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# COMMENT

## THE UNITED STATES AS A DEFENDANT IN ADMIRALTY

### INTRODUCTION

In recent years the scope of activities of the United States government has expanded greatly and now covers many hitherto "private" fields including, among others, the ownership of merchant vessels. The extent of the government's tort liability arising from the operation of these ships is a subject which has occupied the attention of both Congress and the courts. It is a subject which this comment will attempt to present and evaluate in the light of applicable legislative and judicial developments.

### HISTORY

An ancient legal maxim declared that the King could do no wrong.<sup>1</sup> From this adage grew the modern doctrine of sovereign immunity from suit. Several theories were advanced to justify the doctrine, ranging from, the superiority of the sovereign to any law the sovereign may create,<sup>2</sup> on the one hand, to the positivistic Justice Holmes' approach of plain practicality<sup>3</sup> on the other. Regardless of the rationale employed, all American decisions hold, in varying degree, that the United States is immune from suit unless permission to sue has been granted.<sup>4</sup> As the function of the government expanded and its contact with the people became more personal, the severity of this doctrine became the subject of attack.<sup>5</sup> This was especially true in the field of Admiralty where the United States had

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1. In the Matter of Wadsworth and the Queen of Spain, 17 Q.B. 171, 117 Eng. Rep. 1246 (1851).

2. *The Western Maid*, 257 U.S. 419 (1922).

3. *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907).

A sovereign is exempt from suit not because of any formal conception or absolute theory but on the logical and practical grounds that there can be no legal right as against the authority that makes the law on which that right depends.

cf. *United States v. Shaw*, 309 U.S. 495, 501 (1940).

The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functions may operate undisturbed by the demands of litigants.

54. *Lynch v. United States*, 292 U.S. 571 (1934); *The Western Maid*, 257 U.S. 419 (1922); *Stanley v. Schwalby*, 162 U.S. 255 (1896).

5. *Eastern Transp. Co. v. United States*, 272 U.S. 675 (1927); *Schillinger v. United States*, 155 U.S. 163 (1894); *United States v. Lee*, 106 U.S. 196 (1882); *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834); See also *Dalchite v. United States*, 346 U.S. 15,60 (1953) Where J. Jackson in his dissenting opinion said:

[the decision would lead one to believe that] The ancient and discredited doctrine that the King can do no wrong has not been uprooted; it has merely been amended to read: The King can do only little wrongs.

experienced and is experiencing a period of extensive ownership<sup>6</sup> of commercial ships (as distinguished from warships). The competition between government and private shipping greatly favored the government, since the government was in no way liable to persons suffering injury from government-owned ships unless it had waived immunity.<sup>7</sup>

Whenever the above mentioned problem arises the question to be resolved has always been: What constitutes a "suit" against the government? The courts have been prone to designate virtually any dispute presented before them as a "case" which requires the consent of the sovereign to be sued. Thus, it has been held that a Bill of Review<sup>8</sup> and a Claim for Credit<sup>9</sup> are "suits".

Of course, the consent can be given only by Congress<sup>10</sup> and an attempt by anyone other than Congress is void.<sup>11</sup> Congress, in the granting of this consent, is empowered to impose any conditions whatever<sup>12</sup> including limitations on the amount of damages recoverable,<sup>13</sup> and requirements as to venue,<sup>14</sup> interest,<sup>15</sup> court jurisdiction,<sup>16</sup> issuance of process,<sup>17</sup> and the filing of claims in a prescribed manner.<sup>18</sup>

Courts have held the libelants to the highest degree of conformity with these requirements, even though they be purely procedural,<sup>19</sup> or

6. Table supplied by U.S. Dept. of Commerce Maritime Division, Statistics and Special Studies Office.

Date	Number Private Vessels	Number Government Vessels	Percent of Merchant Vessels owned by U.S. Government
1931	1,365	365	21%
1936	1,306	240	15%
1941	1,108	76	7%
1946	644	3,778	85%
1951	1,288	2,085	62%
1955	1,087	2,140	66%

Note: This table of ships includes seagoing steam and motor merchant vessels of 1,000 gross tons and over, inclusive of vessels on the inland waterways, Great Lakes and those owned by the United States Army and Navy and special types such as cable ships, tugs, etc.

7. See Dec. Dig. Key 125.

8. *United States v. Haas*, 58 F. Supp. 179 (N.D.N.Y. 1944).

9. *United States v. Heard*, 32 F. Supp. 39 (W.D. Va. 1940).

