.<sup>314</sup> Employing these factors, and aided by a rebuttable presumption against waiver in noncollision cases (as the 68th Congress would likely have it),<sup>315</sup> courts can uniformly and consistently apply the PVA to admiralty claims against the government. Fortunately, for those claims rejected by the PVA there is likely life on the other side under the SAA.<sup>316</sup>

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311. *Uralde*, 614 F.3d at 1287–88 (finding the PVA did not apply when a Coast Guard crew left the public vessel and boarded a private vessel to give medical assistance); *Mid-S. Holding Co. v. United States*, 225 F.3d 1201, 1202–03 (11th Cir. 2000) (finding the SAA applied to a claim ultimately barred by the discretionary function exception when a Coast Guard crew boarded a private vessel during interdiction and unplugged the bilge pump power cord, causing the vessel to sink); *see also* Raley, *supra* note 21, at 464 (proposing to resolve the confusion surrounding the PVA by encouraging the Supreme Court to hold, at its next opportunity, that the Damages Provision is not applicable “where a crew from a government-owned vessel causes damage to a private vessel, or its personnel, while aboard the private vessel”).

312. *Uralde*, 614 F.3d at 1286–88 (suggesting the PVA applies to failure to rescue claim). *Contra* *Taghadomi v. United States*, 401 F.3d 1080 (9th Cir. 2005) (suggesting the SAA applies to failure to rescue claim).

313. *See, e.g.,* *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 168–69 (2d Cir. 1968) (finding that either the PVA or SAA applied when drunken seaman turned wheels on drydock wall and caused Coast Guard vessel to fall from and damage drydock). In a similar vein, the intentional shooting of another individual from aboard a public vessel would not occur “in the operation of” a public vessel as defined herein. *See* discussion *supra* note 309.

314. *See* *Am. Stevedores, Inc. v. Porello*, 330 U.S. 446, 449, 454 (1947); *Canadian Aviator*, 324 U.S. at 224–25. Of course, courts should also consider the discretionary function exception. *See* discussion *supra* note 81. But, claims subject to abrogation under a discretionary function exception might not be good candidates for jurisdiction under the PVA in the first place. *See supra* notes 309–13 and accompanying text.

315. *See* discussion *supra* Part II.D. Such a presumption could be overcome by showing the facts of the case fit squarely within the limited holdings of *Canadian Aviator* (navigation and movement) or *American Stevedores* (contact with a public vessel or its appurtenances).

316. *See* discussion *supra* Part II.C.3.

## CONCLUSION

The Founders decided more than two hundred years ago to incorporate the ancient customs of admiralty and maritime law into their new government.<sup>317</sup> Hoping to achieve consistency and reliability, especially in an area of law likely to involve noncitizens, they assigned the federal courts jurisdiction over all claims sounding in admiralty.<sup>318</sup> In the 1920s, a burgeoning republic on its way to becoming the world's predominate force decided to shed its sovereign armor and entertain admiralty suits against the government.<sup>319</sup> However nearsighted and haphazard Congress's statutory scheme may seem today, courts are left with a choice between two statutes in most admiralty suits against the government: the PVA or the SAA.<sup>320</sup> Because of the circuit disagreement, varying venue provisions, and the PVA's reciprocity requirement, this choice often involves unnecessary delay and cost; extended argument and appeal over jurisdiction displaces more important discussion of liability and compensation.<sup>321</sup>

Reliability and consistency concerns alone demand a nationwide resolution of this issue, not only to encourage judicial efficiency and reduce the risk of forum shopping, but also to honor the original intent of the PVA's proponents, the plain language of the statute, and the limited nature of Supreme Court holdings involving the PVA.<sup>322</sup> Most importantly, the PVA must be viewed alongside its "sister statute," the SAA.<sup>323</sup> Removal of the Merchant Vessel Proviso from the SAA in 1960 enlarged the claims cognizable under the SAA, but did nothing to alter the type of claims originally (and still) cognizable under the PVA.<sup>324</sup> Often, courts broaden the scope of a sovereign

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317. See discussion *supra* Part I.B.

318. See discussion *supra* Part I.B.

319. See discussion *supra* Part I.C.

320. See discussion *supra* Part I.C–D.

321. See *supra* note 119 (detailing the lengthy procedural history of *Marine Coatings*).

322. See discussion *supra* Part II.B–E.

323. See discussion *supra* Part I.C–D.

324. See discussion *supra* Part II.C.2–3.

immunity waiver to ensure compensation for deserving victims.<sup>325</sup> However, a broad construction of the PVA actually results in more limited access to the courts.<sup>326</sup> Because suits rejected by the terms of the PVA will often lie under the more generous waiver contained in the SAA, it is simply unnecessary to stretch the PVA beyond its natural bounds.

By interpreting the PVA strictly and allowing suit only in those cases involving enumerated contract claims (i.e., towage and salvage claims) and cases where the public vessel plainly and directly caused personal injury or property damage (i.e., the public vessel was more than merely involved), the federal waiver of sovereign immunity in the admiralty context becomes workable. In the end, a strict interpretation not only increases access to the courts and streamlines choice of venue under another duly enacted and amended statute (the SAA), it also permits the words of the PVA to “mean what they say” and at once calms all of the trouble lurking beneath the surface for plaintiffs suing the United States government in admiralty.

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325. See cases cited *supra* note 34.

326. See *supra* note 262.

TABLE 1: COMPARING THE PVA AND THE SAA<sup>327</sup>

	<i>Public Vessels Act</i>	<i>Suits in Admiralty Act</i>
Sovereign immunity waived under what circumstances?	For “damages caused by a public vessel” or for “compensation for towage and salvage services, including contract salvage, rendered to a public vessel”	If the “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”
Suit in personam against the U.S.?	Yes	Yes
Reciprocity required to bring suit?	Yes	No
Statute of limitations?	Two years	Two years
Allows seizure of U.S. vessels/cargo?	No	No
Allows trial by jury?	No	No
Venue?	A district court where “any plaintiff resides or has an office” or, if no resident plaintiff, “in . . . any district”	A district court where “any plaintiff resides or has its principal place of business; or [where] the vessel . . . is found”
Subpoena provisions?	Prohibits subpoena of crew without consent of “master or commanding officer”	No such provision
Allows costs and interest?	Allows costs but no pre-judgment interest unless provided for by contract	Allows costs and post-filing, pre-judgment interest
Incorporates provisions of the other statute?	Yes, the PVA incorporates SAA provisions not inconsistent with its terms	No, the SAA does not incorporate any provisions of the PVA

327. Table 1 is adapted from selected provisions of the PVA and the SAA; it compares many—but not all—of the most important parts of each statute. *See* Public Vessels Act, 46 U.S.C. §§ 31101–31112 (2006); Suits in Admiralty Act, *id.* §§ 30901–30918.