10. *Hidalgo Steel Co. v. Moore & McCormack Co.*, 298 Fed. 330 (4th Cir. 1924); *United States v. New York & O.S.S. Co.*, 216 Fed. 61 (2d Cir. 1914).

11. *Hudson Trading Co. v. United States*, 28 F.2d 744 (3rd Cir. 1928); *Keil v. United States*, 65 F. Supp. 431 (D. Md. 1946).

12. *Treat v. Farmers' Loan & Trust Co.*, 185 Fed. 760 (2d Cir. 1911).

13. *North Atlantic & Gulf S.S. Co. v. United States*, 209 F.2d 487 (2d Cir. 1954).

14. *Miller v. United States*, 76 F. Supp. 523 (W.D. Wash. 1948).

15. *United States v. Jacobs*, 63 F.2d 326 (5th Cir. 1933). *cert. granted* 289 U.S. 719 (1932); *Radel Oyster Co. v. United States*, 78 Ct. Claims 817 (1934).

16. *Henry Kaelin & Sons v. United States*, 290 Fed. 243 (E.D.N.Y. 1923); *The Isonomia*, 285 Fed. 516 (2d Cir. 1922).

17. *Walton v. United States*, 73 F.2d 15 (8th Cir. 1934); *Mill Creek & Minehill Nav. & Rr. Co. v. United States*, 246 Fed. 1013 (E.D.Penn. 1917); *Mount Tivy Winery v. Lewis*, 42 F. Supp. 636 (N.D. Calif. 1942). *But see United States v. American Surety Co. of New York*, 25 F. Supp. 700 (E.D.N.Y. 1938).

18. *Fox v. Alcoa S.S. Co.*, 143 F.2d 667 (5th Cir. 1944).

19. *Crescitelli v. United States*, 66 F. Supp. 894 (E.D. Penn. 1946).

formal.<sup>20</sup> Further, every rule of construction in the interpretation of the consent given is in favor of the sovereign.<sup>21</sup> The rationale the courts advance is that the government is giving up a right, and, therefore, the courts should not take any more power than was expressly relinquished.<sup>22</sup>

The consent to suit which Congress declared has been held to be a privilege accorded the libellant and not a property right within the purview of the Fifth Amendment.<sup>23</sup> Upon the basis of this reasoning Congress may, in its discretion, withdraw its consent even though a pecuniary consideration has passed.<sup>24</sup>

The doctrine of sovereign immunity extends as well to suits against property held by the government,<sup>25</sup> on grounds of public policy<sup>26</sup> or by statute.<sup>27</sup> This doctrine prevents suits against the personified ships owned and operated by the government.<sup>28</sup>

#### LEGISLATION

A statute enacted in 1916<sup>29</sup> completely reversed the previous rule as to the sovereign's suability.<sup>30</sup> By this Act, *any* vessel owned and operated by the United States was to be held to the same duties and liabilities as privately owned competing vessels. It took only four years for Congress to decide that this was not a workable piece of legislation, since the harassment from liens, etc. against government owned ships, outweighed the rights given to the injured. Congress then passed the Suits in Admiralty Act<sup>31</sup> superseding the prior act. The latter act had the effect of releasing incumbrances on government owned ships by eliminating *in rem* actions and substituting actions *in personam*. Viewed in the light of the purpose of an *in rem* action (*i.e.*, to secure a reliable source from which the payment may be made after a verdict), a lien is quite unnecessary against the United States.<sup>32</sup>

20. *California Casualty Indemnity Exch. v. United States*, 74 F. Supp. 404 (S.D. Calif. 1947).

21. *McMahon v. United States*, 342 U.S. 25 (1951); *Rodincinc v. United States*, 74 F. Supp. 284 (E.D. Penn. 1947).

22. *Liberty Glass Co. v. Jones*, 66 F. Supp. 25 (W.D. Okla. 1946).

23. *Imhoff-Berg Silk Dyeing Co. v. United States*, 43 F.2d 836 (D. N.J. 1930).

24. *Lynch v. United States*, 292 U.S. 571 (1934); *Ginochio v. United States* 74 F.2d 42 (7th Cir. 1934).

25. *Moon v. Hines*, 87 So. 603, 205 Ala. 355 (1921) Holding the government liability was not distinguishable between suits directly against the government and those against its property.

26. *The Aussa*, 52 F. Supp. 927 (D. N.J. 1943).

27. 41 Stat. 525 (1920); 46 U.S.C. §§ 741-752 (1952); *Johansen v. United States*, 343 U.S. 427 (1952).

28. *Stanley v. Schwalby*, 147 U.S. 508 (1892).

29. 39 STAT. 728 (1918), 46 U.S.C. 801 (1952).

30. *The Lake Monroe* 250 U.S. 246 (1919).

31. 41 STAT. 525 (1920); 46 U.S.C. 741 (1952).

32. *But see infra* note 97.

It must be pointed out, however, that this Act in no way gave rise to a new cause of action, but merely created new remedies.<sup>33</sup> The policy of the Act was to allow the government to move more freely in Admiralty matters by relieving it from the aforementioned inconveniences.

The draftsmanship of the Act was not clear and controversy arose as to the interpretation of that portion of the Act which provided that a proceeding *in personam* could be maintained, "Where a proceeding in Admiralty could be maintained."<sup>34</sup> There were three possible interpretations of the words quoted above: 1) Suits exclusively *in rem*, 2) Suits optionally *in rem* or *in personam*, or 3) Suits exclusively *in personam*. Because actions in Admiralty had been *in rem* it was clear the Act applied to the two former possibilities. After a short period of indecision, it was resolved that the Act was intended to broaden the rights of the injured and upon that reasoning the courts held that the Act encompassed actions exclusively in *personam*,<sup>35</sup> as well as the other two categories.

The scope of the Act was very broad both as to type of injury and ships to be covered. Thus injuries received from the cargo of the ship<sup>36</sup> or the ship itself<sup>37</sup> were actionable even though the ship was registered in a foreign country, so long as the ship was owned and controlled by the United States.<sup>38</sup>

Most courts have held that consent, when given, is to be strictly construed,<sup>39</sup> even in such a broad grant of rights as the Suits in Admiralty Act.<sup>40</sup> Thus the court will on its own motion, without the defense being pleaded by the government counsel, preserve the consent requirement.<sup>41</sup>

It is an additional requirement that the libellant must show the ship's ownership and control lay in the government, though this requisite need not be met on the date of filing.<sup>42</sup> There need be no showing of the present active use by the government of a merchant vessel, but, rather,

33. *United States v. Loyola*, 161 F.2d 126 (9th Cir. 1947); *Crescitelli v. United States*, 66 F. Supp. 894 (E.D. Penn. 1946); *Pinerio v. United States*, 65 F. Supp. 191 (N.D. Calif. 1945).

34. 41 Stat. 525 (1920), 46 U.S.C. 742 (1952).

35. *Nahmeh v. United States*, 267 U.S. 122 (1925); *United States v. The Thekla*, 266 U.S. 328 (1924); *Markle v. United States*, 8 F.2d 87 (S.D. Tex. 1925); *Sawyer v. United States*, 66 F. Supp. 271 (S.D. N.Y. 1946).

36. *Ryan Stevedoring Co. v. United States*, 176 F.2d 490 (2d Cir. 1949).

37. *Balboa Co. v. Standard Fruit & S.S. Co.*, 85 F. Supp. 312 (S.D.N.Y. 1949).

38. *Caldarola v. United States*, 98 F. Supp. 987 (S.D.N.Y. 1951) (Panamanian Registry).

39. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *Jentry v. United States*, 73 F. Supp. 899 (S.D. Calif. 1947); cf. *Employers' Fire Ins. Co. v. United States*, 167 F.2d 655 (9th Cir. 1948). *But see* *Niagra Fire Ins. Co. v. United States*, 76 F. Supp. 850 (S.D.N.Y. 1948). *Contra* *United States v. Shaw*, 309 U.S. 495, 501 (1940) "When authority [to sue] is given, it is liberally construed."

40. *Kruhmin v. United States War Shipping Adm.*, 81 F. Supp. 689 (E.D. Penn. 1949).

41. *Rodincic v. United States*, 175 F.2d 479 (3rd Cir. 1949).

42. *Eastern S.S. Lines v. United States*, 187 F.2d 956 (1st Cir. 1951); *McWilliams Dredging Co. v. United States*, 105 F. Supp. 582 (E.D. La. 1952).

it is enough that the ship had a commercial character at the time the cause of action arose.<sup>43</sup>

The liability of the government was further extended, by the Public Vessels Act of 1925,<sup>44</sup> to *all* vessels owned and operated by the United States Government. This Act, similar to the Suits in Admiralty Act, applied only to ships not covered by the statute.

The fact that the forms of action were determined by two similar but independent statutes raised a problem concerning which Act was to be used in each particular case. The court in *The Samovar*<sup>45</sup> held that a ship owned by the United States, assigned to the Army and carrying Lend-Lease supplies was a "public vessel" rather than a "merchant vessel" and, therefore, was within the purview of the Public Vessels Act. A vessel under control of the Navy and used for the transportation of personnel and supplies was held to be a "public vessel" and thus within the Public Vessels Act.<sup>46</sup> Conversely, the court determined that a privately-owned ship chartered to the War Shipping Administration was "operated for the United States" within the provisions of the Suits in Admiralty Act.<sup>47</sup> Similarly, a ship under a one-trip charter for its carrying capacity to the United States was held to lie within the purview of the Suits in Admiralty Act, although the owner was operating the ship (for his own profit) with his own crew under his exclusive control.<sup>48</sup> The fact that a ship owned by the government was loaned to a state has been held not to affect the classification of a "public vessel".<sup>49</sup> Military vessels are by their very nature public vessels, within this statute.<sup>50</sup>

Perhaps the best illustration of the distinction between public and merchant vessels was pointed out by the court in *Geo. W. Rogers Const. Corp. v. United States*.<sup>51</sup> The court here differentiated between ships owned and operated by the United States, carrying no private shipper's cargo, and those ships carrying such cargo; the former were held to be within the Public Vessels Act, and the latter within the Suits in Admiralty Act.

A further distinction was made in *Prudential S.S. Corp. v. United States*,<sup>52</sup> where the court held that cargo shipped by the United States on a merchant vessel carrying other private cargo, did not justify general

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43. *American Surety Co. of New York v. United States*, 112 F.2d 903 (10th Cir. 1940).

44. 43 STAT. 1112 (1925), 46 U.S.C. 781 (1952).

45. 72 F. Supp. 574 (N.D. Calif. 1947).

46. *Roeper v. United States*, 85 F. Supp. 864 (E.D.N.Y. 1949).

47. *Epstein v. United States*, 86 F. Supp. 740 (S.D.N.Y. 1949).

48. *Calmar S.S. Corp. v. United States*, 103 F. Supp. 243 (S.D.N.Y. 1951).

49. *Abbott v. United States*, 112 F. Supp. 801 (Ct Claims 1953).

50. *Page v. United States*, 105 F. Supp. 99 (E.D.La. 1952).

51. 118 F. Supp. 927 (S.D.N.Y. 1954).

52. 122 F. Supp. 164 (S.D.N.Y. 1954).

average recovery against the United States, as the vessel was not "owned by or operated for the United States."

Once a case has been determined to be within the scope of a particular Act, the right must be decided by that Act, since the remedies of each statute are mutually exclusive.<sup>53</sup> This does not mean that all causes of action *must* lie within these two acts, for there are certain maritime torts which do not fall within either, yet which remain actionable.<sup>54</sup>

#### JUDICIAL INTERPRETATION

##### *Jurisdiction*

Once the consent to suit has been given, the problem of jurisdiction then arises. It has been held that by the mere creation of a right against itself, the government does not thereby obligate itself to provide a remedy for the enforcement of that right.<sup>55</sup> Even though a remedy has been given,<sup>56</sup> it may vary materially from the method of gaining judgment. The reason the courts advance is that there is no implied contract that Congress will perform any subsequent acts, such as appropriating the money with which to pay the judgment.

The remedy of an action in personam given by the Public Vessels Act and by the Suits in Admiralty Act has been held to be exclusively within the jurisdiction of the district courts.<sup>57</sup> Though an action is always brought *in personam* under these Acts, the libellant may, (provided he would have been permitted to do so if suing a privately-owned ship) request that the suit be conducted according to the principles of actions in rem.<sup>58</sup> The jurisdiction then must be established according to rules applicable to such actions; for example, by bringing suit in the district where the vessel is located.<sup>59</sup> If the libellant brings suit where he is not a

53. *Untersinger v. United States*, 172 F.2d 298 (2d Cir. 1949); *Isbrandtsen Co. v. United States*, 123 F. Supp. 819 (S.D.N.Y. 1953).

54. *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951); *Moran v. United States*, 102 F. Supp. 275 (D. Conn. 1951).

55. *Stark v. Wickard*, 321 U.S. 289 (1944); *United States v. Mellon*, 32 F.2d 415 (D.C. 1929).

56. *Dismake v. United States*, 297 U.S. 167, 172 (1936) ("It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise"); *Morgan v. United States*, 115 F.2d 427 (5th Cir. 1940); *Renfrew Mfg. Co. v. United States*, 53 F.2d 404 (D. Mass. 1931).

57. *Weinstein v. Black Diamond S.S. Corp.*, 40 F.2d 590 (2d Cir. 1930); *Hetfield v. United States*, 78 Ct. Claims 419 (1933); *cf. Johnson v. Fleet Corp.*, 280 U.S. 320 (1930) ("The Court of Claims now has jurisdiction to try causes of action not tryable under the Suits in Admiralty Act or the Public Vessels Act). *But see Byron Brown Ralston v. United States*, 91 Ct. Claims 91 (1940) *cert. denied* 311 U.S. 687 (1940).

58. The form is essentially the same as a proceeding *in rem* against an individual owner. See *BENEDICT ON ADMIRALTY*, Vol. 2, p. 309.

59. *Nahmeh v. United States*, 267 U.S. 122 (1925); *Willard Sutherland & Co. v. United States*, 8 F.2d 358 (S.D.N.Y. 1924); *The Cape Fear*, 8 F.2d 80 (S.D.N.Y. 1923); *The Isonomia*, 285 Fed. 516 (2d Cir. 1922); *Alsberg v. United States*, 285 Fed. 573 (S.D.N.Y. 1922); though the locus of the vessel is not the only place action may be maintained, *McWilliams Dredging Co. v. United States*, 105 F. Supp. 582 (E.D.La. 1952); *cf. The Mount Shasta*, 291 Fed. 92 (D. Mass. 1923).

resident or where the vessel is not located, the suit must fail,<sup>60</sup> although a subsequent appearance of the vessel in the district cures the defect.<sup>61</sup>

Some difficulty has been encountered in distinguishing between jurisdiction and venue. The court in *Brailas v. United States*,<sup>62</sup> clarified this problem; they held that the statutory provision authorizing a libel in personam against the United States related to jurisdiction while the provision regarding suit to be brought in the district in which the party suing resides or in which the vessel sought to be charged with liability is found related to venue.

### Venue

In an action in personam a suit may be maintained in the district where the libelant resides, or where his principal place of business is located or where the vessel sought to be charged is found.<sup>63</sup> While it is true the mere residence of the libelant is sufficient to maintain the action,<sup>64</sup> it has been held the residence must be a voluntary one and the forced hospitalization of a seaman does not establish proper residence for his maintenance of the action.<sup>65</sup>

If the libelant brings suit in personam in a district in which he is not a resident, a general appearance by the government constitutes a waiver of venue,<sup>66</sup> though the government may also waive this defense by failing to object until the day of trial.<sup>67</sup> If the libelant brings his action *in rem* and, in the alternative, *in personam*, a general appearance by the United States does not preclude the libelant from amending his complaint to set forth his cause of action solely *in personam*.<sup>68</sup> If however, the action, by its nature, is *in rem*, an appearance will not prevent the government from raising an objection to the venue even after trial.<sup>69</sup>

### Parties

The mere fact that agencies or instrumentalities of the United States do its work does not, of course, entitle them to immunity from non consensual suit.<sup>70</sup> As the agencies are not immune because of title, the

60. *Preussler v. United States*, 102 F. Supp. 274 (S.D.N.Y. 1952).

61. *Hoiness v. United States*, 335 U.S. 297 (1948); *Grant v. United States War Shipping Adm.*, 65 F. Supp. 507 (E.D. Penn. 1945). *But see Schnell v. United States*, 166 F.2d 479 (2d Cir. 1948) in an action *in rem* in nature.

62. 79 F. Supp. 963 (S.D.N.Y. 1948).

63. *Galban Lobo & Co. v. United States*, 18 F.2d 221 (2d Cir. 1927).

64. *Carroll v. United States*, 133 F.2d 690 (2d Cir. 1943); *The Anna E. Morse*, 287 Fed. 364 (S.D. Ala. 1923); *Simonsen v. United States*, 22 F. Supp. 239 (E.D. Penn. 1937).

65. *Abbott v. United States*, 61 F. Supp. 989 (S.D.N.Y. 1945).

66. *Willard Sutherland & Co. v. United States*, *supra* note 59; *Silk v. United States War Shipping Adm.*, 79 F. Supp. 579 (E.D. Penn. 1948).

67. *Brailas v. United States*, 79 F. Supp. 963 (S.D.N.Y. 1948).

68. *The West Tacook*, 1924 A.M.C. 168 (1923).

69. *Willard Sutherland & Co. v. United States*, 8 F.2d 358 (S.D.N.Y. 1924).

70. *Keifer & Keifer v. R.F.C.*, 306 U.S. 381 (1939).

officials<sup>71</sup> serving in these agencies, to be immunized, must be acting in their authorized official capacity at the time of the creation of the cause of action.<sup>72</sup>

Whether or not the government is the real defendant in an action is determined, not by merely looking to the parties listed in the pleadings, but rather by examining the prospective effect upon the defendant, were the libellant to win. If the government would be forced to act, either directly or indirectly, then the government is the real party in interest.<sup>73</sup> Thus, the fact that the United States is not named as defendant, but has an interest so directly involved that it in fact<sup>74</sup> is the real party in interest is enough to require that the government give its consent before suit may be maintained.<sup>75</sup>

If the defendant in question is an agency of the government, the courts look behind the nominal party and treat the case as one against the government itself,<sup>76</sup> though in the converse situation the government may maintain an action independently rather than through an instrumentality of its creation.<sup>77</sup>

There has been little controversy when the government has possession of the ships and is using them for a public purpose, since Congress has clearly provided for liability in such cases.<sup>78</sup> Statutes also provide for the liability of corporate affiliates of the United States owning and operating maritime vessels,<sup>79</sup> such affiliates being liable in personam.<sup>80</sup> Therefore, for example, the United States Shipping Board Emergency Fleet Corporation may sue<sup>81</sup> or be sued as a private corporation, although the United States is the sole owner of stock in that corporation.<sup>82</sup> This is true not-

71. *Mitchell v. Haines*, 17 N.J. Misc. 123, 125, 5 A.2d 680,681 (1939) ("Immunity from suit on the part of federal officers extends only to such individuals as are strictly public officers and who are an integral part of governmental agencies in the administration of governmental functions").

72. *Bell v. Hood*, 71 F. Supp. 813 (S.D. Calif. 1947); *Applegate v. Applegate*, 39 F. Supp. 887 (E.D. Va. 1941).

73. *United States v. Ickes*, 70 F.2d 771, 773 (D.C. 1934) ("It is elementary that, where the purpose of a suit is in effect to enforce the specific performance of a contract, this cannot be accomplished by indirect actions, either against federal officers or by mandamus"); *Schevitzky v. Home Owners' Loan Corp.*, 26 F. Supp. 311 (E.D. Mo. 1939).

74. After a full disclosure of the record. *Lambert v. R.F.C.*, 71 F. Supp. 509 (E.D.N.Y. 1947).

75. *Mine Safety v. Forrestal*, 326 U.S. 371 (1945).

76. *Union Nat. Bank of Clarksburg, W. Va. v. McDonald*, 36 F. Supp. 46 (N.D.W.Va. 1940).

77. *Insurance Co. of North America v. United States*, 159 F.2d 699 (4th Cir. 1947).

78. 41 STAT. 525 (1920), 46 U.S.C. 741 (1952); *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *The Western Maid*, 257 U.S. 419 (1922); *Ex Parte New York*, No. 2, 256 U.S. 503 (1921).

79. 41 STAT. 525 (1920), 46 U.S.C. 741 (1952). This statute applied of course to liability of ships subsequently acquired after passage of the Act. *Sevin v. Inland Waterways Corp.*, 88 F.2d 988 (5th Cir. 1937).

80. 41 STAT. 525 (1920), 46 U.S.C. 742 (1952).

81. *Supra* note 77.

82. *United States v. Bethlehem Steel Corp.*, 113 F.2d 301 (3rd Cir. 1940).

withstanding the fact that the ships are leased to a private corporation and the private corporation is sued, as long as the action is not one *in rem*.<sup>83</sup> The fact that the United States would ultimately have to pay is no defense. To secure immunity, satisfactory evidence must be offered that the United States has chartered and maintained control over a private ship.<sup>84</sup>

The most difficult problem in this area concerns the rights and liabilities under leases of ships from the government. The leases usually constitute "General Agency Agreement"<sup>85</sup> contracts. The question then becomes: who is the employer of the injured employee, the government or the lessee. The Supreme Court has held the lessee accountable for his own misconduct<sup>86</sup> and extended his liability further in *Hust v. Moore-McCormack Lines*,<sup>87</sup> by allowing the injured party to sue the lessee even though he had no de facto control over the injured party. This view was modified by the Clarification Act of 1943 and the government<sup>88</sup> was held accountable for the maintenance, cure, etc. of injured seaman.<sup>89</sup>

The question of comity briefly enters this field when a foreign national brings suit against the United States. Before he can recover he must show that his country, in a like situation, would afford recovery to a United States citizen. In the event he fails to do so he cannot recover.<sup>90</sup>

### Damages

The United States in granting the right to sue may limit the amount of damages recoverable,<sup>91</sup> or may provide the same measure of damages as would be assessed against a private individual.<sup>92</sup>

The provision for "damages" in a statute does not limit the scope of the statute for it has been held that "damages" means compensation for any kind of injury, be it tort or contract.<sup>93</sup> The courts have likewise broadly interpreted the coverage of the statute to include virtually any type of injury suffered. Therefore, it has been held that recoverable damages do not have to be inflicted by the ship itself, but may arise from the operation of the ship.<sup>94</sup>

83. *Brady v. Rosevelt S.S.Co.*, 317 U.S. 575 (1943); *The Fenn Victory*, 75 F. Supp. 701 (W.D. Wash. 1947); See also, *Carroll v. United States*, 133 F.2d 690 (2d Cir. 1943).

84. *Cleary Bros. v. Christie Scow Corp.*, 215 F.2d 740 (2d Cir. 1954).

85. For a thorough presentation and discussion of this problem see 5 *YALE L.J.* 584 (1896).

86. *Brady v. Rosevelt S.S. Co.* *Supra* note 84.

87. 328 U.S. 707 (1946).

88. 57 STAT. 45 (1943), 50 U.S.C. 129 (1952).

89. *Cosmopolitan Co. v. Mcallister*, 337 U.S. 783 (1949) distinguishing *Brady v. Rosevelt supra* note 87.

90. *Maiorino v. United States*, 111 F. Supp. 817 (S.D.N.Y. 1952) (*An Italian*); *Lopez v. United States*, 102 F. Supp. 870 (E.D.N.Y. 1952) (*A Cuban*)

91. *North Atlantic & Gulf S.S. Co. v. United States*, 209 F.2d 487 (2d Cir. 1953).

92. *U.S. Ex Rel Marcus v. Hess*, 317 U.S. 537 (1943).

93. *Thompson v. United States*, 184 F.2d 105 (9th Cir. 1950).

94. *Ibid.*

If the libelant has insurance and has recovered upon that insurance for an interest he has lost, he may nevertheless sue the government.<sup>95</sup> The doctrine of subrogation comes into effect and any damages the libelant recovers, up to the amount he received from the insurer, will be held for the insurer.

When the right to damages has been established, the fact that Congress fails to appropriate money does not prevent recovery of a judgment.<sup>96</sup> The fact that the damages are mathematically impossible to determine accurately likewise does not bar recovery.<sup>97</sup>

While the general rule is that the United States does not pay court costs,<sup>98</sup> it is held that the government may recover them against its opponents.<sup>99</sup> This is true even though the United States dismisses the action.<sup>100</sup> Attorney's fees are generally treated according to the same rules as costs. If the fees were made an element of damages by agreement, however, the United States will be held to the same extent as a private individual.<sup>101</sup>

In determining the right of damages against the government, the United States is allowed the right of set off,<sup>102</sup> in the same manner as set off is allowed to an individual.<sup>103</sup>

The court in *Pennell v. United States*<sup>104</sup> stated the general rule for the recovery of interest from the United States:

As a general principle, it has become the established rule of the Supreme Court that interest is not allowed on claims against the government . . . [T]he only recognized exceptions to this rule are where the government stipulates to pay interest and where interest is given expressly by act of Congress, either by the name of 'interest' or under that of 'damages'.<sup>105</sup>

95. *Insurance Co. of North America v. United States*, 76 F. Supp. 951 (E.D. Va. 1948).

96. *Byron Brown Ralston v. United States*, 91 Ct. Claims 91,96 (1940) ". . . we have often held that where the right of compensation exists the failure to make appropriation therefore will not in itself deny that right."

97. *Beacon Oyster Co. v. United States*, 63 F. Supp. 761 (Ct. Claims 1946).

98. *United States v. Worley*, 281 U.S. 339 (1930); *United States v. Poling Russell Inc.*, 212 F.2d 184 (2d Cir. 1954); *United States v. Jacobs*, 63 F.2d 326 (5th Cir. 1933); *O'Boyle v. United States*, 49 F.2d 273 (2d Cir. 1931).

99. *United States v. Jardine*, 81 F.2d 747 (5th Cir. 1936).

100. *United States v. National Biscuit Co.*, 25 F. Supp. 329 (S.D.N.Y. 1938).

101. *United States v. Standard Oil Co.*, 156 F.2d 312 (9th Cir. 1946).

102. *Seaboard Surety Co. v. United States*, 67 F. Supp. 969 (Ct. Claims 1946).

103. *United States v. U.S. Fidelity Co.*, 309 U.S. 506 (1940); *United States v. Shaw*, 309 U.S. 495 (1940).

104. 162 Fed. 75 (D.Me. 1908).

105. *Id.* at 78.

While this principle has been applied in the majority of cases<sup>106</sup> it has been held that by bringing suit, the United States subjects itself to interest charges arising therefrom.<sup>107</sup>

### CONCLUSION

Although one may question the soundness of such a policy, it goes without saying that the United States government has established for itself the legal right to enter the area of what was once private business.<sup>108</sup> When the government does enter this area, especially on the scale it has in the Admiralty field,<sup>109</sup> certain of its sovereign rights must be abandoned<sup>110</sup> for the sake of fairness to competing private shipowners. Paramount among these rights is the immunity of a sovereign from suit. As Judge Bowen in *The Beaton Park*<sup>111</sup> stated:

In this country our theory as to the government in business is that when our Government enters upon an ordinary business undertaking, such as operation of merchant ships, it does so under the same liabilities and responsibilities as private individuals when they engage in the same kind of business; and Congress has given consent for the institution of legal action by those aggrieved for the enforcement of such liabilities of the Government. In respect to merchant ship operation, we do not recognize the Government as having immunity from suit.<sup>112</sup>

True, the United States ought to be afforded the same rights as private individuals,<sup>113</sup> but no additional rights should be given which place the government in a superior position. The rights should not be broadened

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106. *Boston Sand Co. v. United States*, 278 U.S. 41 (1928); *Warren Gordon Lighterage Co. v. McAllister Towing & Transportation Co.*, 12 F.2d 779 (S.D.N.Y. 1926) (Interest held not allowable from U.S., when U.S. has chartered a vessel, though the charterer is liable); *Watts v. United States*, 129 Fed. 222 (S.D.N.Y. 1904).

107. *United States v. The Thekla*, 266 U.S. 328 (1924).

108. See *Mills & Long, The Statistical Agencies of the Federal Government* (1949)—evaluating statistically such fields as old age insurance (Social Security), Finance (Housing and Home Finance Agency), Public Utilities (Federal Power Commission), Banking (Federal Deposit Insurance Corp.).

109. See table, note 6 *supra*.

110. *United States v. State Bank*, 96 U.S. 30 (1877); *Walker v. United States*, 139 Fed. 409 (M.D. Ala. 1905) *aff'd*, 148 Fed. 1022 (5th Cir. 1906) (Courts are under a right and duty to withhold relief from a sovereign except upon terms which do justice to the citizens or subjects); *Kirkendall v. United States*, 31 F. Supp. 766, 770 (Ct. Claims 1940). "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was occurred is immaterial".

111. 65 F. Supp. 211 (W.D. Wash. 1946).

112. *Id.* at 110.

113. 41 STAT. 527 (1920); 46 U.S.C. 746 (1952). "The United States shall be entitled to the benefits of all exceptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels."

by classification of procedure,<sup>114</sup> evidence,<sup>115</sup> or an extra judicial matter.<sup>116</sup> The government when in a business should be held accountable to the same extent as a businessman.

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114. *Mosseller v. United States*, 158 F.2d 380, 382 (2d Cir. 1946) ("Having consented to suit, the United States should be held to have placed itself in the position of an ordinary litigant before the court, to whom the rules of civil procedure ordinarily apply"); *United States v. Anglin & Stevenson*, 145 F.2d 622 (10th Cir. 1944); *Merlino v. United States*, 104 F. Supp. 817 (S.D.N.Y. 1952) ("The general policy of the law that amendments shall be freely allowed in order that justice may be done is as applicable to the government, Admiralty Rule 23 as defendant as it is to any other defendant"); 79 F. Supp. 450, 452 (W.D. La. 1948) ". . . the government in its pleadings, and particularly in the making of judicial admissions, should be held to the same manner that the private person or corporation is held."

115. *American-Hawaiian S.S. Co. v. United States*, 191 F.2d 26, 28 (2d Cir. 1951) ("No reason is apparent to us why the government should not be treated as any private litigant in applying the rule that available evidence, if it is to be used, must be brought forward at the trial"); *United States v. Bransen*, 142 F.2d 232 (9th Cir. 1944).

116. *Daitz Flying Corp. v. United States*, 4 F.R.D. 372 (E.D.N.Y. 1945) (In an action against the government, its attorney directed to appear for pre-trial conference must do so, and if he does not the government is subject to the same extent as private litigants and is also bound by its attorney agreements or admissions at such a conference to the same degree as a private libellant. Fed. R. Civ. P. 16).